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"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case

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For I am all the subjects that you have,
Which first was mine own king; and here you sty me
In this hard rock, whiles you do keep from me
The rest o' th' island

WILLIAM SHAKESPEARE,
THE TEMPEST act 1, sc. 2, lines 341–44

I. INTRODUCTION

On June 26, 1992, the International Court of Justice (ICJ) ruled that it has jurisdiction to hear the case *Certain Phosphate Lands in Nauru*,[1] brought by the Republic of Nauru against the Commonwealth of Australia. In the absence of a settlement, the Court will proceed to consider the merits of the allegations made by Nauru—that it suffered damage as a result of Australia's violation of its rights under both the relevant United Nations Trusteeship provisions and several general principles of international law including self-determination, perma-

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1. Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240 (June 26) (Preliminary Objections, Judgment) [hereinafter Preliminary Objections, Judgment]. As used in this Article, the term "Nauru Case" refers generally to the dispute and the proceedings. This Article suffers from the awkwardness of discussing a case that is currently before the International Court of Justice; any conclusions drawn as to matters before the Court derive from the comprehensive research and findings detailed in REPUBLIC OF NAURU, COMMISSION OF INQUIRY INTO THE REHABILITATION OF WORKED OUT PHOSPHATE LANDS OF NAURU, REPORT (1988) [hereinafter COMMISSION REPORT]. A summary of this report is presented in CHRISTOPHER WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP (1992).

nent sovereignty over natural resources, and abuse of rights.[2] Nauru alleges that these violations occurred when it was administered by Australia—first, pursuant to the League of Nations Mandate System and, subsequently, under the Trusteeship System of the United Nations, which succeeded the Mandate System.[3] Nauru now seeks a declaration from the Court that Australia is bound to make restitution or reparation to Nauru for the damage and prejudice it suffered as a result of the Australian administration.

The Case brought by Nauru against Australia involves a number of issues that are of central importance to international law. The Case is the first instance of a former dependent territory bringing action against a metropolitan authority for abusing its power when administering the dependent territory. As such, it raises a number of questions of grave significance to all former colonies. The Case also presents the stark plight of a people whose verdant island home, once known as "Pleasant Island," has been transformed by mining into a scarred wasteland. Nauru looks to international law for a means of remedying the environmental damage. The rehabilitation of the island is necessary for the survival of the Nauruans as an independent people.

Nauru contained extremely rich phosphate deposits that are a very valuable source of fertilizer.[4] Approximately one third of the island was mined out while it was administered by Australia.[5] While the Nauruan claim broadly encompasses a number of acts and omissions on the part of that administration, it focuses in particular on Australia's failure to provide for the rehabilitation of the lands it had mined out, and on its failure to ensure that the Nauruans received proper compensation from the exploitation of the phosphate deposits.[6]

Nauru's case is based primarily on the international obligations created by the trusteeship system.[7] The trusteeship system and its predecessor mandate system were created in order to protect dependent peoples against colonial exploitation. The central goal of the trusteeship system was to prepare dependent territories for independence as sovereign states. The Court has never previously considered a case involving trusteeship obligations in the merits phase.[8] Neither has it

2. *See infra* part V.

3. The Nauru Mandate and Trusteeship systems are discussed in detail *infra* part III.

4. ENCYCLOPAEDIA BRITANNICA 562 (15th ed. 1985)

5. Application Instituting Proceedings (Nauru v. Australia), at 14 (May 19, 1989) [hereinafter Nauru Application].

6. *Id.* at 30, 32.

7. *See generally* R.N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS (1955); JAMES N. MURRAY, THE UNITED NATIONS TRUSTEESHIP SYSTEM (1957).

8. For example, the *Northern Cameroon Case* raised the issue of a breach of trusteeship obligations. The Court declined to exercise jurisdiction, however, because it held that a judgment would be devoid of purpose. Northern Cameroon (Cameroon v. U.K.), 1963 I.C.J. 15 (Dec. 2) (Preliminary Objections, Judgment).

dealt with the issue of permanent sovereignty over natural resources.[9] The Court has also not yet had an opportunity to consider the issue of international responsibility for environmental harm.[10] The manner in which it deals with this latter question could be noteworthy for two reasons. First, considerable uncertainty surrounds the applicable law. Second, the ICJ could become an important forum for settling environmental disputes between states.[11]

The first five parts of this Article outline the background to the case, the fiduciary obligations created by the mandate and trusteeship systems, and the arguments that may arise in relation to trusteeship obligations, self-determination, permanent sovereignty over natural resources, and environmental responsibility. It also examines the Nauru Case from the perspective of the international law relating to indigenous peoples.

In the final three parts, the Nauru Case is explored in its larger context. In focusing on the relationship between a metropolitan power and a dependent people, the Nauru Case raises fundamental issues regarding colonialism. The relationship between colonialism and international law is the central theoretical focus of this Article. The imperial idea that cultural differences divided the European and non-European worlds is important to an understanding of the colonial project[12]—the dispossesion of the non-European world and the implementation of a civilizing mission of suppressing and transforming peoples perceived as different, as "other." This dichotomy between the two worlds posed novel problems for European jurists who had to account for the colonial project in legal terms. Attempts to solve these problems gave rise to many of international law's central doctrines, particularly sovereignty doctrine.

This Article seeks to displace approaches to sovereignty doctrine that traditionally focus on how order is created among sovereign states[13] without giving much weight to the history of the doctrine. These approaches are Eurocentric in outlook.[14] This Article is different because it emphasizes the problem of cultural difference and not the

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9. For detailed discussion of these doctrines see *infra* part V.

10. The *Nuclear Tests Case*, which raised this issue, was discontinued for lack of purpose. Nuclear Tests (Austl. v. France), 1974 I.C.J. 253 (Judgment of Dec. 20).

11. *See Declaration of the Hague, Mar. 11, 1989, Selected International Legal Materials on Global Warming and Climate Change*, 5 AM. U. J. INT'L L. & POL'Y 567 (1990) (requesting countries to settle environmental disputes at the ICJ).

12. *See* ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE APPROACH (1992).

13. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1 (2d ed. 1987).

14. The traditional historical understanding of sovereignty focuses on the doctrine's European origins during the Peace of Westphalia. *Id.* at xxxvi.

issue of order among sovereign states. Second, this Article seeks to show that sovereignty doctrine, as applied to colonies, was not simply a European idea extended to peripheral areas. Rather, it developed out of the colonial encounter, and adopted a form different from accepted notions of Western sovereignty. Third, this Article avoids presenting the history of sovereignty as simply the background necessary to arrive at the conceptual question of how order is maintained among states.[15] My argument is that conceptual and historical renditions of sovereignty are related and that the history of the doctrine is selectively included in its most contemporary "conceptual" version. This raises the issue of what is included and excluded and why?

The inquiry into sovereignty must be understood in the context of the "civilizing mission." This mission advanced European civilization as embodying universal standards.[16] Jurists, however, had difficulty claiming that European civilization, in all its avowed specificity, was "universal" and binding on non-European societies. Furthermore, the argument asserted a fundamental difference between Europe and non-Europe even as it sought to eradicate this difference. My argument is that the civilizing mission, the historical maintenance of a dichotomy between what was posited as two different cultural worlds, combined with the task of bridging the resulting gap, provided international law with a dynamic that had important consequences for the generation of international institutions and doctrines, particularly sovereignty doctrine.

The Nauru experience illustrates the new approach to the non-European world in the period after World War I. In this phase, the uncivilized were viewed as being in need of rescue from the colonial system, and the problem of cultural difference was to be managed through the newly invented mandate system. The mandate system placed territories not yet capable of being independent under an administration supervised by the League of Nations. It was through this system and its successor, the trusteeship system, that international law and the civilizing mission promised to fulfill its task of incorporating all territories into international society on equal terms as part of one, universal system.

The Nauran case suggests that the arrival of independence for the non-European states does not necessarily signal the end of the civilizing mission's influence on the development of international law. This

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15. Within the conceptual approach, it is understood that sovereignty is in some respect historically contextual. But the conceptual approach's treatment of history is lacking: the issue is simply acknowledged, and then summarily dismissed, rather than made an integral part of the inquiry into sovereignty.

16. MOHAMMED BEDJAOUI, INTERNATIONAL LAW: ACHIEVEMENT AND PROSPECTS 7–8 (1991).

Article's exploration of the doctrines of self-determination and permanent sovereignty over natural resources demonstrates, rather, that the dynamic of the civilizing mission persists in ways that have an enduring significance for international law. The Nauru Case then, perhaps as no other case before it, raises profoundly important questions about the manner in which international law and institutions have addressed the phenomenon of colonialism in all its phases—the colonial project itself, decolonization, and now the even more complex post-colonial phase.

II. HISTORICAL BACKGROUND OF THE NAURU CASE

Nauru is an island located in the Central Pacific at about latitude 0° 32′ South and longitude 166° 56′ East. It is only 8.25 square miles in area and has an indigenous population of approximately 5300 people.[17] The Nauruans are believed to be of mixed Micronesian, Melanesian, and Polynesian stock. They developed their own distinct language in the course of their history.[18] The island consists of a coastal plain and a central plateau known as "topside." The southwest of the island contains Buada Lagoon.[19] Mango, breadfruit, and pineapple trees grew beside the lagoon, while coconut and pandanus trees flourished on the coastal belt.[20] Fishing was an important activity on Nauru, and fish were cultivated in the lagoon. Topside contained wild almond trees, hibiscus, and pandanus.[21]

These were the resources that the Nauruans depended upon for all their needs prior to the arrival of Europeans. Contact with Europeans occurred in 1798 when Captain John Fearn, sailing from New Zealand to China, arrived at the island. Contact between the Nauruans and Europeans intensified in the 1830s as whaling ships used the island to replenish supplies, and beachcombers and deserters made Nauru their home.[22]

Rivalries between Australian, British, and German trading companies operating in the Pacific and, in particular, near New Guinea increased during the latter half of the nineteenth century. Britain and Germany decided to intervene officially,[23] and the two countries, in

17. *See* Memorial of Nauru (Nauru v. Austl.), 1990 I.C.J. Pleadings (1 Certain Phosphate Lands in Nauru) 89 (Apr. 1990) [hereinafter Nauru Memorial]. The most significant sources of information on Nauru are WEERAMANTRY, *supra* note 1; BARRIE MACDONALD, IN PURSUIT OF THE SACRED TRUST (1988); NANCY VIVIANI, NAURU: PHOSPHATE AND POLITICAL PROGRESS (1970); MASLYN WILLIAMS & BARRIE MACDONALD, THE PHOSPHATEERS (1985).

18. VIVIANI, *supra* note 17, at 4.

19. Nauru Memorial, *supra* note 17, para. 200, at 83.

20. 5 COMMISSION REPORT, *supra* note 1, at 1032–33.

21. *Id.*

22. *Id.* at 10.

23. *Id.* at 19–20.

1886, divided up the Western Pacific into spheres of influence with Nauru falling within the German sector and the neighboring phosphate island of Banaba into the British sector. Germany officially annexed Nauru in 1888.[24]

Phosphate was discovered on the island in 1900 by an employee of the Pacific Islands Company, a British trading enterprise. This company, later reconstituted as the Pacific Phosphate Company, succeeded in purchasing the rights to mine for phosphates from the Jaluit Gesselschaft, the German trading company that had been granted the right to exploit the mineral resources of Nauru by the German Reich. Mining began and a small royalty was paid to Nauruan landowners.[25] Shortly after the outbreak of the First World War, Australian forces occupied the island and administered it during the war.[26]

Once the war ended, Nauru became part of the larger debate at the 1919 Versailles Conference regarding the disposal of the former colonies of the defeated Germany and the Ottoman Empire. Some countries, such as Australia, New Zealand, and South Africa, were intent on simply replacing the Germans as colonial masters. U.S. President Wilson, however, was emphatically opposed to the continuation of the colonial system by any of the Allied Powers.[27]

Prime Minister Hughes of Australia dismissed Wilson's aspirations as unrealistic and referred to the League of Nations as Wilson's "toy."[28] Hughes's outspoken position in favor of annexation was motivated by a complex set of factors that included economic gain[29] and the desire to assuage his country's pain for all of the sacrifices (including the loss of 60,000 Australian lives) it had made for the British war effort.[30] South Africa's Prime Minister Jan Christiaan Smuts was equally intent on annexing South West Africa but found it unnecessary to prosecute his case as Hughes was doing all the advocacy required.

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24. *Id.* at 20. For a discussion of whether this action amounted to a valid acquisition of sovereignty over Nauru even under the international law applicable at the time, see WEERAMANTRY, *supra* note 1, at 8.

25. The royalty was about one-seven-hundredth the value of the product. VIVIANI, *supra* note 17, at 35.

26. *Id.* at 40–41.

27. *See generally* MACDONALD, *supra* note 17, at 1–18; WEERAMANTRY, *supra* note 1, at 41–54. *See also* Address to Congress by President Woodrow Wilson, Fourteen Points (Jan. 8, 1918), *reprinted in* R. CRANSTON, THE STORY OF WOODROW WILSON 461 (1945). For more on the background to the mandate debate see NORMAN DE MATTOS BENTWICH, THE MANDATES SYSTEM 1–20 (1930); QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 1–63 (1930); CHOWDHURI, *supra* note 7, at 13–35.

28. Letter from Hughes to Governor-General of Australia (Jan. 17, 1919), *quoted in* PETER SPARTALIS, THE DIPLOMATIC BATTLES OF BILLY HUGHES 122 (1983). *See also* Nauru Memorial, *supra* note 17, at 13–14, n.1.

29. VIVIANI, *supra* note 17, at 42.

30. *See* WEERAMANTRY, supra note 1, at 48.

Hughes sought British support for his position. His persistence was finally successful as it led British Prime Minister Lloyd George to endorse and advocate a compromise solution that was ultimately accepted.[31] Territories such as Nauru and New Guinea, while remaining under the supervision of the League, were to be administered "under the law of the mandatory as integral portions thereof."[32] In an attempt to win Hughes' support, Lloyd George argued that while the mandate scheme required the protection of certain rights of the natives, the compromise formula allowed Australia something comparable to ownership over the island.[33] Having been assured considerable control over the natives, the Dominions celebrated their diplomatic victory as an acknowledgement of their new international status.[34]

Although the Conference thus decided in principle to grant the mandate over Nauru to the British Empire, it was far from clear what this actually meant in terms of the specific arrangements among Britain, New Zealand, and Australia. Consequently, a bitter internal struggle developed among the three states.[35] Hughes was intent on nothing less than complete control over Nauru. Predictably, Prime Minister Massey of New Zealand was vehemently opposed to Hughes' plans as New Zealand was also dependent on a steady supply of phosphates.[36] Britain too was intent on asserting its interests in Nauru and suggested placing Nauru under British administrative authority already established in the region by the High Commissioner of the Western Pacific.[37] Finally, the three governments decided to draft a separate agreement relating to Nauru. The resulting Nauru Island Agreement (NIA)[38] determined that the phosphates were to be shared among the three signatories.[39] Phosphate mining commenced shortly afterwards.

The mandate system was eventually included as article 22 of the League of Nations Covenant. The partner governments, however,

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31. WEERAMANTRY, *supra* note 1, at 46–47. The compromise involved the creation of so-called class "A," "B" and "C" mandates. *See* discussion *infra* part III.A.

32. This was the formula applied to class C mandates. *See* LEAGUE OF NATIONS COVENANT, art. 22, discussed *infra* part III.A.

33. WEERAMANTRY, *supra* note 1, at 47.

34. *ee* WILLIAMS & MACDONALD, *supra* note 17, at 128–29.

35. *See generally* MACDONALD, *supra* note 17, at 2–6.

36. WILLIAMS & MACDONALD, *supra* note 17, at 127.

37. Milner's proposal would have had the effect of making Nauru part of the Gilbert and Ellice Islands Colony, which had also included Banaba. *See* MACDONALD, *supra* note 17, at 10–11.

38. Agreement between Australia, Great Britain and New Zealand Relative to the Administration of Nauru Island, July 2, 1919, 225 C.T.S. 431 [hereinafter Nauru Island Agreement (NIA)]. The mandate had not in fact been conferred at the time of the signing of the NIA.

39. According to the terms of the NIA, Australia and the United Kingdom each recieved 42% of the phosphates produced, and New Zealand the remaining 16%. *See* discussion *infra* part III.

concluded the NIA prior to the official granting of the mandate over Nauru, which occurred, finally, on December 17, 1920.[40] This was achieved by means of a separate document, the Nauru Mandate. While referring to the general provisions of article 22 of the League of Nations Covenant, the Nauru Mandate specified in greater detail the obligations imposed on the mandatory powers.[41]

The island was administered under the resulting regime until the outbreak of World War II. Nauru suffered tremendous hardship during the War. The Japanese occupied the island in 1942 and forcibly deported a part of the population. The Australians recaptured the island in 1945. Almost one-third of the Nauruans lost their lives during this period.[42] No phosphate was mined between 1941 and 1947.

The next major change in the international legislative history of the island occurred in 1947, when Nauru was placed under the United Nations Trusteeship System, which succeeded the Mandate System. The Nauru Mandate was replaced with a Trusteeship Agreement for Nauru.[43]

Nauruan dissatisfaction with their minimal involvement in the political and economic life of the island intensified during the Trusteeship period. Following U.N. criticism of the administration of the island, the Nauru Local Government Council (NLGC) was formed in 1951. The powers enjoyed by the Council, however, were minimal and it was not until 1965 that Nauruans became involved, even to a limited respect, in legislative actions on the island. Despite these changes, the Nauruans continued to be deprived of any right to interfere with the administration and operation of the phosphate industry.

