Prologue

In 2009 I was briefly engaged by the Parliament of Nauru as a legal adviser. I joined a team of four Nauruans and four international consultants to formulate a referendum campaign informing the Nauruan people of proposed amendments to the 1968 Constitution. The referendum was the culmination of a lengthy process of constitutional review that had been conducted with United Nations Development Programme funding.[1] In its 2007 Report, the Constitutional Review Commission appointed by the Parliament of Nauru had described what it understood to be the historical factors requiring address via constitutional reform – 'what', in other words, had 'gone wrong' with the Republic of Nauru:

> The failure of institutions due to defective or ineffective laws, including the Constitution and statutes.
>
> Lack of motivation or incentive to preserve wealth for the future, and account for its management and drawings upon it.
>
> Absence of machinery for enforcing accountability and transparency, and for punishing breaches.
>
> Failure of leaders to learn the principles of good governance and elements of the cabinet parliamentary system, and make a commitment to them.
>
> In planning for improvement in the above areas, a serious shortage of human capital, particularly people with appropriate skills, and accountants and lawyers.[2]

Failure of institutions, lack of motivation to preserve wealth for the future, lack of machinery for enforcing accountability and transparency, failure of leaders to learn the principles of good governance, shortage of

[1] Government of the Republic of Nauru and United Nations Development Programme, 'Nauru Constitutional Reform Project', project document, 2008. Available at info.undp.org/docs/pdc/Documents/FJI/00058097_Nauru%20CRC_Prodoc.pdf.

[2] Nauru Constitutional Review Commission, '"*Naoero Ituga*": Report', 28 February 2007, 3–4. Available at paclii.org/nr/other/Nauru_Constitutional_Review_Commission_Report_28Feb07.pdf.

people with appropriate skills. The implication was that the 'failures' of the Nauruan state were to be solved with better institutions, better laws and better training of leaders in the business of governance. To achieve these goals, the Republic required constitutional reform. It also required more 'human capital' – the shortage of which was, in the meantime, to be filled by people like me, paid with UNDP funding. The small Nauruan public service was top-heavy with Australian public servants on secondment from the Commonwealth Treasury, and the Department of Foreign Affairs and Trade.

Armed with comparative constitutional studies of Pacific island states, the Commission had recommended a suite of amendments to bring the Nauruan Constitution in line with 'internationally recognised principles and standards'.[3] Proposed amendments were designed to strengthen the separation of the legislature and the executive, particularly with respect to financial transparency, a notorious issue in the historical management of the Nauru Phosphate Royalties Trust; to recognise at constitutional level the status of customary law as 'continuing to have effect as part of the law of Nauru, to the extent that such law is not repugnant to the Constitution or to any Act of Parliament'; and to introduce social and economic rights into the Constitution.[4] From a human rights perspective, this last recommendation would have made the Nauruan Constitution one of the most progressive in the world.[5]

The Constitution under review had remained unchanged since 1968. It had been drafted over the course of a few months by historian Professor James W. Davidson and Victorian Parliamentary Counsel Rowena Armstrong, in anticipation of Nauru's United Nations-decreed Independence Day of 31 January 1968. Two years earlier in 1966, negotiations between the Nauru Local Government Council and the Australian Department of Territories over the wholesale resettlement of the Nauruan people to Curtis Island in Queensland with some form of self-government, as decreed by the UN Charter provisions on trusteeship, had reached an impasse.[6] The Nauruan delegation, led by Hammer

[3] Nauru Constitutional Review Commission, '*Naoero Ituga*', 3.
[4] The 1968 Constitution made no reference to the effect or status of 'customary law' in Nauruan law, although custom was recognised in legislation and frequently applied with respect to land ownership and usufruct. Ibid., 13.
[5] Steven Ratuva, 'The Gap Between Global Thinking and Local Living: Dilemmas of Constitutional Reform in Nauru' (2011) 20 *The Journal of the Polynesian Society*, 241–68 at 244.
[6] Gil Tabucanon and Brian Opeskin, 'The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration' (2011) 46 *Journal of Pacific History*, 337–57.