Nauruan demands for full control over the phosphate industry were finally met in 1967, when the partner governments sold the industry to the Nauru Local Government Council.[44] The Nauruan campaign for independence ended on January 31, 1968, when the trusteeship over Nauru was terminated and Nauru became an independent state.

As for the historical origins of the dispute itself, representatives of the Nauruan people have maintained that the three partner governments were responsible for the rehabilitation of the lands mined out prior to July 1967, when Nauru acquired control of the phosphate

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40. Mandate for Nauru, 2 LEAGUE OF NATIONS O.J. 93 (1921) [hereinafter Nauru Mandate].

41. *See* discussion *infra* part III.

42. VIVIANI, *supra* note 17, at 77–87.

43. Trusteeship Agreement for the Territory of Nauru, Nov. 1, 1947, 10 U.N.T.S. 3 [hereinafter Trusteeship Agreement].

44. *See* WEERAMANTRY, *supra* note 1, at 273–74.

industry.[45] As no alternative industries had been developed on the island, Nauru continued mining for its survival. Nauru has accepted responsibility for the rehabilitation of all lands mined since July 1, 1967.[46]

The partner governments denied responsibility. In 1986, various diplomatic approaches having failed, the Nauru Government appointed a Commission of Inquiry into the Rehabilitation of the Worked Out Phosphate Lands of Nauru.[47] Among the questions presented, the Commission was required to identify the parties responsible for the rehabilitation of the lands in question. The Commission, which was chaired by a professor of international law, Christopher Weeramantry,[48] presented its findings in a ten-volume report that found the three partner governments responsible for the rehabilitation of the lands. The position of the partner governments remained unchanged by these findings, and on May 19, 1989 Nauru commenced proceedings against Australia in the International Court of Justice.[49]

The central claims made by Nauru were that it had suffered loss first as a result of the failure of the partner governments to rehabilitate the lands mined prior to July 1, 1967, and second, because of the manner in which the phosphates had been exploited.[50] The Commission of Inquiry concluded that the cost of rehabilitating the land mined during the period in question was $72 million (Australian); Nauru has provisionally asserted that it lost 172.6 million pounds because of the phosphate pricing system.[51]

Proceedings were not instituted against New Zealand and the United Kingdom, whose submissions to the compulsory jurisdiction of the Court contained reservations that could have prevented the

45. The Nauruans were represented at these discussions by the Nauruan Local Government Council led by the Head Chief of Nauru, Hammer DeRoburt. Australia argued before the ICJ that Nauru had waived all claims relating to rehabilitation at the time it entered into an agreement with Australia, in 1967, for the transfer of control over the phosphate industry. The Court rejected Australia's argument by a majority of 12 to 1. The history of Nauru's assertion of the claim regarding rehabilitation is set out by the Court in Preliminary Objections, Judgment, *supra* note 1, at 247–50.

46. Australia argued, in the jurisdiction phase of the proceedings, that Nauru acted in bad faith in bringing the claim against Australia without having commenced the rehabilitation of the island. Preliminary Objections of Australia (Nauru v. Aust.), 1990 I.C.J. Pleadings (Certain Phosphate Lands in Nauru) para. 404, at 162–63 (Dec. 1990) [hereinafter Australia Memorial]. The Court rejected this contention by 12 to 1. Preliminary Objections, Judgment, *supra* note 1, at 255.

47. For the background of the Commission, see WEERAMANTRY, *supra* note 1, at xiii–xvi.

48. Professor Weeramantry was appointed to the International Court of Justice in 1990 but has played no role in the Court proceedings regarding Nauru.

49. Preliminary Objections, Judgment, *supra* note 1, at 242.

50. Nauru Memorial, *supra* note 17, at 309. The figure takes into account all the expenses incurred by Australia in administering the island and managing the phosphate industry and also includes potential interest earnings.

51. *Id.*

Court from exercising its jurisdiction.[52] The preliminary objections phase of the case was heard in November 1991; the Court published its decision ruling that it had jurisdiction to hear the case the following June.

III. THE LEGAL REGIME APPLICABLE TO NAURU

A. The System of International Law

1. The Mandate System

Nauru's case is based primarily on the fiduciary obligations embodied in the mandate and trusteeship systems. Although the United Nations trusteeship system, which succeeded the mandate system, outlines a far clearer set of obligations undertaken by Australia, the mandate system nevertheless requires careful analysis as it provides the legal framework against which Australia's actions in its first phase of administering the island must be assessed. In addition, while the International Court of Justice has never directly considered the question of a breach of trusteeship agreement,[53] the mandate system has been the center of extensive litigation in the series of cases surrounding the status of South West Africa, which became the independent state of Namibia.[54] The principles developed in these cases lend themselves to clarification of both mandate and trust obligations.

The concept of an international trusteeship and the related idea of self-determination acquired a specific legal form for the first time in international law with the creation of the mandate system. Nevertheless, the idea of a mandate can be viewed as the institutional manifestation of a much older idea that natives should be protected by the colonizing power and that their interests and lands should be looked after in trust by that power. This idea is found in the work of the

52. Judge Ago, however, maintains that Nauru could and should have taken action against all three parties. *See* Preliminary Objections, Judgment, *supra* note 1, at 326–28 (dissenting opinion of Judge Ago). Australia's laudable submission to the jurisdiction of the Court, based on its concept of 'international citizenship', is discussed by Senator Gareth Evans, Australia's Minister for Foreign Affairs and Trade, in 13 AUST. Y.B. INT'L L 413 (Philip Alston & D.W. Greig eds., 1992).

53. *See supra* note 8.

54. *See* International Status of South West Africa, 1950 I.C.J 128 (July 11) [hereinafter International Status of South West Africa]; Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67 (June 7); South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21) (Preliminary Objections Judgment); South West Africa Cases (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6 (Jul. 18) (Second Phase Judgment); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) [hereinafter Namibia Case].

sixteenth-century Spanish theologian and jurist Francisco de Vitoria.[55] Repudiating the idea that the Indians of the New World were simply heretics and barbarians who could be dispossessed of their property, Vitoria argued that the Indians had their own sovereigns and that their public and private rights had to be respected.[56] At the same time, however, Vitoria asserted that the Indians were like children in need of governance by "people of intelligence."[57] Furthermore, the essential elements of trusteeship, as that concept is broadly understood today, also formed an essential part of Vitoria's jurisprudence: "the property of the wards is not part of the guardian's property; but it has owners and no others are its owners; therefore the wards are the owners."[58]

A number of developments through the centuries suggest that the idea of a trust played a role in both domestic and international relations. In the former realm, Chief Justice Marshall of the U.S. Supreme Court stated, in the celebrated case of *Cherokee Nation v. Georgia*,[59] that the Indians "are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."[60] This concept of trust continues to play a vital role in regulating the relationship between Indian tribes and the United States and Canadian governments.[61]

This theme of trusteeship, largely ignored in nineteenth-century international law writings, was recovered by the statesmen and lawyers confronted with the task of administering the former colonies of Germany and Turkey at the end of World War I. In seeking a legal basis for trusteeship, the League focused on two ideas: first, the creation of justiciable obligations imposed on the mandatories and intended to protect the interests of the dependent peoples; and second, the establishment of a system of supervision designed to ensure that the mandatory power was administering the mandated territory in accordance with those obligations.

The primary substantive obligation undertaken by the mandatory or power is stated in subsection 1 of article 22 of the League Covenant,

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55. For an outline of Vitoria's work, see ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1954); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986); JAMES B. SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW (1934); James B. Scott, *Preface to* FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI RELECTIONES at 5–6 (Ernest Nys, ed., John P. Bate, trans., Carnegie Institute 1917) (1696); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST 93–108 (1990).

56. VITORIA, *supra* note 55, at 128.

57. VITORIA, *supra* note 70, at 161.

58. *Id.* at 127.

59. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

60. 30 U.S. (5 Pet.) at 17.

61. *See* WEERAMANTRY, *supra* note 1, at 82–83.

which stated that "the well being and development" of the peoples subject to the mandate, formed a "sacred trust for civilization."[62] The mandate system was based on a compromise formula that categorized mandate territories into three classes: "A," "B," and "C" mandates.[63] Nauru was classified as a "C" mandate.[64]

The broad idea underlying the mandate is apparent from article 22(1): dependent peoples, instead of continuing to be the victims of colonial domination and exploitation, were to be the subjects of international protection. The suggestion made in article 22(3), with reference to Turkish colonies included in the class "A" mandate, was that the "well-being and development" of the mandate peoples had to be preserved and advanced in order to enable them to become, ultimately, citizens of sovereign states.[65]

Thus, the mandate system was unique in establishing the principle of international accountability for the administration of the territory in question. Furthermore, although the League authorized the mandatory to administer class C mandates as an "integral portion" of the mandatory, it did not confer sovereignty over that territory to the mandatory. This point was made not only by the ICJ,[66] but also by the domestic courts of mandatories who determined the status of the mandated territory for the purposes of the domestic legal system.[67]

This system reinforced the principle that control and ownership of the territory are distinct issues and that the trustee "is precluded from administering the property for his own personal benefit."[68] The relevant jurisprudence characterizes the mandate not so much as a set of rules, but as a policy that had to be pursued to ensure the well-being and development of the mandated peoples, and the preservation of their property for the time when they would emerge as members of an independent and sovereign state.[69]

The extent to which the mandate system embodied substantive legal obligations is suggested by the fact that these obligations were made

62. LEAGUE OF NATIONS COVENANT art. 22, paras. 1–2.

63. *Id.* at para. 3.

64. This was a category reserved for territories that, "owing to the sparseness of their population or their small size, or their remoteness from the centers of civilisation" can be "best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population." *Id.* at para. 6.

65. The principle that C mandates were to become independent states was affirmed in the *Namibia* Case. *See* Namibia Case, *supra* note 69.

66. International Status of South West Africa, 1950 I.C.J. 128, 132 (Jul. 11).

67. *See, e.g.*, Rex v. Christian, S. Afr. L. R. 101 (App. Div. 1924); Frost v. Stevenson, 58 C.L.R. 528 (Austl. 1937).

68. International Status of South West Africa, 1950 I.C.J. 128, 149 (Jul. 11) (separate opinion of J. McNair). Consistent with the idea that no profits were to be made in the course of acting as a mandatory, President Wilson claimed that the mandate was a burden rather than a privilege. *See* H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 127 (1948).

69. International Status of South West Africa, *supra* note 54, at 148–49.

justiciable. For example, article 7 of the Nauru Mandate stipulated that if a dispute arose between the mandatory power and any other Member of the League as to the "interpretation or application" of the mandate, recourse could be made to the Permanent Court of International Justice.[70]

In terms of supervision, the mandatory was obliged to satisfy requirements designed to enable the League of Nations to assess the territory's progress. For instance, mandatories were required to submit an annual report to the League Council.[71] These reports were submitted to the Permanent Mandates Commission (PMC), the monitoring organ established to "receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates."[72] The PMC consistently maintained that the sovereignty of the mandatory did not extend beyond its mandated territory; furthermore, it clearly regarded the mandate system as designed to bring about the independence of all the mandate territories, regardless of the category in which each was placed.[73] This assertion by the PMC had real effects on the administrative practices of the B and C mandates because it foreclosed attempts by the mandatory to absorb the mandated territory into its own.[74]

2. The Trusteeship System and the Theories of Resettlement and Rehabilitation

The League of Nations collapsed with the outbreak of the Second World War, and the Mandate System was officially terminated on April 18, 1946.[75] The Charter of the United Nations, which succeeded the League of Nations, provided under article 75 that the United Nations would establish an international trusteeship system.[76] Nauru was placed under the trusteeship system by the General Assembly on November 1, 1947.[77] Apart from referring to specific obligations applicable to Nauru, the Trusteeship Agreement also incorporated the obligations created by the whole U.N. Trusteeship System itself.[78]

The U.N. Charter provided for a far more precise set of obligations than were contained in the Mandate System under the League of

70. Nauru Mandate, *supra* note 40, art. 7.
71. LEAGUE OF NATIONS COVENANT art. 22, para. 7.
72. *Id.* para. 9.
73. *Id.* at 81.
74. *Id.* at 81.
75. CHOWDURI, *supra* note 7, at 113.
76. U.N. CHARTER art. 75. Chapter XI of the Charter, articles 75 to 91, establishes the trusteeship system.
77. Trusteeship Agreement for the Territory of Nauru, 10 U.N.T.S. 3 (1947) [hereinafter Nauru Trusteeship Agreement].
78. *Id.* at 6.

Nations. Article 76(b) describes one of the basic objectives of the trusteeship system as the promotion of the political, economic, social and educational development of the inhabitants of trust territories in order to ensure their progress towards self-government.[79] Under this system, a territory was treated as having a much more sophisticated personality than under the League Covenant and the Nauru Mandate.[80] For example, sovereignty was viewed as having economic, social, and cultural components, and the Trusteeship Agreement specified procedures for ensuring the political advancement of the Nauruan people.[81]

As for supervisory mechanisms, all U.N. functions relating to the Trusteeship were to be performed by the General Assembly,[82] assisted by a Trusteeship Council[83] made up of countries divided equally between those that administered trust territories and those that did not.[84] The General Assembly was empowered to consider reports submitted by the trustee administering authority,[85] and to accept petitions from inhabitants of the trust territories. Most significantly, the Charter provided for "periodic visits to the respective trust territories."[86]

Although the substantive obligations of the trusteeship system have never been the subject of a decision by the Court, the comments of domestic courts have illuminated the nature of the trusteeship obligation. For example, in interpreting the Trusteeship provision applicable to the Pacific trust territory of Saipan, the U.S. Court of Appeals for the Ninth Circuit acknowledged the vagueness of the substantive provisions but concluded that "we do not believe that the agreement is too vague for judicial enforcement."[87]

The broad theme of the Trusteeship period is the emergence of Nauruan nationalism and the Nauruan struggles to gain control of the phosphate industry and to become a sovereign state in the face of opposition from the three trustee powers, especially Australia. Even during the time of the Mandate, it had become increasingly evident that the mining process could, conceivably, leave the Nauruans home-

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79. U.N. CHARTER art. 76(b).

80. *See supra* note 65 and accompanying text.

81. The more detailed nature of the obligations are suggested by article 5. Nauru Trusteeship Agreement, *supra* note 77, at article 5(b), (c).

82. UN CHARTER art. 85, para. 1.

83. U.N. CHARTER art. 85, para. 2.

84. U.N. CHARTER art. 86, para. 1(c).

85. U.N. CHARTER art. 87, para. (a).

86. U.N. CHARTER art. 87, para. (c).

87. People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 97–99 (9th Cir. 1974). This case raised a series of issues comparable to the Nauru Case, including the nature of the protection offered by the Trusteeship against environmental damage to the inhabitants' lands.

less.[88] The issue was raised directly in the Trusteeship Council in 1948,[89] and the issue of resettlement was sporadically considered by the Australian administration in the 1950s.[90] The search for a suitable island commenced in earnest in the early 1960s, as the Trusteeship Council exerted intensifying pressure on Australia to make good their trusteeship obligations.

The Banabans of Ocean Island provided a precedent for the resettlement process. After the British colony had been efficiently mined out, the inhabitants were resettled in Rabi, an island in the Fijian group.[91] Nauru presented more complex problems because of its status as a trusteeship territory and the Nauruans' strong desire to maintain their sovereignty and identity as a people after resettlement.[92] At the same time, however, the Australian Department of Territories had begun to formulate a plan to persuade the Nauruans to settle in Australia and eventually become citizens.[93] This was to be achieved by adopting policies that would foster assimilation. Australian officials decided not to disclose this assimilationist plan to the Nauruans.[94] Thus, the seriousness of the attempts made by the Department of Territories to find an island for resettlement by the Nauruans as a sovereign people in the 1960s can be doubted. Furthermore, the resettlement initiative seemed to be motivated less by a concern for the future of the Nauruans than by a desire to continue the exploitation of their natural resources unimpeded by their presence.[95]

The problem finally focused on the question of whether the Nauruans were prepared to settle on Curtis Island, off the Australian coast.[96] The Australians were prepared to give the Nauruans limited self-government as Australian citizens, but remained unwilling to concede sovereignty.[97] After protracted negotiations, Nauruan Head Chief DeRoburt declared in August 1964 that the Nauruans intended to remain on the island.[98] When the parties failed to agree on reset-

88. For questions raised in the PMC as to the effect of mining on the land available for cultivation and habitation in 1937 see generally WEERAMANTRY, *supra* note 1, at 95–96.

89. *See* WEERAMANTRY, *supra* note 1, at 285.

90. VIVIANI, *supra* note 17, at 113.

91. For the unsuccessful litigation launched by the Banabans, see Tito v. Waddell & Others (No.2); Tito & Others v. Attorney General [1977] 3 All ER 129. *See* WEERAMANTRY, *supra* note 1, 210–30 (discussing the Banaban litigation).

92. WILLIAMS & MACDONALD, *supra* note 17, at 465.

93. Minute to the Department of Territories, 5 Nov. 1953, *quoted in* WEERAMANTRY, *supra* note 1, at 288.

94. One official recommended, "I believe our best interests would be served by playing along with the Nauruans on the idea of a new Nauru." *Id.* at 290.