DeRoburt, insisted that 'self-government' meant international status as a sovereign state, whether on the island of Nauru itself, or on Curtis Island. The Australian Department of Territories, however, would concede no more than status as a municipal council within the State of Queensland.[7]

The UNDP's constitutional review process had commenced in 2004, when the first iteration of Australia's offshore detention regime was in full swing. In 2001 the Commonwealth executive under Liberal Prime Minister John Howard had alighted upon what it labelled a 'Pacific solution' to Australia's 'asylum seeker crisis'. That crisis consisted of the arrival of comparatively small numbers of asylum seekers in the northern territorial waters of Australia, most then from Afghanistan and Sri Lanka.[8] The last detained asylum seekers of the Howard era had been relocated from Nauru to Australia in 2007 with great moral fanfare by the new Labor Prime Minister, Kevin Rudd. When I arrived in Nauru in 2009, the detention centre had been repurposed as a government storage depot. Office supplies were stacked against corrugated iron walls. Weeds grew in the gravel. Offshore detention – yet another ignoble entry in the catalogue of Australian immigration policies – seemed then a brief entry, mercifully consigned to the past. That impression was soon proved wrong. A few years later, in 2012, Australia's 'Pacific Solution' was revived, this time by Rudd's successor as Labor Prime Minister, Julia Gillard. Office supplies were moved back out of the sheds, which were returned to their original function, and renamed 'Regional Processing Centre 1'.[9] Soon there would be an RPC 2, an RPC 3 and an RPC 4, all built and run by Australian commercial subcontractors. Throughout the duration of this project, asylum seekers who arrive by sea in Australian waters as 'unauthorised maritime arrivals' have been detained and sent to Nauru, or to Manus Island in Papua New Guinea, for 'processing' of their asylum claims. Soon after Australia revived its offshore detention regime, a new Nauruan government was elected and Nauru's still-unfolding constitutional crisis took

[7] Nancy Viviani, *Nauru: Phosphate and Political Progress* (Canberra: Australian National University Press, 1970), 140–7.

[8] Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 *Asian-Pacific Law and Policy Journal*, 1–43; and Susan Metcalfe, *The Pacific Solution* (North Melbourne: Australian Scholarly Publishing, 2010).

[9] Peter Billings, 'Irregular Maritime Migration and the Pacific Solution Mark II: Back to the Future for Refugee Law and Policy in Australia' (2013) 20 *International Journal on Minority and Group Rights*, 279–306.

a darker turn.[10] The new executive moved to limit and then effectively cease issuing visas to visitors not engaged directly by detention centre contractors. With dubious pretext, the executive deported the Resident Magistrate and cancelled the visa of the Chief Justice of the Supreme Court, both Australian judges.[11] The time frame of claim processing stretched out to two, to three, to four, to six years. Independently verifiable information on conditions for asylum seekers on Nauru became increasingly difficult to obtain.

Wave after wave of legal challenges to the offshore detention regime have since been mounted, drawing on Australian law, Nauruan law and international law. Legal victories have been few and far between, and the contortions of executive power – in both Australia and Nauru – more frequent. In February 2016 in a case brought by a Bangladeshi asylum seeker, the High Court of Australia accepted the Minister for Immigration and Border Protection's argument, prepared by some of the best legal minds in the country, as to why offshore processing of her asylum claim did not amount to arbitrary detention under Australian law: the Commonwealth of Australia, the Minister argued, does not detain anyone on Nauru. The Republic is a sovereign state; if anyone is detained there, they are detained by the Nauruan executive, not by the Australian executive.[12] The majority of the High Court agreed. Even though the offshore detention regime exists at the Australian government's instigation, with Australian funding under Australian oversight, the regime was held to be run by private contractors, operating under Nauruan sovereign jurisdiction.[13] But back in 2009, in that window between the two phases of offshore detention, the tortuous architecture of Australian immigration law seemed a thing of the past, not the future. Nauru had been left – in extreme foreign debt, without a bank and owing years of back pay to its public servants – to raise revenue in other ways.

Compared to the gravity of these events for the Nauruan community, for asylum seekers and indeed for Australia's international reputation, my brief experience in Nauru is insignificant. Law student from an elite

[10] Stewart Firth, 'Australia's Detention Centre and the Erosion of Democracy in Nauru' (2016) 51 *Journal of Pacific History*, 286–300. See also Chapter 6, 'After Independence: Sovereign Status and the Republic of Nauru'.