95. Soviet Representative, Trusteeship Council, 1953, *reprinted in* WEERAMANTRY, *supra* note 1, at 302.

96. VIVIANI, *supra* note 17, at 145–46.

97. *Id.* at 146.

98. Ironically, Curtis Island contained mineral sands, the rights to which had already been sold by the Australian Government. *Id.* at 146.

tlement, the question of rehabilitating the Nauruan lands emerged as an issue to be resolved between the parties and the Trusteeship Council turned its attention toward this issue.

On December 21, 1965 the General Assembly, reaffirming the "inalienable right of the people of Nauru to self-government and independence," resolved that "immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation."[99] On December 20, 1966 the General Assembly reasserted its position in even stronger terms.[100]

The Australian government responded to these various pressures by appointing the Davey Committee to inquire into the prospects of rehabilitating the mined out lands. The Committee reported in 1966, suggesting that rehabilitation was feasible, at least on a modified scale.[101] The Administration, however, maintained its previous position that rehabilitation was not possible, and implemented a strategy of linking the issues of rehabilitation with the emerging, and by then almost inevitable Nauruan progress toward independence, by attempting to make the granting of independence conditional on Nauruan withdrawal of their claim for rehabilitation.[102]

A series of discussions, known as the "Nauru Talks," were held from 1964 to 1967 between the Nauruans and the Australian government, concerning resettlement, rehabilitation, independence, and royalties. The talks resulted in the adoption of the Nauru Island Phosphate Agreement (NIPA) in 1967. Australia initially attempted to retain control over the phosphate industry.[103] Confronted by implacable opposition by the Nauruans, however, Australia eventually agreed to transfer all rights to Nauru. It then asserted that this constituted a complete settlement of any Nauruan claims to compensation for rehabilitation. Despite Australian pressures to include a provision in NIPA to this effect, the Nauruans refused such a clause.[104]

In the final agreement, the phosphate industry was sold to the Nauruans for $21 million (Australian).[105] This, together with the fact that the Nauruans would receive 100% of the net proceeds from future phosphate sales, was characterized by Australia as a generous gesture that took into account the Nauruans' long term needs.[106]

99. Question of the Trustee Territory of Nauru, G.A. Res. 2111(XX), U.N. GAOR, 20th Sess., 1407th plen. mtg. (1965).

100. G.A. Res. 2226(XXI), U.N. GAOR, 21st Sess., 1500th plen. mtg. (1966).

101. Nauru Memorial, *supra* note 17, at 71–73.

102. Nauru Memorial, *supra* note 17, at 221.

103. VIVIANI, *supra* note 17, at 164–67.

104. *See* WEERAMANTRY, *supra* note 1, at 274.

105. *Id.* at 164. For a broad outline of the matters covered by the NPA, see WEERAMANTRY, *supra* note 1, at 273.

106. *See* WEERAMANTRY, *supra* note 1, at 278.

B. The System of Domestic Law: The Nauru Island Agreement

The agreements discussed above outline the international regimes applicable to Nauru that were to be implemented in the domestic legislation of the island. The most significant legislation applicable to the administration of Nauru in practice was the Nauru Island Agreement of 1919.

Referring to the anticipated grant of the Mandate, the NIA, according to its preamble, was entered into in order to "make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Island."[107] The characterization of the mining operation as possessing a distinct but related identity from the Mandate itself suggests the complex relationship between the mining operation and the administration of the island.

The administration of the island was entrusted to an Administrator who was to be appointed initially for a five-year term by the Australian government. Eventually the three partner governments developed the practice of allowing Australia to appoint each of the succeeding Administrators.[108] Subsequent interference by New Zealand and the United Kingdom in the everyday administration of the island was minimal.

In addition to outlining the functions of the Administrator, much of the agreement focused on devising a system to exploit the phosphates. The British Phosphate Commissioners (BPC) was established consisting of three members, with each of the partner governments appointing one such member. According to the NIA, all title to the phosphate deposits and related property was to be vested in the BPC.[109] Any previously held title to the phosphates or other property was to be "converted into a claim for compensation at a fair valuation"[110] payable by the three Governments.[111] This arrangement was consistent with the position that the partner governments were, through the

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107. Nauru Island Agreement, *supra* note 38, pmbl.

108. The Trusteeship Agreement for Nauru itself recognized that while the three partner governments jointly comprised the "Administering Authority," it was Australia which in practice administered the territory. Nauru Trusteeship Agreement, *supra* note 77, art. 4.

109. *Id.* art. 6.

110. *Id.* art. 7.

111. *Id.* art. 8. No payments were made to the Nauruans pursuant to this article. Instead they were paid a royalty that Australia characterized as gratuitous despite the fact that the Nauruans owned the phosphates. *See* discussion *infra* part V.B. The total royalty paid to the Nauruans as a percentage of the value of the phosphate exported (which was sold at cost rather than world price to farmers in Australia and New Zealand) was 0.3% in 1921; 5.1% in 1939; 2.7% in 1948; 7.8% in 1959; 7.6% in 1964; and 31% in 1965. These figures include all the monies placed in various funds established by the Administration for the benefit of the Nauruans. VIVIANI, *supra* note 17 at 189–90. All the expenses of administering Nauru were met from the sales of the phosphates, in accordance with article 2 of the NIA.

BPC, acquiring control over the phosphate operations by purchasing the relevant assets.

The Nauruans suffered the consequences. As early as 1925, the damaging effects of the mining were apparent, and the Nauruans protested that unless the mining depth was limited, the planting of food producing trees would become impossible. The protests were unheeded and the BPC, supported by the partner governments, continued mining to an unrestricted depth.

In summary, the legal regime established on the island by the NIA and the Lands Ordinances raises serious questions as to the compatibility of the Administration of the island with the terms of the Mandate. Simply put, the arrangements outlined above suggest that the welfare of the Nauruans was profoundly subordinated to the commercial interests of the BPC and, through them, the partner governments. Instead of being a source of protection, the mandate became, in practice, the cover for a system of exploitation that effectively destroyed one-third of the Nauruan homeland.

IV. OVERVIEW OF THE NAURUAN CASE AGAINST AUSTRALIA

A. The Nauruan Causes of Action

The core of Nauru's legal theory of recovery concerns Australia's failure to fulfill its obligations under the Nauru Mandate and the Nauru Trusteeship Agreement. In addition, Nauru's argument relies on general established doctrines of international law. Nauru claims Australia breached principles of permanent sovereignty over natural resources and self-determination in the course of its administration. Additionally, Nauru contends that Australia violated customary international law doctrines by engaging in a denial of justice in the broad sense—denial of justice *lato sensu*.[112] First, it is claimed that Australia abused its authority over the territory and people of Nauru. Second, Nauru asserts that Australia violated the solemn duties of a predecessor state that is entrusted with the task of administering or preparing a territory whose title is to be transferred.[113] Finally, Nauru

112. *See* Nauru Application, *supra* note 5, at 30; Nauru Memorial, *supra* note 17, at 160–63.

113. *See* Nauru Application, *supra* note 5, at 30; Nauru Memorial, *supra* note 17, at 167–71. The essential element of the action is a misuse of rights by a state in such a manner as to cause damage or prejudice. The Permanent Court of International Justice has referred to this principle in connection with the administration by a state of territory whose sovereignty is to be transferred. *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. a) No. 7 at 30; *Free Zones Cases* (Fr. v. Switz.), 1930 P.C.I.J. (ser. A) No.24 at 12 and 1932 P.C.I.J.(ser. A/B) No. 46 at 167. In the Nauru case, it is arguable that the rights enjoyed

could possibly claim that Australia violated customary international law principles prohibiting unjust enrichment.[114]

As a remedy, Nauru requests that the ICJ adjudge and declare that "Australia has incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered."[115] Although it has provided provisional figures relating to the losses suffered because of the manner in which the phosphates were exploited, Nauru seeks that the issue of reparations be decided in a separate phase of the proceedings in the absence of agreement between the parties.[116] Interestingly, Nauru has also reserved its right to request aggravated damages that "reflect the particular elements of excess and the lack of ordinary consideration in the conduct of the Respondent State."[117]

It is important for the success of Nauru's arguments before the ICJ that the content of the mandate and trusteeship obligations be seen and interpreted in evolutionary terms. Authority for this evolutionary approach to interpreting the trusteeship is provided by the ICJ's statement in the *Namibia* Case.[118] As a consequence of this approach, the actions of a trustee power—in this case Australia—must be consistent with developments in international legal norms as to how dependent peoples should be prepared for self-government. The evolution of norms is evident in the relevant PMC proceedings and the U.N. General Assembly resolutions. These provide relevant guidance as to how the international community perceived the purposes of the Australian mandate and trusteeship over the island.

B. The Australian Response

In the preliminary phase of the case, Australia raised a number of objections to Nauru's allegations, and requested that the ICJ declare

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by Australia by virtue of the Mandate and Trusteeship systems were exercised for purposes other than those for which they were granted, thus breaching international law. *See* WEERAMANTRY, *supra* note 1, at 358–60. *See generally* B.O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Rights in International Law*, 16 HARV. INT'L L.J. 47 (1975).

114. The principle that a party cannot retain benefits unjustly acquired, independent of any relationship established by the law of tort, contract, or trusts is an aspect of many domestic systems of law and has been characterized as a principle of international law by many eminent authorities, including Bin Cheng, O'Connell, and de Arechaga. *See generally* WEERAMANTRY, *supra* note 1, at 355–58.

115. Nauru Application, *supra* note 5, at 32.

116. *Id.*

117. *Id.*

118. "[T]he concepts embodied in Article 22 of the Covenant . . . were not static, but were by definition evolutionary . . . ." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16.

that it lacked jurisdiction to hear the case.[119] Australia argued that Nauru had waived all claims regarding rehabilitation: this waiver was an implicit and necessary aspect of the 1967 agreement, and had been affirmed by Head Chief Hammer DeRoburt's statements in the United Nations at the time of the termination of the trust. Australia further argued that the General Assembly and the Trusteeship Council alone were competent to assess the breaches of trusteeship obligations, and it was not within the Court's competence to reopen a trust that had been terminated by the United Nations. Australia also argued that Nauru had delayed raising the matter. Another argument was that Nauru was acting in bad faith by claiming the island had to be rehabilitated if people were to continue living on it. Australia pointed out that Nauru itself had continued to mine the land and had failed to commence the process of rehabilitation. Most significantly, Australia asserted that the Court could not decide the issue of Australia's responsibility without also pronouncing on the responsibility of the two other governments that comprised the Administrative Authority of Nauru. Thus, Australia argued, the Court would be deciding on the responsibility of absent parties who had not consented to the Court's jurisdiction. All of these arguments were rejected by the Court.[120]

In accordance with the practice of the Court, Australian arguments as to the merits phase of the case will not be publicly disclosed until the hearing of that phase. Nevertheless, statements made by the Australian Government suggest, in broad terms, its position. Australia asserts that the Nauruans enjoyed a high standard of living during the period of mandate and trusteeship, and that this was reflected by the comments made by U.N. Visiting Missions on the quality of the health care, education, and public services provided to the Nauruans.[121] On the crucial question of rehabilitation, Australia argues that the phosphate agreement gave Nauruans the economic benefit of the phosphate industry, that the partner governments gave up their mining concession without compensation, and that, as a result, Nauruans had the means to provide for rehabilitation.[122] Australia has also continuously stressed that the income Nauru received from the phos-

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119. *See* Australia Memorial, *supra* note 46, at 3–4. For a list of all the arguments so presented see Antony Anghie, *International Decisions*, 7 AM. J. INT'L L. 282 (1993).

120. One of Australia's objections was upheld, although this was not significant enough to prevent the case from continuing to the merits phase. For the decision and the reasoning of the majority, see Preliminary Objections, Judgment, *supra* note 1, at 259–62.

121. Australian Dept. of Foreign Affairs and Trade, Nauru: International Court of Justice Action Against Australia Backgrounder, *reprinted in* 13 AUSTR. Y.B. INT'L L. 409, 410 (Philip Alston & D.W. Greig eds., 1992).

122. *Id.* at 411.

phates would have ensured the long-term well-being and prosperity of the nation.[123]

Australia suggests in effect that if the needs of the beneficiaries were "adequately" provided for, the trustee could then dispose of the remaining trust assets in whatever manner it pleased—indeed, that it could appropriate the residual assets for itself.[124] The crucial issue, therefore, is whether the mandate and trust obligations may be interpreted so widely as to accommodate this reading.

Furthermore, Australia has repeatedly responded to several of the Nauruan allegations with the argument that the Trusteeship Council and the General Assembly never declared the Administration to be in violation of the trusteeship obligations.[125] This argument could raise complex issues as to the legal effects of the Trusteeship Council's actions. A further question may arise regarding Australia's persistent failure to provide the Council with the information it continuously requested as to royalty payments.

V. NAURU'S THEORIES OF RECOVERY

A. Trusteeship and Self-Determination

1. Overview of Self-Determination

At the ICJ, Nauru can forward two claims tied to the right of a subject people to self-determination. First, the Australian government failed to fulfill its obligations under the mandate and trusteeship to fully apprehend the right of the Nauruan people to self-determination. Alternatively, self-determination as a general principle may provide a basis for action by Nauru independent of the trusteeship obligations themselves. Even in the absence of the specific trust arrangement, the relationship between Australia and Nauru could have been characterized as one giving rise to an obligation by Australia to respect Nauru's right to self-determination.

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123. *Id.* Australia argues that "[t]he income from phosphate mining should have given Nauru one of the highest per-capita incomes in the world." *Id.*

124. Australia has never really denied that it profited from the exploitation of Nauru's resources.

125. *See* Australia Memorial, *supra* note 46, at 83. Overall, while Australia lost the jurisdiction phase of the proceedings, certain arguments used in that phase may be repeated in the merits context. On one previous occasion involving mandate obligations, the South West African litigation of 1962 and 1966, the Court declared that it had jurisdiction in the first phase and then declared, in the merits phase, that further materials presented in that phase necessitated the reversal of the original finding that jurisdiction was established. Thus a number of technical and procedurally oriented defenses may remain open to Australia. *See* Preliminary Objections, Judgment, *supra* note 1, at 270–76.

The mandate and trusteeship systems may be regarded as specific regimes used to achieve the goal of self-determination. However, the doctrine of self-determination has evolved and expanded in the post-World War II era into a general principle of international law applicable to all colonial and dependent territories. From its legal origins in the League Covenant, the concept of a right of self-determination has been further elaborated in the U.N. Charter,[126] in the two primary international human rights covenants,[127] and in the declarations of the U.N. General Assembly.[128]

The principle of self-determination has been expressed as the right of a people to "freely determine their political status and freely pursue their economic, social and cultural development."[129] The right, furthermore, has been made explicitly applicable to Trustee powers.[130] The right of "all peoples" to self-determination continues to be one of the most controversial doctrines in international law[131]—what "peoples" are entitled to this right? At least for the Nauruans, this question does not pose a difficulty as they have been explicitly designated as a "people" in the Nauru Trusteeship Agreement. Instead, the controversy centers on the scope of the obligations of Australia to respect the Nauruan people's right to self-determination under the trusteeship.

2. Political Participation and Education

In its most formal conception, the right of self-determination simply means the right of a subject people to freely determine their political status. But under the mandate and trustee systems, the administering power had an affirmative duty to promote the realization of the right to self-determination. In order to consider the question of whether Australia fulfilled its obligations to promote and to respect the Naruan right of self-determination, the Australian record in the areas of po-

126. U.N. CHARTER arts. 1(2), 55.

127. International Covenant on Civil and Political Rights, art. 1(2), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 1(2), 993 U.N.T.S. 3 [hereinafter ICESCR].

128. *See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at para. 6, U.N. Doc. A/4684 (1966) [hereinafter U.N. Declaration on Granting Independence to Colonial Countries and Peoples].

129. ICCPR, art. 1(1).

130. ICCPR, art. 1(2).

131. Dismissed by one eminent jurist, Sir Gerald Fitzmaurice, as "nonsense," the principle now seems an established part of international law, not only because of its inclusion in the international legal instruments mentioned, but also because of its recognition by the ICJ in several cases. *See, e.g.*, Namibia Case, *supra* note 69, at 31. The literature on self-determination is considerable. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 84–103 (1977); ANDRES RIGOSUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION (1973); U.O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW (1972); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977).

litical participation and education will be examined. These areas are examined here for the simple reason that educated and politically active people are better able to pursue their own development than people who are deprived of such opportunities and advantages.

The Administration was successful in building schools and providing the Nauruans with various public services,[132] earning the praise of the PMC and the Trusteeship Council.[133] But as a trustee entrusted with the solemn mission of furthering the political development of its ward, Australia engaged in an irreducible conflict of interest. As Weeramantry observed, the entire mandate system was afflicted with the problem of divided loyalties:

> Here was one of the primary enigmas of the mandate system. There was an attempt to protect defenceless states against the desire of the more powerful to exploit their resources. At the same time this could only be done by entrusting those defenceless states to the control of one or other of those very states which were anxious to have power over them for advantages of their own.[134]

In Nauru, the efficient extraction of the phosphates was of central importance to the BPC and the Administration. On the other hand, the Administration was entrusted with the duty to provide the Nauruans with the education necessary to develop the political, economic, and legal skills required to vindicate their rights as an independent people. The Administration, as trustee, not only failed to protect the welfare of the Nauruans, but also prevented the Nauruans from protecting their own interests.