[11] On the prevalence of foreign judges in the Pacific, see Anna Dziedzic, 'The Use of Foreign Judges on Courts of Constitutional Jurisdiction in Pacific Island States' (2018), PhD thesis, University of Melbourne.

[12] *Plaintiff M68* v. *Commonwealth of Australia* (2016) 257 CLR 42.

[13] *Plaintiff M68/2015* at 375.

first-world university takes up a temporary UN-funded position, almost oblivious to the deeper historical and political context in which they are working; hardly news. But the experience troubled me for years afterward. What I had learnt of Nauru whilst on the island was enough only to highlight the contours of my ignorance. Beyond the singsong clichés picked up in my suburban Australian childhood – bird poo island, poor then rich then poor again – I knew next to nothing about the place. A Nauruan boarder in my class at school, there for the first few years of the 1990s then gone. A geography class called 'Our Pacific Neighbours', which in retrospect was a valiant attempt to orient Australian high school students to their planetary whereabouts. In that class, I learnt a little of Nauru's 'squandered phosphate wealth', amid textbook sketches of the Dutch colonisation of Irian Jaya, now West Papua; of the British importation of Indian labourers to Fiji; of Australia's role in the Portuguese handover of Timor Leste to Indonesia in 1976. If I was taught anything about German imperialism in the Pacific, I don't remember it. But I had a German great-grandfather who had left Kiel before World War I, either to escape conscription or join the merchant navy, we didn't know which. I had a grandfather who had fought in the Australian army against Japan in Papua New Guinea during World War II. But these fragments of regional history, and their relation to what I was doing in Nauru, had never arranged themselves into a coherent story.

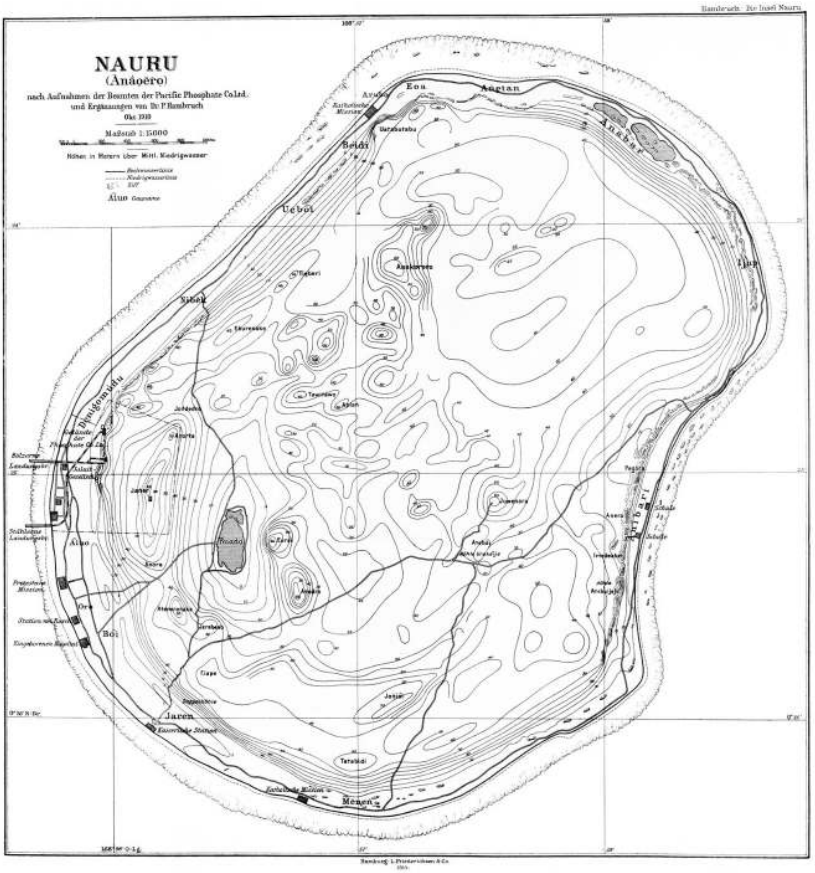
On the island, I did my underqualified best to do the job I had been hired to do. But it was obvious that the referendum process was regarded with polite distrust, if not contempt, by the Nauruan community. We worked to put together bilingual campaign materials, increasingly aware that the Nauruan team's wary deliberations over how to translate English constitutional vocabulary into Nauruan were surface reflections of the tectonic political tensions they were reckoning with in their lives as a result of their work on the campaign. We attended meetings with 'H.E.' – His Excellency the President, then Marcus Stephen – and with government MPs, trying and failing to divine who was working for the proposed amendments, and who against. I visited the house of the Taiwanese ambassador, who grew green vegetables in his front yard in boycott of the miserable lettuces shipped from Australia for sale in Nauru's old company store, Capelle & Partner. I shared a hotel corridor with a delegation from the Russian Federation, and the reason why soon became apparent: as the referendum campaign got underway, the Nauruan government announced its recognition of the independence of the Georgian provinces of Abkhazia and South Ossetia. A few days later, Nauru expressed gratitude to the Russian Federation for