These themes are illustrated by the saga of the "Geelong Boys." The first Administrator of Nauru, Brigadier General Griffiths, adopted an admirable policy of educating the Nauruans for responsible administrative positions. He initiated a program to train promising Nauruans in Geelong, a city in Australia.[135] A number of concerned Geelong organizations, intent on helping Australia discharge its in-

132. It should be noted, however, that education was funded by the Nauruans from the royalties given to them by the mining. *See* VIVIANI, *supra* note 17, at 98.

133. *Id.* at 64. These assessments, however, were often based on favorable comparisons with conditions generally prevailing in Pacific territories, as opposed to standards deriving from the Trusteeship provisions requiring the development of Nauru into an independent state. For example, the Trusteeship Council was concerned that no Nauruan had completed a university education by 1955. VIVIANI, *supra* note 17, at 117. Viviani also suggests that educational policy was not particularly well implemented even within the Administration's own limited terms. *Id.* at 115–20.

134. WEERAMANTRY, *supra* note 1, at 90.

135. *Id.* at 112.

ternational obligations, participated in the program[136] and the students thus trained were known as the "Geelong Boys."

As early as 1928, Griffiths reported on the success of the program and reiterated his belief that "in a comparatively short time practically the whole of the Nauruan service positions will be filled by Nauruans."[137] This successful experiment was short-lived. W.A. Newman,[138] Griffiths' replacement, was far less supportive of the Nauruans. While acknowledging that the Geelong scheme had produced "amazingly successful results," he warned that: "[I]t would be unwise to educate the Nauruan population generally to a higher standard than laid down in the simple existing programme of instruction."[139]

In 1932, Head Chief Detudamo caused consternation in the Administration and among the BPC by speaking of independence.[140] This aspiration, combined with the political awareness of the Geelong Boys, made it increasingly difficult for the Administration to negotiate phosphate royalties and to administer the island in general. Consequently, the Administration branded the Geelong Boys as malcontents and excluded them from any role in the administration of the island.[141] Since the Geelong Boys' experience had demonstrated that education was subversive, Administration policy changed accordingly. Deciding that the Nauruans were to be given only basic forms of education, the Administration then claimed that the Nauruans were incapable of managing affairs for themselves.[142]

Protection of the phosphates was the key issue behind the treatment of the Nauruans, and this was reflected not only in educational but political policies. Little was done to develop the political institutions on the island or to progressively include the Nauruans in the more important decision-making processes of the island. During the first

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136. *Id.*

137. *Id.* (quoting Griffiths).

138. General Griffiths had unsuccessfully attempted to protect the Nauruans from the BPC. Newman, however, collaborated with the BPC against the Nauruans. For a discussion as to how the BPC dominated the Administration, see WEERAMANTRY, *supra* note 1, at 103–04.

139. WEERAMANTRY, *supra* note 17, at 112–13.

140. WILLIAMS & MACDONALD, *supra* note 17, at 282.

141. *Id.* at 279–82; *see also* WEERAMANTRY, *supra* note 1, at 113. It is noteworthy that DeRoburt, who played a decisive role in the Nauruan independence campaign, was one of the Geelong Boys.

142. The Administration seemed intent on creating a society that would remain in a permanently subordinate position. The Australians involved in the Geelong program recognized this design and continuously attempted to bring this matter to the attention of the Australian Ministry of Territories. They were rebuffed on each occasion. *See generally* WEERAMANTRY, *supra* note 1, at 384–90 (describing the struggles by Australians concerned for the welfare of the Nauruans). H.E. Hurst, one of the key members of the Geelong Group, was investigated for communist activities. Hurst himself believed that Australia meant to eradicate the Nauruans. H.E. Hurst, *Australia Seeks to Destroy Nauruans as a People*, PACIFIC ISLANDS MONTHLY, Nov. 1964, at 73.

debates of the Trusteeship Council regarding Nauru, it was pointed out that only one position of importance, that of "Native Affairs Officer," was held by a Nauruan, the Nauruan Head Chief. A Nauruan Council of Chiefs was established in 1928, but its powers were carefully limited to advising the Administrator on Nauruan matters; the Administrator was not bound to act upon this advice.[143] Apparently unwilling to provide advanced education to the Nauruans for fear of its politically destabilizing consequences, the Administration instead justified its neglect to ensure political progress by simply characterizing the Nauruans as apathetic and inherently inept.[144]

As a result of the continuing pressure that both the Trusteeship Council and the Nauruans themselves exerted, the Council of Chiefs was replaced in 1951 with the Nauru Local Government Council.[145] Once more, however, the powers of the Council were largely advisory; the Administration retained its discretion as to implementation of this advice and the financing of the activities of the Council.[146] Further pressure resulted in the formation of a Nauruan Legislative Council in 1966, just two years prior to independence. The phosphate industry was made immune from regulation by the Council even at this late stage, and it was not until 1967 that the Nauruans won complete control over the industry.[147]

3. Interpreting Self-Determination

In the context of the history roughly sketched above, the Nauruans allege that Australia breached its trusteeship duties to promote the right to self-determination of the Nauruan people and, in particular, that Australia failed to fulfill its obligations under article 76(b) of the U.N. Charter. In response, Australia characterizes the trusteeship obligations imposed by article 76 as obligations of "result" that bestowed on the Administering Authority considerable discretion as to how to achieve the result of independence. Australia argues in its

143. *Id.* at 94.

144. These were the terms in which the Nauruans were described to the Trusteeship Council by the Administration. In fact, the Nauruan Council of Chiefs, increasingly impatient with the impenetrable paternalism of the Administration, made desperate attempts to acquire greater control over the administrative policies and the finances of the island. In 1948, the Nauruans petitioned the Trusteeship Council directly and requested that a U.N. Visiting Mission come to the island to inquire into the situation. The petition was regarded as serious enough to justify a visit by the Acting Minister of External Territories to the island, who persuaded the Nauruans to withdraw the petition. *See* VIVIANI, *supra* note 17, at 94.

145. Membership on the Council was determined by popular vote. Virtually 100% of the eligible Nauruans voted in the first two elections. *See* VIVIANI, *supra* note 17, at 115.

146. Viviani remarks that, as a consequence, "the Administrator still controlled the new Council completely." *Id.* at 104.

147. *Id.* at 165.

Preliminary Objections to the Court that "there can be no doubt that the result was achieved: Nauru became independent and the people prospered."[148] The argument is highly questionable. The Nauruans ultimately prospered despite and not because of the Administration's policies. For example, they regained control over the phosphate deposits only after overcoming the Administration's attempts to retain control.[149]

Thus the Australian argument that it fulfilled its duties under the Nauruan trusteeship by permitting formal political independence and ceding control of the phosphate lands contains two underlying premises worth considering. First, the Australian response suggests that any judicial review of its actions must be based on the idea that the trust obligations provided Australia with considerable political discretion as to what means were to be used, in the particular circumstances presented by Nauru, to discharge those obligations.[150] Second, Australia's position asserts that the trusteeship obligations called for no more than ensuring that the Nauruans received independence.

Clearly, the trust obligations imposed a considerable burden on trustee powers. Nevertheless, as it is suggested in the *Namibia* case, where the policies enacted by the trustee powers were "actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the territory,"[151] the argument as to a valid exercise of discretionary authority cannot apply. Given that Australia was acting with, most charitably put, divided loyalties, the Australian defense that it was acting within the discretion granted it under the trusteeship seems unfounded.

The second premise of the Australian defense suggests that the eventual achievement of formal political independence by Nauru discharged all trustee obligations. This position's emphasis on formal independence suggests that, once independent, a former trusteeship territory cannot invoke the principles of self-determination to make the trustee power accountable for its economic, political, and social policies, regardless of the extent to which these policies may have impaired the newly emergent state from participating effectively in the international community.

International norms and practice indicate that formal political independence is an essential element of self-determination.[152] Interna-

148. Australia Memorial, *supra* note 46, at 96.

149. WILLIAMS & MACDONALD, *supra* note 17, at 481.

150. Australia accepts that the trust obligations were legal in character but argues that "the obligations involve the exercise of a political as well as a legal judgment." Australia Memorial, *supra* note 46, at 96.

151. *See* Namibia Case, *supra* note 54, 1971 I.C.J. at 56.

152. *U.N. Declaration on Granting Independence to Colonial Countries and Peoples*, *supra* note

tional organizations have invoked the right of self-determination primarily on those occasions when colonial powers deny subject peoples their political rights and impede the pace of political independence.[153] Once formal independence is achieved, these watchdog international bodies seem far less concerned with the issue of providing the newly independent state with a mechanism to seek remedies for any damage and prejudice it suffered as a result of the the policies pursued by the ousted colonial power.[154]

While there is ample evidence to suggest that formal independence is central to the concept of self-determination, this in itself does not establish that the granting of formal independence is all that the principle demands. Article 1(2) of the International Covenant on Civil and Political Rights presents self-determination as a broad concept, imposing on both trustees and colonial powers broad obligations related to political, economic, and cultural development.[155]

Commentators on the doctrine of self-determination, while acknowledging that its scope is yet to be fully and precisely defined, nevertheless suggest that the concept of self-determination has several different components.[156] U.O. Umozurike argues that the doctrine of self-determination includes the right to government by the will of the people, the free pursuit of economic, social, and cultural development, the enjoyment of fundamental human rights and equal treatment, and the absence of discrimination.[157] A second authority, W. Ofuatey-Kodjoe, after his careful study of state practice and the practice of international organizations, includes within the scope of the right of self-determination "the liberty to take steps to achieve full self-government without hindrance."[158] Impeding such a progress will therefore give rise to a violation of international law.

207, at 66, art. 3. This emphasis on formal political independence pervades the Declaration; the preamble "[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." *Id.* at pmbl.

153. The U.N. criticism of South Africa for its activity in Namibia prior to its independence provides an example of such action. *See* Namibia Case, *supra* note 69; U.O. UMOZURIKE, SELF-DETERMINATION INTERNATIONAL LAW 112–37 (1972).

154. With respect to Namibia, the international community has attempted to ensure that Namibia's rights of actions against South Africa will be preserved. *See* discussion of permanent sovereignty over natural resources doctrine *infra* part VI.

155. Trusteeship obligations, as embodied by article 76 of the U.N. Charter which is particularly addressed by Australia, are far more detailed and extensive. As such, they cannot be readily subsumed into the simple act of granting independence without doing violence to that article. *See* Hugh Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989*, 1991 BRIT. Y.B. INT'L L. 1, 21–33 (discussing treaty interpretation and the principle of "natural and ordinary meaning").

156. U.O. UMOZURIKE, SELF DETERMINATION IN INTERNATIONAL LAW 190 (1972).

157. *Id.* at 192.

158. W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 165 (1977).

The far more detailed terms of the documents that defined the U.N. trusteeship system, and the relationship between trustee and subject peoples, strongly suggest that it would be difficult to subsume these many obligations into the mere act of granting political independence without doing considerable violence to the spirit of the trusteeship system. Such a myopic focus on independence alone is completely contrary to the purposes of the mandate and trusteeship systems. If independence was all that mattered, the Administration, presumably, could have granted the Nauruans independence in 1949 and thereby discharged all their obligations.[159] The whole rationale of the system—and this is made explicit in the terms of the mandate system itself—was the development of independent communities so that they could "stand by themselves under the strenuous conditions of the modern world."[160] This overarching purpose—the uplifting of the Nauruan people—would be a primary consideration before the ICJ in its interpretation of the specific legal obligations of Australia.[161] Seen in these terms, any Administration policy that impeded such a process would be in violation of international law.[162]

If the principle of self-determination simply requires the formal granting of independence, then abuses suffered by a dependent people will cease to possess any legal significance at the precise point in time when the people become independent sovereigns and acquire the capacity to make claims in international law. International law would continue to maintain a formal notion of the "sovereign equality of states," even while appearing to endorse a process by which the enduring effects of maladministration establish substantive inequalities between states.

B. Permanent Sovereignty Over Natural Resources (PSNR)

1. Overview of PSNR Doctrine

The seizure and exploitation of natural resources found in colonial territories were an integral part of the colonial project.[163] More often

159. Given the lack of political and educational advancement, there is an argument to be made that the Nauruans would have been better off at least to the extent of having control over the phosphates at an earlier stage.

160. LEAGUE OF NATIONS COVENANT art. 22(1).

161. The Vienna Convention on Treaties provides that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, para. 1, 1155 U.N.T.S. 331.

162. This also makes unclear the validity of the Administration's apparent view that satisfactory implementation of the principle of self-determination for the Nauruans consisted of persuading the Nauruans to resettle in Australia as Australians while the island was mined out. *See* WEERAMANTRY, *supra* note 1, at 297–302.

163. *See* Bengt Broms, *Natural Resources, Sovereignty Over*, *in* 10 ENCYCLOPAEDIA OF PUBLIC

than not, colonizers obtained concessions through direct coercion or by "agreements" that were largely incomprehensible to the natives who were the ostensible signatories to them.[164]

As Western colonialism collapsed in the post-1945 era, one of the most immediate tasks confronting newly independent countries was that of regaining control over their natural resources. Many developing countries resorted to outright expropriation of foreign property interests in order to accomplish this goal. In the international legal arena, a loose coalition of newly independent nations spearheaded the passage of a series of General Assembly resolutions that formulated the doctrine of permanent sovereignty over natural resources.[165]

The link between natural resources and sovereignty is outlined in the legal instruments that serve as the foundation of PSNR doctrine. In 1962, the U.N. General Assembly passed the most significant statement on PSNR, Resolution 1803, which declares: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and the well-being of the people concerned."[166] Likewise, article 1(2) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights describe the right of a people to control its natural resources.

The language of the documents that describe the doctrine of PSNR is often general and has led to many interpretive problems. For example, the content of the right and the meaning of the term "peoples" were left unexplained. If "peoples" refers to the peoples under colonial rule, do these peoples possess a latent sovereignty with an accom-

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INTERNATIONAL LAW 306 (Rudolf Bernhardt ed., 1981) (observing that gaining control over natural resources was a significant motive of colonizers).

164. The experiences of the Nauruans and their neighbours, the Ocean Islanders illustrate this theme. *See* Tito v. Waddell & Others (No. 2), 3 ALL ER 129, 149 (1977).

165. The doctrine of PSNR became an important element of the developing world's demand for a so-called New International Economic Order. *See, e.g.*, Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. 30, U.N.Doc. A/9030, at 50 (1974); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp 1, U.N. Doc. A/9559 (1974). For accounts of the doctrine and the controversies it has generated see Subrata Roy Chowdhury, *Permanent Sovereignty Over Natural Resources in* INTERNATIONAL LAW AND DEVELOPMENT 59–85 (Paul de Waart et al., eds., 1988); F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT 132–40 (1990); Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 R.C.A.D.I. 245 (1979); PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW AND PRACTICE (Kamal Hossain & Subrata Roy Chowdhury eds., 1984)

166. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). G.A. Resolution 1803 is of particular importance as it has been generally accepted as part of international law, unlike many other PSNR declarations.

panying right to their natural resources? If so, what obligations, if any, are imposed on colonial powers by this right?

Despite the uncertainty of PSNR doctrine, it became a focal point for the intense debate over the legality of the wave of nationalizations that accompanied decolonization. In particular, PSNR framed the dispute between newly independent nations set on the course of expropriation and the objects of expropriation policies—the foreign enterprises that claimed entitlement to continued rights to natural resources acquired during the colonial period.[167]

Drawing upon general principles of international law and the doctrine of PSNR, the developing countries marshalled several arguments in support of their position. As a starting point, they argued that the natural resources had always belonged to the people of the territory and that this ownership continued through the colonial episode. Furthermore, any concession granted by the colonial power with respect to resources of the colony was subject to review by the newly independent people upon independence. This principle is reflected in the language of a U.N. report issued during the heyday of PSNR doctrinal ferment.[168]

The developed world responded by arguing that such nationalizations incurred state responsibility by violating the doctrine of acquired rights, which mandates that a new state must respect the obligations undertaken by a predecessor state.[169] Accordingly, it followed that newly independent countries were legally bound to honor the concessionary rights to their natural resources that private enterprises had acquired prior to independence.[170] The former colonial powers did not dispute the right of a sovereign to nationalize property *per se*.[171] Rather,

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167. For an account of this debate that combines legal analysis and historical case studies, see HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 479–562 (3d ed. 1986).

168. Mohammed Bedjaoui, *First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties*, UN Doc. A/CN.4/204, in [1968] 2 Y.B. INT'L L. COMM'N 115, UN Doc. A/CN.4/SER.A./1968/Add.1.

169. This concern is evident in the debates surrounding the drafting of the G.A. Res. 1803, *supra* note 166. The Netherlands, for instance, argued that "as a general rule, *old* investments should not be jeopardised by new laws and should be protected in accordance with the generally recognised principle of international law of respect for legally acquired rights." *See* Karol Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L.Q. 398, 442–43 (1964).

170. The techniques used by colonial powers to safeguard their concessionary rights included the incorporation of provisions protecting fundamental rights and freedoms in the constitutions of the territories that were to become independent. *See* OKON UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 462–63 (1972).