AUD$50 million in development aid.[14] I ate at the handful of Chinese restaurants on the island, and picked up some of the stories of the British Phosphate Commission's importation of labourers from mainland China in the early twentieth century – but not, it turns out, even the half of it. I was loaned a government car, donated to the Nauruan government as part of Japan's bilateral aid programme. Nauru, I was told with a wink when I picked up the car, voted with Japan in the International Whaling Commission.[15]

Toyota notwithstanding, I preferred to walk. In the early mornings I walked along the beach at Menen, separated from the open ocean by the jagged limestone reef that fringes the island. In the evenings I walked up to topside, Nauru's mined-out central plateau, following the well-trodden paths that weaved through limestone pinnacles and noddy bird carcasses. On Sundays I walked the island's perimeter road, passing unadorned monuments marking Japan's occupation of Nauru during World War II. A fifth of the Nauruan population died during that war, interned on Chuuk Atoll in the Japanese Mandated Islands, now part of the Federated States of Micronesia. The Nauruan community had chosen 31 January as their Independence Day, the date the survivors came home from Chuuk. Clockwise from Parliament House was the cantilever, a gargantuan steel arm hulking out from the beach across the reef to the open ocean. The original cantilever had been built in the late 1920s by the British Phosphate Commission to cart phosphate from topside straight down into the holds of moored ships, to be spread over the farms of Australia, New Zealand and the United Kingdom. Anticlockwise was Anibare Bay, blown out of the limestone reef with dynamite by the Pacific Phosphate Company in the 1910s to create a harbour for the harbourless atoll.

One morning out walking on the beach, I had an uncanny experience. Watching a container ship disappear over the horizon, I lost my balance. In that moment, I realised I had not simply boarded a plane and shifted location in a fixed world; had not simply flown from one point to another. Rather, the world itself unfolded differently from the point at which I stood. The net of relations cast by Nauru over the world created a different international order to the one I knew. The one I knew was already – so I had foolishly thought – alive to the imperialism of European knowledge structures, sensitive to the legacies of colonial violence, aware of the politics of difference. Yet I had arrived in Nauru believing the place was somehow fundamentally out of

[14] Reuters, 'Pacific Island Recognises Georgian Rebel Region', *Reuters*, 15 December 2009.
[15] Republic of Nauru, 'Republic of Nauru Defends its Vote at the International Whaling Commission', press release, 28 June 2005.



1 Map of Nauru from Paul Hambruch, *Nauru: Ergebnisse der Südsee-Expedition, 1908–1910* (Hamburg: L. Friederichsen & Co, 1914). Credit: Alamy Stock Images.

joint with the world. Standing on that beach, it no longer made sense to think of Nauru as an anomaly in the international order. As much as Paris and New York and London, as Japan and Germany and Australia, Nauru was what was.[16] It was me that had it all wrong.

[16] Doreen Massey describes the world-making effect of imagining space as a surface across which the ignorant discoverer moves: '(c)onceiving of space as in the voyages of discovery, as something to be crossed and maybe conquered, has particular ramifications . . . this way of imagining space can lead us to conceive of other places, peoples, cultures simply as phenomena "on" this surface. It is not an innocent manoeuvre, for by this means they are deprived of histories.' Doreen Massey, *For Space* (London: SAGE Publications, 2005), 4.