171. The proposition that states may exercise their sovereign power by nationalizing enterprises dealing with natural resources has been clearly established; however, uncertainties exist as to how international law qualifies the exercise of such power. *See, e.g.*, Francesco Francioni, *Compensation for Nationalisation and Foreign Property: The Borderland Between Law and Equity*, 24

they argued that nationalization could take place provided a number of conditions were met, the most significant being payment of compensation according to internationally determined standards.[172]

The developing countries rejected these views with a range of arguments. In its most radical formulation, the developing block argued that all international law, including doctrines of acquired rights, were part of an international law that they had played no role in formulating.[173] Given the essential tenet of international law that sovereigns can be bound only by laws to which they have consented, the developing countries asserted that they were not bound by rules that they rejected upon independence. A less sweeping response to the demand of former colonial enterprises for compensation attempted to limit the scope of the doctrine of acquired rights. Even if the doctrine of acquired rights was accepted as binding law, it applied only to rights that were "properly vested, *bona fide* acquired and duly evidenced."[174] Where rights were acquired as a result of duress or fraud, presumably, these rights would not be protected by the doctrine.[175] Furthermore, the issue of compensation had to be decided by taking into account and setting off the profits that had been made by the enterprise prior to nationalization.[176]

INT'L & COMP. L. Q. 255, 260–61 (1975); DANIEL P. O'CONNELL, THE LAW OF STATE SUCCESSION 101–02 (1956).

172. Both the United States and the United Kingdom successfully fought for the inclusion of a reference to "international standards" in the crucial 1962 resolution that states that the "owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law." G.A. Res. 1803, *supra* note 166, at art. 4. For the debates surrounding the drafting of this resolution, see generally Gess, *supra* note 169; Stephen M. Schwebel, *The Story of the U.N's Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463 (1963).

173. *See generally*, S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT. & COMP. L.Q. 121 (1965); R.P. Anand, *The Role of the "New" Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L LAW 383 (1962).

174. 1 DANIEL P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 247 (1967).

175. It is difficult to find any instance of a concession being set aside on these grounds. *See* LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 78–89 (1974). In the British colonies, attempts by colonized peoples to question the legality of concessions acquired subsequent to cession or conquest during the colonial period were defeated by the simple claim that actions undertaken by the British authorities—and other entities such as the East India Company in whom sovereignty was vested—were "acts of state," and thus beyond the scrutiny of municipal courts. It would seem that while it was possible to vest sovereignty and therefore immunity in a trading company, the colonized lacked the sovereignty and therefore the international personality to bring any sort of claim in the international sphere. *See* [1963] 2 Y.B. INT'L L. COMM'N 117 UN Doc. A/CN.4/SER.A/1963/Add.1. Analogous reasoning was used to deny the Banaban claim. *See supra* note 91.

176. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 1978 R.C.A.D.I. 300.

2. PSNR Doctrine as a Legal Cause of Action

One barrier to the employment of PSNR doctrine as a legal cause of action is the lack of agreement between the developed nations and developing nations as to its parameters. The developed world, by stressing the conditional nature of the sovereignty that was won by the developing countries, presented those countries with a stark paradox. They could now participate in the international system as sovereign states and enjoy all the benefits that accompanied such participation. But this participation also implied an acceptance of existing rules of international law—including precisely those rules that prevented an inquiry into the history of colonial exploitation and have blocked attempts by the developing nations to negate the effects of that exploitation.

In response, the developing countries have staked their position on one of the central propositions of international law: sovereigns are bound only by the principles to which they consent. As sovereign powers, they claim not to be bound by the preexisting doctrines that the former colonial powers have sought to foist upon them as a condition of discussing compensation.

Ironically, however, the developed world has been able to have it both ways on this issue. The doctrine of PSNR, formulated by the developing world, was in large part successfully resisted by the developed world precisely on the basis that developed countries had not "consented" to the formulation of the principles being urged on the international community by the passage of General Assembly resolutions. The effectiveness of developed country sovereign resistance to emerging international law has been recognized by international tribunals.[177] The developing countries, however, are taken to have consented to the preexisting rules of law simply by becoming sovereign—this despite the explicit repudiation by those countries of the rules in question. Thus "consent" has taken on completely different meanings for the developed and developing worlds.

If Nauru relies purely on the doctrine of PSNR, it will argue that it was vested with certain rights in its resources even while it possessed only the status of a "people." This vesting of rights in a "people" is explicitly provided for in General Assembly Resolution 1803, which describes "the right of peoples and nations to permanent sovereignty over their natural wealth." While the wording is ambiguous,[178] it

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177. *See, e.g.*, Texaco Overseas Petroleum Company et al. v. Libyan Arab Republic, 53 I.L.R. 389 (1978), *reprinted in* 17 I.L.M. 1 (1978). If the new norms have not become international law, then presumably it is the old rules that continue to prevail.

178. For example, the initial distinction between "peoples and nations" suggests that both dependent peoples and existing states (nations) possess the right; however, the article concludes

should provide Nauru with sufficient grounds to argue that dependent "peoples" such as the Nauruans had a right to sovereignty over their resources.

Such a line of argument challenges several current interpretations of the doctrine. For example, in his authoritative study on the drafting of the resolution, Karol Gess rejects the notion that a colonial people necessarily possess sovereignty.[179] Gess argues that it is difficult to justify the idea of colonial people possessing sovereignty over their resources even while under colonial rule since the "peoples" referred to in the General Assembly resolution are peoples in "colonial administrative units which came into being between the middle and end of the nineteenth century."[180] These units, Gess argues, hardly correspond with the pre-colonial units,[181] while PSNR doctrine applies only to units where there is a continuity between the pre-colonial and colonial unit. Consequently, the doctrine does not protect the right of these dependent peoples inhabiting the unit that came into being only because of colonialism.[182]

3. Nauru's Claim under PSNR

Nauru's claim in this arena centers on the question of what authority the three partner governments acted under in appropriating the island's wealth. Australia has justified its position with respect to the phosphates in a number of ways. The Australian government has consistently argued that the BPC validly derived its rights to the phosphates from the British Phosphate Company, which in turn purchased these rights from the Jaluit Gesselschaft. Australia has also taken the position that the rights so derived were protected under article 80 of the U.N. Charter, which seems to protect acquired rights.[183] Australia intended to invoke this provision in the United Nations to protect the NIA by arguing that the rights exercised with respect to the phosphates and provided for by the NIA were not subject to the subsequent terms of the mandate and trusteeship systems.[184]

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with the term "people of the State concerned," which may suggest that the "people" mentioned are those of an existing "State."

179. Gess, *supra* note 169.

180. *Id.* at 447.

181. *Id.*

182. In other words, it seems, former colonies possess no legally congnizable existence except that provided by an international law that permitted conquest and dispossesion. Profound implications follow from such an argument, but these cannot be explored here. Basically, Gess's position questions the validity of Nauru's claim and, furthermore, illustrates aspects of the range of argumentative strategies, based on sovereignty doctrine, which suppress the colonial past.

183. U.N. CHARTER art. 80(1).

184. MACDONALD, *supra* note 17, at 25–27. The British, however, believed the argument untenable.

From a Nauruan perspective, this argument is suspect for a number of reasons. Preexisting private rights over mandate and trust territories had to be respected by the administering power.[185] Nevertheless, this principle cannot be taken to endorse a situation in which the administering authority nationalizes the private concession in question and then operates it for its own benefit. Such an action would be completely contrary to the basic tenet that a fiduciary cannot act in such a way as to benefit itself from the property of the trust.

Arguably, this is precisely what occurred on Nauru: the partner governments in effect nationalized the Nauruan phosphate concession of the British Phosphate Company in 1920.[186] Given that the partner governments derived their powers from the mandate, they were required to exercise them in a manner consistent with the terms and requirements of the mandate. In addition, the partner governments did not suffer any financial loss in the nationalization process because the resources of Nauru paid for the transaction by which the BPC acquired rights to mine the phosphates.[187] While the nationalization of the industry was valid and arguably required by the mandate, the subsequent failure of the partner governments to run the industry for the benefit of the natives coupled with their policy of appropriating industry profits for themselves constituted a violation of the terms of the mandate.[188]

It has been further suggested by Weeramantry that the purchase of the concession by the BPC, even if valid, did no more than transfer a *right to mine* for the phosphate.[189] This was the only right that the Jaluit Gesselschaft possessed, and the only right that could, therefore, be transferred to its successors in title. No alternative basis for title has been suggested by Australia.[190] Consequently, the title to the phosphates, as opposed to the right to extract them, must have always

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185. On the question of the continuity of private concession over mandated territories and the power of the Administering Authority to nationalize private interests, see Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 PCIJ, (ser. A) No.2; 1925 PCIJ, (ser. A), No.5.

186. WEERAMANTRY, *supra* note 1, at 382. In establishing this state monopoly, the mandatory would have been bound by the terms under which the mandate was to be exercised.

187. The sum of 3.5 million pounds was paid by the partner governments for the purchase. This was regarded as "an advance to the Commissioners who were expected to earn enough from the business to repay the principal with interest over the next fifty years." WILLIAMS & MACDONALD, *supra* note 17, at 141.

188. In considering the issue of how the purchase of the concession is to be characterized, the Court will be guided by the principle stated by Judge Shahabuddeen that "although form is not unimportant, international law places emphasis on substance rather than on form." *See* Preliminary Objections, Judgment, *supra* note 1, at 2778 (J. Shahabuddeen, separate judgment).

189. WEERAMANTRY, *supra* note 1, at 194.

190. An argument could be made that title to the phosphates themselves were acquired by conquest. However, no such claim has been made by Australia.

resided with the Nauruans.[191] As such, royalties should have been commensurate with the value of the phosphates, and not the minimal payments that were actually made, which were characterized even by Australia as gratuitous. Also, if the mining rights were derived from the German concession, so too were the corresponding obligations under German law to rehabilitate the lands damaged in the course of mining or to provide appropriate compensation.[192]

Apart from these considerations that arise from the legal regime specific to Nauru, the Nauruan PSNR argument receives considerable support from a variety of other sources. First, there is the problem of Gess's convoluted construction of General Assembly Resolution 1803. Gess's interpretation of the term "people" in the resolution is a manifestly artificial way of avoiding the "natural and ordinary" meaning of the term as referring to colonial peoples.[193]

Similarly, the principle stated in the International Covenant on Civil and Political Rights that "in no case may a people be deprived of its own means of subsistence"[194] has a particular application to Nauru given its overwhelming dependence on phosphates as a primary resource. Furthermore, the example of Nauru was explicitly considered in the drafting of the provision.[195] And in its resolution dealing with Nauru in 1966, the General Assembly reaffirmed the right of the Nauruans by "[r]ecognising that the phosphate deposits on the island of Nauru belong to the Nauruan people."[196] Finally, the notion that the resources of a mandated territory belong to its people, rather than its administering authority is reinforced by the international community's condemnation of the South African expropriation of Namibian uranium.[197]

At a minimum, the consideration of a Nauruan claim for damages based upon PSNR principles will provide the ICJ with an opportunity

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191. This principle is understood in German law, Nauruan cutomary law, international law, and the common law of Australia. *See* Mabo and Others v. State of Queensland, 107 A.L.R. 1 (1992) (Austl).

192. WEERAMANTRY, *supra* note 1, at 188–89.

193. *See* Hugh Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989*, 1991 BRIT. Y.B. INT'L L. 1, 21–33 (on techniques of interpretation)

194. ICCPR, art. 1(2)

195. The delegate for El Salvador cited the example of Nauru in response to the British delegate's statement that he could not conceive of a case of a people being deprived of their own means of subsistence. *See* U.N. GAOR 3d Comm., 674th mtg., UN Doc. A/C.3/SR/674, at 248. Nauru was likewise mentioned in deliberations on permanent sovereignty over natural resources. *See* U.N. GAOR 2d Comm., 794th mtg., UN Doc. A/C.2/SR/794, at 294.

196. G.A. Res. 2226 (XXI).

197. Question of Namibian Uranium, G.A. Res. 35/227, U.N. GAOR, 35th Sess., 111th plen. mtg. at 229, U.N. Doc. A/RES/35/227 (1981). Like Nauru, Namibia was a C class mandate. *See also* Caleb M. Pilgrim, *Some Legal Aspects of Trade in the Natural Resources of Namibia*, 1991 BRIT. Y.B. INT'L L. 249.

to clarify the parameters and the legal import of this unsettled and contentious body of doctrine.

C. Environmental Damage

1. International Environmental Harm

The essence of Nauru's claim against Australia is the prejudice it continues to suffer as a consequence of Australia's failure to rehabilitate the lands damaged by phosphate mining. In light of recent developments in the area of international environmental law, Nauru is in a position to forward a novel claim of transnational environmental damage that transcends traditional doctrines of recovery based on injury to private property interests.

The development of modern international environmental law is usually associated with the Stockholm Declaration of 1972 and its stated principles concerning liability for environmental harm.[198] These principles have been affirmed and elaborated by the recent Rio Conference on the Environment.[199] Two of the central principles emerging from the Stockholm Conference are: man's fundamental right to "an environment of quality"; and the responsibility of states to ensure that "activities within their jurisdiction or control do not cause damage to the environment of other States."[200]

Apart from the norms outlined in these instruments, it has been asserted that the traditional doctrine of state responsibilty provides protection for the environment. These arguments rely on the broad principle that a "state is bound to prevent such use of its territory, . . . [which] is unduly injurious to the inhabitants of the neighbouring state."[201] This principle was applied to the question of environmental damage in the *Trail Smelter Case*,[202] an arbitration between the United States and Canada concerning damage caused to the state of Washington by the activities of a corporation based in Trail, British Columbia.

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198. *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (1972), *reprinted in* 11 I.L.M. 1416 (1972). *See generally*, Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423 (1973).

199. *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5 (1992), *reprinted in* 31 I.L.M. 874 (1992)

200. *Declaration of the United Nations Conference on the Human Environment*, *supra* note 198. This Principle is the basis of Principle 2 of the Rio Declaration.

201. OPPENHEIM'S INTERNATIONAL LAW 291 (Hersh Lauterpacht ed., 8th ed., 1955). On state responsibility see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 431–35 (3d ed. 1979). On state responsibility for international environmental damage see generally INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francesco Francioni & Tullio Scovazzi eds., 1991); PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 138–60 (1992); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992).

202. The Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1911 (1941).

There, the tribunal ruled that a state "owes at all times a duty to protect other States against injurious acts by individuals from within their jurisdiction."[203] However, for relief to be granted, the case had to be one of "serious consequence"[204] and the injury established by clear and convincing evidence.[205]

While a broad principle prohibiting one state from causing harm to another has been pronounced, it is unclear as to how this doctrine actually applies to environmental issues.[206] For instance, considerable difficulties exist in determining what standards should be imposed on countries with regard to air and water pollution caused by industrial activities that are completely legal under international law. These difficulties are reflected by the extent to which responsibility is qualified in the Restatement of Foreign Relations Law of the United States:

> (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
>
> (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
>
> (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.[207]

Given that the "international standard" mentioned in paragraph 1(a) is by no means clearly established, the limitation this paragraph seeks to impose seems largely notional.[208] In any event, the responsibility is heavily qualified by language such as "to the extent practicable."

A number of complex and unresolved issues connected with causation, harm, and the status of lawful activities that cause transborder damage surround the question of responsibility for international en-

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203. *Id.*

204. *Id.*

205. *Id.*

206. As many commentators point out, the issues of causation and responsibility were never actively contested in the case as Canada had already accepted responsibility for the damage. *See, e.g.*, Alexandre Kiss, *Present Limit to the Enforcement of State Responsibility for Environmental Damage*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 201, at 29.

207. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1980).

208. On the absence of any clear international standard, see Sanford E. Gaines, *International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse*, 30 HARV INT'L L.J. 311, 313–14 (1989). The fact that states affected by the nuclear accident at Chernobyl did not accuse the Soviet Union of violating international law also suggests the lack of such standards. *See* PHILIPPE SANDS, CHERNOBYL: LAW AND COMMUNICATION (1988).

vironmental damage.[209] On an even more extreme level, some question whether states really accept responsibility for environmental damage and whether international law imposes an obligation on states to pay compensation for damage they cause.[210] Because of the uncertainties about the applicability to the environment of general principles of international law, many states have turned to treaties to deal with specific types of pollution and environmental harm.[211]

The claim that international law does not require the payment of damages for environmental harm seems particularly anomalous when a clear nexus exists between the harm and a resulting infringement of state sovereignty. This point is best illustrated by Australia's petition before the ICJ in the *Nuclear Tests Case*.[212] Australia alleged that its sovereignty was adversely affected by the radiocative fall-out from French nuclear tests in the Pacific. Australia based its position on general principles of international law relating to the infringement of its sovereignty.[213]

From the arguments presented in the *Nuclear Tests Case*, it is possible to visualize harmful environmental conduct as exhibiting a number of broader dimensions. These dimensions include the infringement of a state's ability to utilize its wealth in a manner determined by its own political processes; a limitation of its administrative, political, and economic policy choices available (as an affected state must devise a means of dealing with the environmental damage); and adverse effects on the health and future well-being of a state's citizenry, animal, and plant life.

2. Nauru's Claim for Environmental Harm

The social, economic, and political well-being of the Nauruan people, which must be advanced by the trustee powers under the terms

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209. *See, e.g.*, Julio Barboza, *Second Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, U.N. Doc. A/CN.4/402 for an account of one stage of the protracted exploration of this issue.

210. *See, e.g.*, Benedetto Conforti, *Do States Accept Responsibility for Environmental Damage?*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 201, at 179–80.

211. *See, e.g.*, *Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft*, *reprinted in* 11 I.L.M. 262 (1973); *Vienna Convention for the Protection of the Ozone Layer*, *reprinted in* 26 I.L.M. 1529 (1987).

212. Application by Australia Instituting Proceedings, Nuclear Tests (Austl. v. Fr.) (1973), I.C.J. Pleadings, Nuclear Tests, Vol. I at 14.

213. Australia asserted that:

> (ii) The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:
>
> (a) violates Australian sovereignty over its territory;
>
> (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources.

Id.

of the U.N. Charter and the Nauru Trusteeship Agreement, are intimately linked with the condition of the environment. Furthermore, there can be scarcely any doubt as to the nature of the harm suffered and its many ramifications for the cultural and economic life of the Nauruans.

Approximately one-third of Nauru's surface was mined out during the time in question. Because phosphate mining is a particularly destructive process, the mined land becomes an uninhabitable wilderness of coral-limestone pinnacles.[214] Pacific ecosystems are particularly fragile and the disruption of the Nauruan system has led to the development of new microclimates with increased sunlight and lower humidity. Patterns of plant life have been adversely affected, and certain plant species are now extinct.[215]

Considered within the framework of responsibility for environmental damage outlined above, the issues of harm and of causation pose no difficulties in the Nauru Case. The precise nature of the state's obligation, suggested in the *Trail Smelter Case*, to prohibit private parties from acting in an internationally harmful manner is far from clear, but in this case the obligation is of a primary nature, as it is the action of the respondent state, Australia, which is under direct scrutiny. As Judge Ago suggests, it is in these circumstances that the question of state responsibility for environmental harm and the issue of payment of damages for that harm presents itself in its clearest form.[216]

The foregoing analysis is based on the assumption that Nauru and Australia may be regarded as separate sovereign states, and that the obligations that Australia owed Nauru were those owed by one sovereign to another.[217] Australia, however, could possibly argue that the language of the Stockholm Declaration, which prescribes a duty not to "cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[218] provides it with a defense. Australia could claim that the mandate system gave it jurisdiction over the island to be administered as an "integral part" of Australian territory.

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214. Ian Anderson, *Can Nauru Clean Up After the Colonialists?*, NEW SCIENTIST, July 18, 1992, at 12–13.

215. *Id. See also* WEERAMANTRY, *supra* note 1, at 31.

216. Roberto Ago, *Conclusions du colloque "Responsabilite des Etats pour les dommages a l'environnement," in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, *supra* note 201, at 493, 495.

217. The question of jurisdiction over territory is of great importance in issues of environmental harm. Thus, article 21 of the Stockholm Declaration, *supra* note 198, prohibits a state from causing damage "to the environment of other States or of areas beyond the limits of national jurisdiction."

218. Stockholm Declaration, *supra* note 198, art. 21.

However, the existence of a fiduciary relationship between the two countries during the period under question does not defeat Nauru's environmental claim. Rather, it may be argued that the duty imposed upon Australia is even more onerous in this case—had Nauru been a sovereign independent state it could have asserted itself internationally in order to prevent further environmental damage. However, the international personality necessary to make such an claim was lacking,[219] and, indeed, the partner governments' task was to develop that very personality. As trustee, Australia was accordingly under a heightened duty to ensure the well-being of the Nauruans.

Australia has not responded in detail to the specific issue of liability for environmental damage.[220] Australia's strongest argument against environmental liability, perhaps, is the argument that the mining activities that caused the damage simply were not illegal at the time they occurred. If the underlying activity was not illegal, the resulting environmental damage itself was was not illegal. To the extent that a case can be made against Australia it is based, then, on Australia's failure to remedy the damage caused by the mining and any liability arising from that mining.

Such an argument takes the question of international environmental harm back to its first principles. Is it the harm, or the failure to remedy its effects which gives rise to legal responsibility? Indeed, is there even an obligation under general principles of state responsibility to remedy effects of environmental damage? No answers are readily available to these fundamental questions; it is for this reason that consideration by the ICJ of the Nauru Case could be of enduring significance.[221]

Despite the demands for rehabilitation set forth in 1965 by General Assembly Resolution 2111, and despite its own conclusion that rehabilitation was unfeasible, Australia continued full-scale mining operations, extracting 1.5 million tons of phosphate in 1966.[222] Although this self-contradictory behavior perhaps does not in itself give

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219. The international community sought to protect Nauruan rights by unsuccessfully requesting that the lands be rehabilitated by Australia. *See* G.A. Res. 2111(XX).

220. In the first phase of the proceedings, Australia argued that much of the mining has been conducted by Nauru itself, subsequent to becoming independent; and that Nauru's failure to commence rehabilitation suggested bad faith. Australia Memorial, *supra* note 46, at 162–63. This argument was rejected by the Court.

221. The Convention on the Regulation of Antarctic Mineral Resource Activities, which deals specifically with the question of mining and environmental damage, adopts a theory by which liability is incurred, not by the causing of the damage per se, but the failure to remedy its effects. Art. 8 places strict liability on a party for "damage to the Antarctic environment or dependent or associated eco-systems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante*." *Convention on the Regulation of Antartic Mineral Resource Activities, reprinted in* 27 I.L.M. 868, 872 (1988).

222. VIVIANI, *supra* note 17, at 187. Resettlement talks had also broken down by 1965.

rise to responsibility,[223] it does illuminate possible grounds for Nauru's claim for aggravated damages.

Whatever the uncertainties regarding the status of environmental responsibility and its application to the Nauru Case, it would seem that the obligations of a trustee to promote the social, economic, and cultural well-being of native peoples previously outlined in article 76(b) of the U.N. Charter encompass environmental damage. In this light, the resolutions of the General Assembly, which called upon Australia to rehabilitate the island, did so simply on the basis that the restoration was necessary for the continuing existence of the Nauruan people. And for the Trusteeship Council, self-determination implied the emergence of a viable, functioning community that could sustain itself and flourish on the island in a manner that it determined for itself. This same concern is evident even at the time of the Nauru Mandate. Even the Permanent Mandates Commission, which could not properly envisage the extent of the damage caused by the mining, inquired about its effects and the future of the Nauruans.[224] Simply put, the issue involves the physical core of sovereignty itself—territory. The Nauruans cannot survive as a people without the rehabilitation of their island.

D. Nauru and Indigenous Rights

1. The Nauruans as an Indigenous People

The relationship between the rights of indigenous peoples and environmental protection is becoming a subject of increasing international concern, as demonstrated by the initiatives taken regarding these issues at the Rio Conference on the Environment.[225] Although considerable literature has been generated on the subject of indigenous rights,[226] no binding principles of international law that deal specifi-

223. Interesting arguments may be made that Australia, *in its own terms* failed to observe standards of due diligence; this failure of due care transformed an otherwise legal activity into an illegal activity. On the issue of due diligence, *see* BIRNIE & BOYLE, *supra* note 201, at 144.

224. The PMC inquired about matters such as the effect on mining for the availability of food for future generations, the space available for a larger population and the uses to which the areas being mined were being put. *See* WEERAMANTRY, *supra* note 1, at 95–98.

225. *See, e.g., Rio Declaration on the Environment and Development, supra* note 199.

226. *See, e.g.*, Jose R. Martinez Cobo, *Study on the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add. 1–4 (1986); Bernadette Kelly Roy & Gudmundur Alfredsson, *Indigenous Rights: the Literature Explosion*, 13 TRANSNATIONAL PERSPECTIVES 19 (1987); Russell L. Barsh, Note, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); THE RIGHTS OF PEOPLES (James Crawford ed., 1988); William A. Shutkin, Note, *International Human Rights Law and the Earth: the Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479 (1991). On the relationship between the environment and human rights in general see W. PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION (1976); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

cally with the relationship between the environment and indigenous rights have yet emerged.[227] Therefore, the only remedies indigenous peoples can rely upon in existing international law are those that might be fashioned from international human rights provisions such as article 27 of the International Covenant on Civil and Political Rights, which deals with the rights of minorities and provides limited protection for the cultures of those minorities.[228]

One of the defining qualities of indigenous peoples, as they have been generally characterized, is their unique relationship with their environment.[229] The land is regarded as an essential, integral part of the physical, spiritual, cultural, and religious existence of the community, which has corresponding responsibilities for its preservation.[230]

The early lifestyle of the Nauruans compared with that of many other indigenous peoples. There was an intimacy between Nauruans and their land that provided them not only with the necessities of life, but also played an integral role in their communal and spiritual existence. Rituals developed around many of the island activities such as harvesting,[231] and Nauruans attributed spiritual significance to the trees, which became the subject of Nauruan legends.[232] One astute observer, Paul Hambruch, pointed out that the relationship was an essential feature of Nauruan customary law, which adjusted to continuing developments and was precise enough to be incorporated into the German civil code applied on the island. In 1914 Hambruch observed that:

> These notions of law cover a wide spectrum: land, reef, ocean, tree, animal, house, tools, family, nation, etc. With the highly developed people of Nauru these ideas have taken on a definite legal character and many were to be found to be so well applicable, that one bases decisions in important legal matters on this law.[233]

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227. For recent international conventions that deal with the protection of indigenous rights see *International Labor Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, (1989), reprinted in* 28 I.L.M. 382 (1989); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990).

228. This provision protects the rights of "persons belonging to minorities" to "enjoy their own culture." ICCPR art. 27. *See* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J.INT'L L. 127 (1991).

229. *See, e.g.*, Cobo, *supra* note 226.

230. *Id.* at 28.

231. 5 COMMISSION REPORT, *supra* note 1, at 1032–33.

232. *Id.*

233. PAUL HAMBRUCH, NAURU (1914), *cited in* Nauru Memorial, *supra* note 17, at 91.

The complex systems of ownership, which encompassed not merely the land but the reef and parts of the sea, were allied with systems of sharing and succession. However, land was not treated as a commodity; Nauruan customary law attributed a sacrosanct nature to the land.[234]

With the advent of the phosphate industry, traditional Nauruan life was completely transformed. A song written probably in the early 1920s poignantly and presciently reveals the Nauruan perceptions of the changes taking place:

> By chance they discovered the heart of my home
> and gave it the name phosphate.
> If they were to ship all phosphate from my home
> there will be no place for me to go.
> Should this be the plan of the British Commission
> I shall never see my home on the hill.[235]

The destructiveness of phosphate mining was not limited to the environment. Nauruan culture has been profoundly and irreversibly affected. The advent of a market economy has led to the destruction of many Nauruan traditions such as chants, ceremonies, games, and harvesting rituals.[236] The dietary habits of the Nauruans, for example, have been completely changed. Fish, coconuts, and fruits have been replaced by canned food. Undoubtedly, many of these changes were unrelated to the immediacies of the phosphate industry and would have been implemented by the Administration with the best of intentions and even may have been welcomed and desired by the Nauruans themselves. As early as 1935, however, an Australia anthropologist who visited the island pointed to dangers these new changes presented and concluded that the goal should be "to develop a people who will take a pride in being Nauruans and not in being imitators of Europeans."[237]

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234. WEERAMANTRY, *supra* note 1, at 158. For Weeramantry's detailed analysis of Nauruan customary law in terms of anthropological evidence and various schools of jurisprudence, see generally *id.* at 154–79, where he points out that the concept of usufruct and trust were recognized parts of Nauruan customary law.

235. *My Dear Home Nauru*, *reprinted in* WEERAMANTRY, *supra* note 1, at 30.

236. An earlier attempt at this process is detailed by Weeramantry. The traders who first came to Nauru in the 19th century sought to make the Nauruans attracted to such goods as tobacco, which could then be used for trading purposes. The Nauruans were inconveniently self-sufficient, and dependencies had to be cultivated. Thus "smoking schools" were established on the island with pipes and tobacco initially being given to the Nauruans free of charge. Firearms, alcohol and European clothing were other items for which a trade developed. WEERAMANTRY, *supra* note 1, at 33.

237. Camilla H. Wedgwood, *Report on Research Work in Nauru Island, Central Pacific*, 7 OCEANIA 361–62 (1936), *reprinted in* Nauru Memorial, *supra* note 17, at 88.

2. The Trusteeship and Indigenous Rights

The Nauru Trusteeship Agreement states in part that in administering the territory, the Administering Authority will

> (a) take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safe-guard the interests both present and future of the indigenous inhabitants of the Territory . . . .[238]

The provision designates Nauruans as "indigenous inhabitants" and gives the doctrine of sovereignty—the latent sovereignty of the Nauruans that is protected by the trusteeship—a distinctive local character. It then follows that the Administration should not merely avoid policies that violate the latent sovereignty of Nauru, but also avoid policies that violate the sovereignty in the particular, unique form that it adopts in the Nauruan context. That unique sovereignty is defined by the specific "customs and usages of the inhabitants of Nauru."[239]

This is the first occasion on which one of the fundamental ambiguities of the mandate and trusteeship systems is given legal recognition. Under the mandate system, recognition was given to the specific culture existing in Nauru (and the other territories) only for the purpose of deciding the degree of backwardness of the territory in question and designating the applicable mandate category ("A," "B," or "C"). Under the trusteeship system, by contrast, the indigenous culture must be taken into account in order to ensure that it be better preserved. This suggests that the process envisaged under the trusteeship system is not the simple transformation of Nauruans into Europeans, but a more complex and problematic synthesis of Nauruan life and European ways.

A new and uncertain accommodation is reached between the "progressive" of international law and the "indigenous" of the Nauruans. The concept of progress, "civilization," is no longer a purely monolithic and Western-oriented process. The entire panoply of trusteeship obligations is expressed as being at least potentially affected by the customs and usages of the Nauruans, which must, in the terms of the provision, be taken "into consideration." The questions are problematic, but the explicit protection given to the customs of the Nauruans suggests that this provision enables, indeed requires, an inquiry into the way in which the *Nauruans themselves*, as opposed to some ostensibly abstract "sovereign state," understood and lived out their relationship with their environment.

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238. Nauru Trusteeship Agreement, *supra* note 77, art. (5)(2)(a).
239. *Id.*

Indigenous people throughout the world are confronted with the task of adapting the vocabulary of political, economic, and cultural rights to represent their reality, and to win some legal protection for their lifestyle as a result. There are clearly persuasive arguments to be made that the preservation of their environment is connected with their right to life and their cultural identity. However, these arguments are often ineffective. One reason is that indigenous peoples, while the subject of much debate in international law, have not as yet acquired any sort of assertable international personality.[240] Furthermore, existing rights, which are couched in terms of the protection of the individual, are insufficient.[241]

In the Nauru Case, however, each of these difficulties is transcended because the applicable law recognizes the Nauruans as a collectivity and explicitly seeks to protect their cultural existence as such. It is this framework which would allow theNauruans to articulate their own histories and their own perception of themselves, not necessarily as "indigenous peoples" intent on reverting to their purer origins, but as peoples with their own culture and law who have been shaped by complex forms of cultural exchange and imposition.[242]

But given all this, how should the inquiry proceed? The inquiry is difficult, since it presupposes a clear standard against which the Administration's actions may be tested. It also raises very complex issues of the extent to which the people of Nauru accepted the changes made to their lifestyle during the period of trusteeship.[243]

One line of argument that can be presented will rely on demonstrating clear Nauruan objections to the violation of their customs and their customary law with regard, for example, to land use. The ineffectual protests made by the Nauruans against the BPC policy of

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240. As Hurst Hannum observes, "it has thus far proved impossible to arrive at a commonly accepted definition of 'indigenousness.'" Hannum further notes that the lack of a definition does not necessarily preclude action on behalf of indigenous people; however, it does limit considerably the sort of recourse indigenous people have to certain remedies. HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 88 (1989).

241. On the question of the applicability of the right to self-determination to indigenous peoples, see Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992).

242. On the question of the complex narratives that establish the identities of indigenous peoples, see Chris Tennant, *The Rights of Indigenous Peoples in International Law*, 34 HARV. INT'L L.J. 277 (1993) (book review).

243. This in turn raises the question of the degree to which adminstrative practices created a "social reality" that resulted in simple Nauruan acquiescence—although not such acquiescence as to lead to Nauruan acceptance of assimilation. For an illuminating analysis on the issue of the reproduction of consent see Efren Rivera Ramos, *The Colonial Welfare State in* ISSUES OF SELF-DETERMINATION 115–32 (William Twining ed., 1991).

mining without restraint would constitute an example of such an objection.[244]

Alternatively, arguments could be presented to the effect that the very terms of article 5 of the Nauru Trusteeship Agreement were violated. By giving explicit protection to "native land," this provision clearly identifies the crucial significance of the relationship between land and the well-being of the Nauruans. The circumstances surrounding the Nauru Lands Ordinances, which enabled the lands to be leased out for mining without the specific consent of the Administration may provide one example of such a breach. The very terms of article 5 were violated as the "public authority" exercised its administrative and legislative powers in such a manner as to facilitate the destruction of the lands, rather than protect the land against harm. It must be noted that the Lands Ordinances were passed during the mandate period; nevertheless, it can be argued that the trustee had an obligation to change the legislation and policies on the island to conform with evolving international norms.

E. The Environment and Inter-Generational Equity

A final emerging environmental issue of relevance to the Nauru Case involves the concept of inter-generational equity.[245] The idea of rights has expanded to include the rights of future generations whose options and policies will be limited by the actions of the current generation. The current generation must therefore act in such a manner as to preserve by way of trust the inheritance of these generations. This concept is of increasing importance in contemporary debates regarding the framework of rights necessary to deal with the particular problems of environmental damage and nonrenewable resources. The moral argument, which has been elaborated most prominently by Edith Brown Weiss,[246] has been the subject of international discussion. Several international instruments and declarations have incorporated this concept.[247] However, as Weiss notes, "the translation of the expressed concern for future generations into normative obligations that relate the past to the future to protect future generations still

244. One law on the island, The Movement of Natives Ordinance of 1921–22, which was repealed only in 1968, imposed various restrictions on the movement of the natives. *See* WEERAMANTRY, *supra* note 1, at 111.