The referendum campaign failed. The Nauruan people voted overwhelmingly against constitutional change.[17] I left the island in deep disquiet over what I had just participated in, and with a visceral memory of that slip in perception. This book began as an attempt to understand two fleeting impressions that stayed with me following my brief time in Nauru: first, that the disjuncture between the ideals of international status and the actual forms of administrative relation in Nauru had a deep history; and secondly, that the international order one perceives is radically determined by the place in which one stands. The book has ended as a detailed account of how imperial law and administration in Nauru produced the post-independence 'failures' the Constitutional Review Commission identified in its 2007 Report. It is dedicated to the people of Nauru, from one more in a long line of *iburbur* to have washed up on their island.

[17] Ratuva, 'Gap Between Global Thinking and Local Living', 241–68.

1

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

1.1 Introduction

This book proceeds from the premise that the Republic of Nauru is not anomalous to the contemporary international legal order but deeply symptomatic of it. The story it tells began as a response to a deceptively simple question: how did Naoerō – a single coral atoll in the Western Pacific, with an area of twenty-one square kilometres, beloved home of the Nauruan people who at the time of independence numbered just over 6,000 – become the Republic of Nauru in 1968, the third smallest sovereign state in the world? It has developed over time into a response to a more pointed question: what might a close reading of the history of imperial administration in Nauru reveal about the continuities between nineteenth-century European imperialism and twentieth-century international law that accounts focusing on the received 'centres' of international legal formation do not? The answer given here takes the form of a narrative of four shifts in the international status of Nauru since the violent incorporation of the island into the German protectorate of the Marshall Islands in 1888, and the changes in administrative form at the local level that accompanied those shifts. The book reconstructs in turn the declaration of protectorate status, the designation of Nauru as a C Class Mandate by the League of Nations in 1920, its redesignation as a United Nations Trust Territory in 1947 and the recognition of Nauru as a sovereign state in 1968. The central argument that emerges is this: as the international status of Nauru shifted from protectorate, to mandate, to trust territory, to sovereign state, what occurred at the level of local administrative form was an accretive process of internal bureaucratisation and external restatement according to the prevailing concepts of the period.

The book is offered as a contribution to the vibrant cross-disciplinary genre of histories of imperialism and international law. Rejecting from the outset any presumption of Nauru as anomaly, the book constructs a detailed history of the relationship between international status and administrative form in the Nauruan case as a frame through which to redescribe how the international system of sovereign states has developed in continuation of European imperial administrative practices of the late nineteenth century.[1] To that end, this book joins the chorus of voices that have, since the 1950s, challenged the presumption that sovereign territorial statehood is the natural or final vehicle for decolonisation.[2] It seeks to supplement this corpus of analytical tools for diagnosing the continuities between imperial exploitation and the contemporary international order, as a necessary step towards disrupting and dismantling those continuities, and working to support a more expansive concept of decolonisation than that institutionalised in the international legal order of the twentieth century.

Conceptual and intellectual histories of international law that centre the archetypical sites of international law – Versailles, The Hague, New York – and the writings of archetypical jurists – Grotius, Vitoria, Vattel and, more recently, a marginally more inclusive cast of protagonists including Lorimer, Twiss and Schmitt – have tended to dominate the field.[3] This book reflects a growing trend toward treatments of the

[1] Anghie's field-defining text proceeds from a similar observation about the significance of Nauru in the history of international law, following the thread into the realm of conceptual history. Antony Anghie, '"The Heart of My Home": Colonialism, Environmental Damage and the Nauru Case' (1993) 34 *Harvard International Law Journal*, 445–506; and *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 1–2. Orford revives questions of the relationship between international status and administrative form in her adroit analysis of the responsibility to protect concept. Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), 189–212. On the significance of the anomaly in imperial development, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400–1900* (Cambridge: Cambridge University Press, 2010), 2.

[2] The statist paradigm of self-determination in international law has always attracted strong critique. See for example Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Capitalism* (USA: International Publishers, 1965); Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996); Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16 *Leiden Journal of International Law*, 1–35.

[3] Randall Lesaffer, 'International Law and its History: The Story of an Unrequited Love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden and Boston: Martinus Nijhoff Publishing, 2007), 32, 36–7.