245. *See, e.g.*, Lothar Gündling, *Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility*, 84 AM. J. INT'L L. 190–212 (1990).

246. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989).

247. *See, e.g.*, Stockholm Declaration, *supra* note 198, princ. 1; *The World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982).

needs to be done."[248] Again, remarkably, the Nauru Case transcends these difficulties because article 5 of the Nauru Trusteeship Agreement, by referring to the well-being of both "present and future interests" of the inhabitants, suggests that an obligation is imposed on the Administration to consider their policies not only in terms of current generations, but future generations as well.

There is arguably a sufficient basis for the ICJ to consider the Nauru Case in terms of inter-generational equity. Given the explicit invocation of future interests by both the PMC and the Trusteeship Council,[249] the Administration's policies of accelerated mining and attempting to resettle the Nauruans are especially troubling.

In its simplest terms, the obligations that arise under the concept of inter-generational equity reaffirm the notion that the mandate and trusteeship systems were devised to enable self-determination in its fullest sense: the development of a state in which future generations of inhabitants could exist and prosper. The Nauru Case raises fundamental questions as to how the rights of future generations should be defined and protected, and what remedies are appropriate if the obligation has been violated.

VI. INTERNATIONAL LAW AND THE CIVILIZING PROCESS

Quite apart from the specific legal issues, the Nauru Case may also be studied from the broader perspective of the developments that the mandate and trusteeship systems represent for the trajectory of international law. My purpose here is to sketch the jurisprudence of different eras in international law, in order to outline the manner in which the non-European world has been characterized within it, and thus the circumstances that required the formulation of new conceptual and jurisprudential structures to deal with the particular problems caused by "the other" at that time.

A. Francisco Vitoria and the Sixteenth Century

The mandate system was devised to further a mission whose origins may be detected in the origins of international law itself: that of locating and placing uncivilized societies and then proceeding to incorporate and reform them. The animating ideas of the mandate system have been admirably expressed as follows:

> Although the aborigines in question are . . . not wholly unintelligent, yet they are little short of that condition, and so are unfit

248. WEISS, *supra* note 246, 29–30. *See also* Shutkin, *supra* note 226, at 503–04.
249. *See supra* part III.

> to found or administer a lawful State up to the standard required by human and civil claims . . . . It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns and might even give them new lords so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay our sovereigns would be bound to take it, just as if the natives were infants.[250]

This passage is taken from a lecture entitled "On the Indians Lately Discovered" given by Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist. It is commonly regarded today as the first work of international legal scholarship.[251]

What is first noticeable is the characterization of the Indians, initially as imbeciles and then as infants.[252] This is a matter of some importance in achieving a particular narrative coherence. Being imbeciles or infants, the Indians *are characterized as belonging to the same order* as the Spaniards. Thus a double act of representation is enacted here: the Indians are domesticated *and* placed in the same system, albeit at an inferior level, as the Spanish.

This characterization must be understood in the context of Vitoria's awareness of the problem of jurisdiction. Renaissance jurists and political philosophers were preoccupied with the issue of whether the Pope had temporal jurisdiction and could therefore limit by his decrees the actions of secular rulers. This problem manifests itself in the case of the Indians in a peculiar form posed because of the issue of cultural difference.[253]

Rather than address this primal conflict of laws problem, Vitoria resolves the issue in this passage by simply representing the Spanish

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250. FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES 161 [ON THE INDIANS LATELY DISCOVERED] (Ernest Nys ed. & J.P. Bate trans., The Carnegie Institute of Washington 1917) (1696). *See also* TZVETAN TODOROV, THE CONQUEST OF AMERICA : THE QUESTION OF THE OTHER (Richard Howard trans., 1984).

251. This is suggested by the very publishing history of the work. It is the first title in the Classics of International Law series produced by the Carnegie Foundation.

252. Vitoria also characterizes Indians as animals, objects, and heretics.

253. As Vitoria states, in refuting the idea that there exists a single emperor who is "lord of the whole world and therefore of these barbarians also":

> Now in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or, if there were, it would be void of effect insamuch as law presupposes jurisdiction. If, then, the Emperor had not jurisdiction over the world before the law, the law could not bind one who was not previously subject to it.

VITORIA, *supra* note 250, at 145.

and Indians as belonging to the same social universe. Although belonging to this universe, the Indians are wanting in its essential characteristics—art, agriculture, law, administration. Because of the lack of these features, Spanish intervention is necessary. Once this apparently overarching framework is created, Vitoria simply proceeds to enmesh the Indians in Spanish laws and customs by enunciating doctrine after doctrine, which effectively enables the Spanish to engage in trading, travelling, and prosletyzing. All of these are characterized as valid under natural law.[254] Inevitably, then, violence is located in Vitoria's system of law in the figure of the Indian whose behavior cannot but violate some aspect of "natural law." Volition and intention that give rise to legal consequences are thus attributed to the Indians. Violations justify reprisals. The process becomes self-sustaining, as each encounter between the Indians and the Spanish gives rise to violations by the Indians that give rise to reprisals by the Spanish. Thus, once a single violation occurs, just war doctrine legitimates the waging of limitless war against the Indians.[255]

B. The Nineteenth Century

By the latter half of the nineteenth century, at the height of colonial expansion, positivism became the primary legal philosophy of the era.[256] Consequently, sovereign will was understood to be the fundamental basis of rules, this rather than transcendent principles based on religion or reason.[257]

International lawyers of the period, such as John Westlake and Thomas Lawrence, largely based the whole system of international law doctrine on sovereign will.[258] Sovereignty doctrine was linked, however, by the other primary characteristic of the law of this era: the clear demarcation of the world into European and non-European sections.[259] Cultural differences became the explicit basis for legal categories. International law existed only among the civilized nations of Europe and only European states were fully sovereign. Non-European

254. *See, e.g., id.* at 149, 152.

255. This is dealt with in Vitoria's Second Lecture, On the Indians, or on the Law of War Made by the Spaniards on the Barbarians. *See id.* at 163.

256. For surveys of the 19th century, see GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984); Ian Brownlie, *The Expansion of International Society: the Consequences for the Law of Nations, in* THE EXPANSION OF INTERNATIONAL SOCIETY 357–70 (Hedley Bull & Adam Watson eds., 1984).

257. *See* THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 10–26 (1895).

258. *See* JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW (1894); THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW (1895).

259. Hence Lawrence commences his book as follows: "International law may be defined as the rules which determine the conduct of the general body of civilized states in their dealings with one another." THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 1 (1895).

states, however, existed outside the realm of the law and thus could not legally oppose the sovereign will of the European states.[260]

Given this scheme, the question of jurisdiction that preoccupied Vitoria became irrelevant. Rather than attempting to establish a common legal universe applicable to all societies regardless of their culture, the nineteenth-century jurists explicitly based their system on a cultural divide that was formulated as a legal divide. The non-European world became incorporated into the exclusive system of law only by virtue of its engagement with the European world.[261] This engagement, most often, took the form of conquest. The process was reinforced by the non-European world's lack of sovereignty, which translated into a lack of any legal basis with which to resist this process.

C. The Mandate System

International attitudes towards colonialism changed dramatically in the new order inaugurated after World War I. It became recognized that colonialism could result in abuse, in pillage and exploitation. Thus, the civilizing mission took on a new form. Instead of being left to the unfettered discretion of sovereign states, the mission was perfected by a new regime of international institutions. Vitoria's idea of trusteeship or wardship over the natives, ignored and dismissed for centuries, was restored to international law.[262]

The execution of this mission was made possible through the displacement and reconfiguration of sovereignty. German sovereignty over Nauru, for example, was extinguished by the Peace Treaty at Versailles when Germany renounced its sovereignty over all of its colonies.[263] Yet, the issue of where sovereignty over the mandated territory was then vested was never satisfactorily resolved: possible candidates included the League, the mandatory, and the mandated territory itself, which was now characterized as possessing "latent sovereignty."[264] Consequently, Wright claimed, the mandates were "not under the sovereignty of any state but in a status new in international law."[265]

It was, however, precisely in the midst of this uncertainty that the civilizing mission could address its new and most formidable chal-

260. *Id.* at 58.

261. Paradoxically, treaties between European and non-European states were commonplace at the time. The international lawyers of the period could not coherently account for this, given that the non-European states were not supposed to exist in international law. *See* Gong, *supra* note 256, at 59–60.

262. In addition to the introductory chapters of virtually all works on the mandates see ALPHEUS SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS (1919).

263. Nauru Application, *supra* note 5, at 6.

264. QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 500–08 (1930).

265. *Id.* at vii.

lenge, that of *creating* sovereignty in the mandated territories.[266] This was to be achieved by the first truly international institution, the League of Nations, whose own status within the framework of traditional sovereignty doctrine was extremely problematic. The goal represented international law at its most aspirational moment. Far from being dictated to and ruled by sovereignty as exercised by states, it set about the divine task, through international institutions, of creating it.[267] Sovereign states such as Australia were harnessed, through League arrangements, to perform this task of bestowing a legal status on a territory for the purposes of preparing that territory for entry into international society.

The absence of sovereignty and the engagement of international institutions, however, created novel practical possibilities. The mandate system necessitated the adoption of a concept of the nation-state against which the developments of particular territories could be judged. In addition, however, the mandate system could realize these conceptions by using the mandatories' administrative systems. Through the various mandatories, the League could address issues aside from legal status, including population, health, education, land tenure and wages, labor matters, external trade, public revenues, order and justice, and public works and services.[268]

By collecting and analyzing information from various territories the League viewed itself as formulating for the first time a universally applicable science of colonial administration, a science that transcended the particularities of colonial administration in specific territories.[269] The civilizing mission was now implemented in its most intrusive and comprehensive form as the institutional apparatus created objects of knowledge that it proceeded to administer with increasingly specialized techniques.[270] The conquests of the nineteenth century were replaced with the census, the education systems, the systematization of land tenure, and the modification and modernization of legal systems. Civilization was no longer a vague idea haphazardly introduced in disparate ways by colonial powers within their own territories.

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266. For the types of inquiry this generated see P.E. Corbett, *What is the League of Nations?*, 1924 BRIT. Y.B. INT'L L. 119; Geoffrey Butler, *Sovereignty and the League of Nations*, 1920–22 BRIT. Y.B. INT'L L. 35.

267. *See generally* David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

268. These are only some of the headings in the table of contents of Wright's masterly work. WRIGHT, *supra* note 264.

269. Wright enthuses, "Nothing less than a science of colonial administration based on a deductive and experimental method was here contemplated. The discovery by such a method and verification by practical application of useful principles and standards is probably the most important contribution which the mandate system could make." *Id.* at 225. For debates in the PMC as to these issues see *id.* at 219–64. We see revealed here the geneology of a number of contemporary international institutions.

270. *Id.* at 552.

Rather, it became centralized within the mandate system.[271] Civilization was not so much imposed by force as it was implemented through administrative techniques aimed at making the natives internalize a new social reality and regulate their own behavior accordingly.

The advent of the mandate system brought nothing less than the dissolution of sovereignty. This was combined with a new and complex arrangement between the different entities that were responsible for the territory. It was within the space created by the absence of sovereignty that these authorities could proceed to extend and refine the civilizing mission by means of a new science of administration. The theme of the mandate system is inclusion and the incorporation of backward territories into international society, but it is the crucial exclusion of the non-European world from this society in the first instance that gives the whole system its momentum.

D. Decolonization

In terms of the trajectory outlined in this Article, the most significant development of the U.N. era was the emergence of demands for universal democracy, human rights, and self-determination. International law had to address these issues if it was to justify itself. The necessary consequence of these actions was decolonization. Non-European states were admitted into "international society,"[272] and colonies became independent. These developments, however, generated a new set of issues, namely the reconciliation between the concepts of universality, equality, and participation, newly espoused by international law and the previous history of exclusion and disempowerment experienced by the colonized.

Simply put, the problem that emerged, from the European point of view, was how to prevent the disruption of international order that would ensue if the developing world were allowed to articulate its history of exploitation through the use of its newly acquired legal resources. The non-European world had to be distanced and excluded, not because it was barbaric or threatening (although residues of these ideas remained) but because it sought reparations.

This distancing was and is achieved by drawing upon the hidden resources of sovereignty doctrine. In sketching out different phases of the civilizing mission, I have suggested the existence of two constants. The first is the exclusion of the non-European world, which is deprived

271. Doubt must be expressed, of course, as to whether this project was successfully implemented. The point is that it is the creation of the mandate system that makes these new projects even possible to contemplate.

272. Peter Lyon, *The Emergence of the Third World*, *in* THE EXPANSION OF INTERNATIONAL SOCIETY, *supra* note 256, at 229–39.

of any legal vehicle through which it can voice its own history and assert its own claims. The second is the endorsement of European intervention, whether by the Spanish crown in the time of Vitoria, the British empire in the nineteenth century, or the League of Nations in this century.

My argument is that fundamental aspects of sovereignty doctrine are constituted by that history of negating the non-European world even while intervening in it. Thus, concealed within the most current and conceptual rendering of sovereignty is this other unique history.[273] It is revealed in the form of legal resources. These resources take the form of the arguments and principles relating to sovereignty doctrine that were developed, refined, and extended in enacting the dual process of exclusion and intervention.[274]

For example, during the colonial phase, sovereignty doctrine suppressed attempts by a colony to make any legal claims simply by denying the colony standing. Colonies, lacking international personality, could not legally contest their treatment by the colonizer.[275] With decolonization and the prohibition of intervention,[276] however, such a denial is no longer viable as colonies themselves become sovereign. In these circumstances, sovereignty doctrine reveals itself in a new guise. It is now elaborated in relation to issues of self-determination and permanent sovereignty in a way that prevents those doctrines from impinging on colonial history or its effects. The arguments are that independence, the acquisition of sovereignty, and acceptance into the international community signify something akin to consent by the newly independent country to all that had occurred in the past and to the system of rules by which it was assessed. In seeking to deny its past, sovereignty doctrine requires all colonized territories that seek to become sovereign to relinquish their own history and the claims that could arise from it. Simultaneously, it asserts the achieve-

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273. "But have we a right to assume the survival of something which was originally there, alongside of what was later derived from it? Undoubtedly. There is nothing strange in such a phenomenon, whether in the mental field or elsewhere." SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 15 (James Strachey trans., W.W. Norton, 1989) (1930).

274. At one level, the phenomenon I am laboriously attempting to describe may be termed, simply, "precedent." In situations where inequality has been sustained and endorsed by law over a long period of time, it is inevitable that the burden of the past, explicitly introduced into legal considerations by the doctrine of precedent, will endure beyond the creation of formal equality as between previously unequal parties. And yet, the "dramatic differences" referred to between the "naturalist" jurisprudence of Vitoria and the "positivist" 19th century suggest that the concept of "precedent" is inadequate. Westlake in the 19th century never draws on Vitoria's writings but yet achieves the same ends in terms of the dual function I seek to describe.

275. Interestingly, such arguments may yet be invoked in the Nauru Case. Australia could argue that although Nauru was a *beneficiary* of the rights and obligations embodied in the trusteeship, it had no standing to enforce these rights because it was not party to the relevant treaties—such as the Nauru Trusteeship Agreement.

276. U.N. CHARTER article 2(4) prohibits the more extreme forms of intervention.

ment of a "universal" international law.[277] More profoundly, there no longer exists any language or alternative vocabulary by which sovereignty and independence can be articulated on the international plane.

This is one reading of international law and sovereignty doctrine and it is, crudely, the reading outlined in support of the suppression of colonial claims. The preceding discussion suggests that the doctrine is not necessarily implacable in its denial of colonialism and the enduring inequities that colonialism has created. Nor is international law simply a product of colonial will. It has, after all, provided Nauru with the means of pursuing its claim. Concepts of self-determination and trusteeship have a substantive content. International institutions may play a vital role, as the Trusteeship Council did in the case of Nauru, through articulation of this content and by ensuring implementation of the appropriate norms. Had it not been for the mandate and trusteeship systems and their supervisory mechanisms, Nauru would not have survived until independence.[278]

My argument, then, is that there is no inherent logic to sovereignty doctrine. This is demonstrated by the completely different versions of sovereignty that are found in each of the phases examined in this section. It is also demonstrated by the competing versions of sovereignty that are propounded by different parties attempting to advance their interpretation of the meaning of principles such as "self-determination" or "permanent sovereignty over natural resources."

Sovereignty doctrine, then, is articulated, supported and developed through particular argumentative practices: through the actions of states, the writing of scholars, and the decisions of jurists. It is possible to question these practices. One could question, for example, the strategic way in which the non-European world is characterized by Vitoria or Gess, and the manner in which this characterization leads to a particular outcome that appears inevitable and "legal."[279] Having identified these strategies, it may be possible to contest them and to deny whatever claims they make to being the universal and logical interpretation of the doctrine in question.[280]

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277. BEDJAOUI, *supra* note 16, at 10.

278. It is necessary to point to the uniqueness of the Nauru experience. It is the trusteeship system's specific obligations that have enabled the case to proceed thus far. Former colonies may not enjoy even this limited recourse to international law.

279. In each of these cases the native is provided with exactly that degree of sovereignty that enables it to be *bound* by international law, while denied the rights offered by the system.

280. Different methods of exploring the issues that then arise, in terms of the themes of this Article, are suggested by Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331–87 (1988); *The Politics of Law: A Progressive Critique* (David Kairys ed., 1982); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: the Case of Classical Legal Thought in America 1850-1940*, 3 RES. L. & SOC. ANN. 3–24 (1980); ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); PATRICIA WILLIAMS,

More broadly, it is possible to question the boundaries within which the inquiry is supposed to take place. I have attempted to avoid focusing on the classical conceptual problem of order among states as it deflects attention from an examination of the historical evolution of sovereignty doctrine. As David Kennedy has argued, international law may be studied as a process that excludes and suppresses the articulation of certain types of claims and identities.[281] By identifying the way in which sovereignty doctrine enacts these exclusions and by seeking to recover those identities, it may become possible to establish a new way of viewing international law. In so doing, it also may be possible to prevent a repetition of the practices of exclusion that have characterized and continue to characterize international law, whether the excluded are the colonized, members of minority groups,[282] indigenous people, or women.[283]

VII. SUNSHINE AND COCONUTS: CONSTRUCTING THE NATIVE

The argument in this Article is based in part on Edward Said's concept of "Orientalism," which he describes as a "Western style for dominating, restructuring and having authority over the Orient."[284] As the discussion of the mandate system suggests, Orientalism works by representing other cultures as inferior, incapable, and disorganized and therefore a suitable object for conquest and control. The military subordination of the colonized is combined with the suppression of its ability to represent itself meaningfully within the larger system of images, ideas, and concepts that combine to construct "reality" and provide the basis for action. Power and representation are thus intimately connected.

While the larger structures of international law may be presented in these terms, the processes of Orientalism also played a crucial role in the everyday administration of Nauru. While this Article has suggested that the Administration's policies may be understood in terms of its desire to exploit phosphates, Said suggests another way of approaching the issue. This method attempts to explain Administrative policy by focusing on the officials' images of the Nauruans, and the way these images were used as a basis for policy and action.

THE ALCHEMY OF RACE AND RIGHTS (1991); Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991).

281. David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. L. REV. 1 (1988).

282. *See, e.g.*, HANNUM, *supra* note 240.

283. *See, e.g.*, Hilary C.M. Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

284. EDWARD SAID, ORIENTALISM 3 (1978).

The relationship between representation and power on Nauru is illustrated simply enough by the instances, already detailed, when the Australian authorities stated to the Permanent Mandates Commission that the Nauruans did not use Topside at all and that mining there did not infringe on the Nauruan's interests.[285] In a context where the island being discussed was halfway around the world from Geneva where the PMC met, the Nauruans simply became the way they were represented by the Administration. The Nauruans' own practices and beliefs—their use of Topside as a source of food, shelter, and clothing, and Topside's cultural and spiritual significance—became irrelevant and mining continued.

These images are linked, not only to administrative policy, but to legal argument. Writing in the 1923–24 edition of the British Yearbook of International Law, Professor A.H. Charteris of Sydney University, concluded his article on the Nauruan mandate by discussing the phosphate royalties being paid to the Nauruans:

> 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 cocoanuts and fish and sunshine.[286]

The statement is cited not so much for its condescension, which must have been commonplace at the time, but for the way in which it decisively characterizes the Nauruans and presents this characterization as the basis for a legal assessment of the sufficiency of the royalty.

Many of the images used by the Administration to present the Nauruans have been mentioned already: the Nauruans as a people were happy, not unintelligent, very indolent, politically apathetic, and inept.[287] The underlying premises of these images were the Nauruans' absence of agency and their corresponding inability to make their own, independent history.[288] In general terms, descriptions of the interaction between the Nauruans and the Australians portrayed the Nauruans as lacking an independent existence.

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285. *See supra* part III.

286. A.H. Charteris, *The Mandate Over Nauru Island*, 1923–24 BRIT. Y.B. INT'L L. 137, 151.

287. *See supra* part.VI.A.

288. A "benevolent" paternalism characterized the views of Australians and New Zealanders who knew the Nauruans but who firmly felt "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." WILLIAMS & MACDONALD, *supra* note 17, at 282. The authors also noted that for these observers, "[t]he quaint idea that 'natives' could ever become collectively sensible in the management of money or the running of a major industral and commercial undertaking was, in their view, just as ludicrous as the belief that they would become ready for modern self-government in the forseeable future." *Id.*

One Australian administrator described the difficulty of Nauruan resettlement in the following terms:

> I believe that a policy of encouraging and helping assimilation can be pursued by us steadily and unostentatiously and that its prospects of success would not be affected if we do not openly disclose it to the Nauruans as a deliberate policy. Assimilation must develop from spontaneous choice by individual Nauruans and from opportunities presented. We can steadily help both of these develop.[289]

The most striking aspect of this passage is the self-conscious appreciation of the power of a colonial authority. The apparatus of colonial administration could present "opportunities" for the Nauruans to participate in what was essentially their own disappearance, the assumption being that Nauruan agency was completely non-existent. Free will could be manufactured and Nauruans could be convinced that they were acting in their own interests when actually doing no more than what had been planned for them by the Administration. That the Nauruans felt oppressed by the Australian perceptions that they attempted to contest and modify is made clear by the statements they made during the pre-independence talks:

> We feel that 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.[290]

The idea that the Nauruans had aspirations to freedom comparable to those of their own people escaped the Administration. This is reflected, even more profoundly, by the plan that the Administration was attempting to implement—that of making the Nauruans Australians by resettling them on either an offshore island or on the mainland itself. The view was that the Nauruans, lacking an independent identity or history, had no option other than to be assimilated into the territory and history of Australia itself. This was a logical conclusion to one version of the narrative of the civilizing process: the transformation of the native into a citizen of the metropolis.

The images and attitudes that informed Australian attitudes toward Nauru from the 1920s onwards have current relevance. Dimensions of

289. WEERAMANTRY, *supra* note 1, at 289 (emphasis in original).
290. *Id.* at 296.

this image are apparent in the Preliminary Objections that Australia lodged with the Court in 1990. In attempting to rebut the argument that it had failed to discharge its trusteeship obligations, Australia asserted that "it had given Nauru adequate financial resources to provide a secure future for the island."[291] This "giving" consisted of the transfer of the mining operation, and the profits the Nauruans were expected to make from future phosphate sales, together with the money already collected in trust funds. All these things represented, arguably, no more than the return of Nauru's assets to the Nauruans.

Australia then refers to a study done on Nauru's phosphate investments that suggests that Nauru had considerable funds to rehabilitate the island and concludes that "available evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline."[292]

The legal significance of these arguments is unclear. Nauru makes no claims as to whether or not Australia "provided" it with "adequate" funds for its future. Rather, the financial issue relates to profits made by Australia from the sale of Nauru's phosphates. Furthermore, to the extent that emphasis is placed on the unwise manner in which Nauru allegedly spends its funds, it can hardly be argued that responsibility in international law is contingent upon the way in which the applicant state chooses to run its economy.[293]

The recurring statements as to Nauru's alleged profligacy are interesting, however, as they represent yet another attempt to construct the Nauruans in a manner consistent with the statement made in 1923 that natives live on sunshine and coconuts and hence require no money. Moreover, when "given" money, Naurans dissipate it as natives are lamentably wont to do. Having outlined the finances that the Nauruans would have received after independence, the Australian argument concludes that, "Nauru should be a community of essentially retired persons—with no necessity to work—living on the substantial income from the phosphate reserves."[294]

The consistent theme underlying the Australian position is that action and initiative are attributable to Australia, while passivity and

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291. Australia Memorial, *supra* note 46, at 64.

292. *Id.* at 66.

293. The consequences of adopting such an approach are ambivalent as uncomprehending judgments are often readily made by outside observers about the policies and economic priorities of a state. For instance, the Economist ungenerously reports that "[g]enerations of Australians have lived beyond their means" and that this results in "a mismatch between effort and reward that has been reconciled by borrowing around $116 billion—more per person than any other country in the world." *Australia's Hard Choice*, ECONOMIST, Mar. 6, 1993, at 15.

294. Australia Memorial, *supra* note 46, at 66. Furthermore, these arguments seem based on

incompetence characterize the Nauruans.[295] It is Australia which properly provides the economic means by which Nauru, if only capable of managing its own affairs,[296] could develop its own society and shape its own destiny. When Nauru acts, however, it does so only to demonstrate its incapacity by dissipating the funds it has been given. Interestingly, however, even *if* the Nauruans invested their finances sensibly, this would simply return them to the stasis ("a community of essentially retired persons") that seems to be presented as their natural condition. The task of nation-building is a task that is the prerogative of other, presumably more civilized, states.

The image of the native is developed into a comprehensive framework of understanding through the actions of officials, administrators, and lawyers. It evolves in internal memoranda, scholarly publications, statements before the Permanent Mandates Commission and Trusteeship Council, parliamentary debates, newspaper reports, and legal argument before the Court itself. What is remarkable is the consistency of the system of perceptions that has resulted, despite the fact that it has been formed over a long period of time by a wide variety of people.[297]

Given the sheer resilience and strength of these perceptions about the Nauruans and the long tradition of exercising authority over them, it is hardly surprising that the Administration was incapable of grasping the autonomy of the Nauruans, their powerful desire for independence, and the tenacity and resourcefulness with which they fought for that goal despite their lack of economic, political, and legal expertise. This rigid system of perceptions appears to have prevented the Administration from comprehending the changing international climate, and the Nauruans' effective use of the opportunities that this changing climate presented for them.[298] As the preceding discussion suggests, Australia's slowness to respond to the emerging political realities was perhaps influenced as much by a deep disbelief in the

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the same premise underlying Charteris's argument, that the Administration could do as it wished with the resources of Nauru providing the "needs" of the Nauruans were "adequately" met.

295. Australian action is continuously presented as purely a product of its own will. This position elides the manner in which the Nauruans successfully fought against Australian attempts to bring about resettlement in Australia, to continue mining, to maintain control over the industry, and to delay independence for as long as possible, thus exerting pressures that compelled changes in the Administration's policies.

296. This point is made more explicitly later in the Australia Memorial: "Nauru is a wealthy country or at least had the potential to be so if it had properly managed the potential wealth it inherited at the time of independence." Australia Memorial, *supra* note 46, at 163. This statement is made in relation to an argument that Nauru was seeking to blame Australia for its own bad management and that it was bringing the claim in bad faith.

297. This is not to claim that this was the only view of the Nauruans. As pointed out earlier in the Article, Australians such as H.E. Hurst attempted to present the other point of view but were generally suppressed.

298. The South West Africa litigation, with its controversial outcome, was occurring at the same time as the Nauruan progress toward independence in the 1960s.

ability and determination of the Nauruans as by its hope of maintaining control over the phosphates.

Ironically, even as the Nauruans were being characterized by the Administration as politically inept and uneducated, they were successfully waging a campaign against that same Administration to win their own freedom and establish themselves as an independent nation.[299] Nauru has made persistent attempts to settle its dispute with Australia by diplomatic means.[300] However, Australia's attitudes regarding Nauru have been, by and large, dismissive and condescending. It is difficult to avoid the conclusion that the rigidity of the attitudes adopted by Australia toward the Nauruans has prevented both the possibility of real communication between the two countries and a full appreciaton by Australia of the strength and merit of Nauru's position. The Nauru Case is a result.

In theoretical terms, the preceding analysis of the way the images of the Nauruans have been developed suggests, of course, that the images and narratives in the discourse of international law derive from a number of fields other than law—anthropology, travel literature, and journalism. From a strictly legal perspective, what becomes crucial in any attempt to understand the way in which these discourses operate is to identify those points at which these images and narratives insert themselves into ostensibly legal argument and the effect this has upon the nature of that argument.

The reverse, however, is also true. The language of international law is becoming increasingly important in shaping our perceptions of contemporary events. It is only by analyzing the complex relationships between international law and these other discourses that we may develop a means of understanding the way international law, in the post-Cold War world, exercises its curious power.[301]

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299. The courage and acumen that DeRoburt demonstrated in leading his people to independence can hardly be overstated. Although ill, DeRoburt left his hospital bed to present his country's case before the Court in 1991. It was his last public appearance. He died three weeks after the Court handed down its decision in Nauru's favor. *See Obituary of Hammer DeRoburt*, DAILY TELEGRAPH, July 24, 1992, at 19.

300. *See* Preliminary Objections, Judgment, *supra* note 1, at 253–55.

301. The terminology of international law is playing an increasingly prominent role in the contemporary public realm. The present crises of Bosnia, Somalia, and Iraq are almost invariably discussed with reference to international law. This lends an ambiguous authority to some views of the issues being scrutinized. The question then becomes one of how this vocabulary of "sanctions," "state terrorism," "violations," "compliance," and "intervention" is used to structure perceptions, actions, and policies. Traditional approaches of international law scholarship, such as that of identifying relevant rules, applying them and outlining the following conclusion do not address the issue of how international law operates within the public realm. The manner in which international law is part of a broader public discourse in this context is perhaps best suggested by the emerging methodologies deriving from literary criticism and anthropology. *See generally* EDWARD SAID, CULTURE AND IMPERIALISM (1993); JAMES CLIFFORD, WRITING CULTURE (1987); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Spivak eds., 1988).

VIII. CONCLUSION

If the Nauru Case should proceed to the merits, it will provide the International Court of Justice with a unique opportunity to outline the law relating to a number of extremely significant areas of international law. This is true, independent of the outcome of the case. Issues relating to colonialism have preoccupied international lawyers for much of this century. Yet this Article seeks to suggest that it is far too simple to see colonialism as a phenomenon that is ended and may now be the subject of a valedictory judgment.

Colonizer and colonized: this is the central dichotomy used to frame the Nauru experience and the larger themes it represents. That these concepts have an enduring significance is suggested by the fact that so many vital contemporary debates are presented as debates between former colonial powers and their subjects, the developed and the developing.

And yet, my postulated dichotomy does not hold true. Australia is both colonizer *and* colonized. Indeed, its creation as a colonial subject is unique, involving as it does the massacre of the Aborigines[302] on the one hand and the establishment of a penal colony for the oppressed, desperate, and criminally condemned of Britain on the other.[303] It is understandable, given this past, that ideas of freedom and egalitarianism have been of central importance to the development of an independent Australian identity. Australia, then, defines itself in these terms as separate from and opposed to the corruptions of the old world and of imperialism. Given this complex set of experiences, the question remains as to how these histories coexist,[304] and which history will prevail.[305]

Colonialism is not a simple phenomenon. Its forms are various and subtle. It reproduces itself through its victims and continuously creates

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302. *See* ALAN MOOREHEAD, THE FATAL IMPACT: THE INVASION OF THE SOUTH PACIFIC 1767–1840 (1987). Mabo and Others v. State of Queensland, 107 A.L.R. 1 (1992) (Austl) at 79.

303. *See, e.g.*, ROBERT HUGHES, THE FATAL SHORE (1988).

304. There is, then, yet another history to be written about the Nauru Case. It is a history of two overlapping, reinforcing and interpenetrating relationships—between the United Kingdom and Australia; and between Australia and Nauru. I have characterized the latter relationship as one between the colonizer and the colonized. It is not impossible to view the former relationship in similar terms, with Nauru acting as a means of both obscuring and reinforcing this reality; there is an intimation of this theme in Australian Prime Minister Hughes's stand at Versailles—his demand that Australia be given control over Nauru in return for the thousands of Australians who died as part of the British war effort. But all this requires a separate inquiry.

305. This is the recurring theme of Australian history, as exemplified in the title of the final volume of Clark's memorable history. *See* 6 C.M.H. CLARK, THE OLD DEAD TREE AND THE YOUNG TREE GREEN: A HISTORY OF AUSTRALIA (1987). For a comparative study, dealing with Australia's ambivalent nationalism, see BRUCE KAPFERER, LEGENDS OF PEOPLE: MYTHS OF STATE (1988). *See also* C.M.H. CLARK, THE QUEST FOR GRACE (1990).

and represses new subjects. In this way, colonialism is like sovereignty itself. This is a challenge for international lawyers, whose craft inevitably demands the articulation and reproduction of the language of sovereignty and with it, perhaps, the suppressions and exclusions that characterize its history.

AFTERWORD

The Nauru Case was settled by a "Compact of Settlement" between Australia and Nauru, which was signed on August 10, 1993. Under the terms of the Compact, Australia agreed to pay Nauru A$107 million. Of this amount, $57 million is to be paid by August 31, 1994; the remaining $50 million is to be paid in accordance with a "Rehabilitation and Cooperation Agreement" under which Australia will fund $2.5 million worth of jointly agreed rehabilitation and development activities in Nauru each year for the next twenty years. The settlement represents, in effect, satisfaction of Nauru's primary claim for the expenses associated with rehabilitating the lands mined out prior to independence. Nauru has agreed to discontinue its ICJ action against Australia. Australia has requested the United Kingdom and New Zealand to contribute to the settlement.

It is reported that some Pacific states, following Nauru's success, are contemplating action against former administering powers for environmental damage suffered prior to independence.[306]

306. *Paying Our Dues*, and Mary Louise O'Callaghan, *Signing up to Right a Colonial Wrong*, THE AGE (Melbourne), Aug. 10, 1993 at 19; *Making Waves in the Pacific*, ECONOMIST, Aug. 21, 1993, at 31. This Article was completed in May 1993. No attempt has been made to modify the text in the light of the settlement. I now hope that the Article illuminates some of the factors that may have led to the settlement; that it contributes to the continuing debates surrounding the unresolved issues raised by the case; and that, at a deeper level, it outlines the challenges posed by these issues to our understanding of the structures of international law.