Legal Models and Methods of Western Colonisation of the South Pacific

Sarah Heathcote
Honorary Associate Professor, ANU College of Law, Australian National University, Canberra, Australia
sarah.heathcote@anu.edu.au

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Abstract

This article addresses the legal models and methods used by the Western powers to colonise the South Pacific. It first focuses on the informal empire in the last third of the nineteenth century and up to World War I. This is the period in which control is gained by the Western powers but responsibility averted since in most cases sovereignty over the territories concerned is not yet acquired. The legal models established for gaining control – culminating notably in the creation of colonial protectorates and only later annexation – were to some extent the same as those established elsewhere in the globe. But the legal methods used by the British (for whom the Empire had become an ‘intolerable nuisance’) and to a lesser extent the United States (ideologically averse to colonisation) in order to establish initial control, stand out because of the way that each projected their municipal laws; in the case of the British with the humanitarian purpose of ending human trafficking. The second focus of this article is on the more innovative regimes used to colonise the Pacific island territories in the late nineteenth and early twentieth century, more specifically those involving joint governance. The condominium emerges as a model of choice to manage disputes between the powers and its use was principally to address their geo-strategic concerns both in the region and globally. Entrenching earlier trends, a tradition of joint governance would later continue into the twentieth century with remarkable similarities to what preceded it.

This article serves as a reminder of the subtle and complex ways in which the law can be instrumentalised to give effect to colonisation. It is timely given the increasing concern today over foreign interference in the South Pacific.

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Keywords

South Pacific – colonisation – acquisition of title to sovereignty – self-determination

Introduction

From the late nineteenth century and well into the twentieth, Western powers imposed on the island territories of the South Pacific various systems of colonial governance, replaced in some cases in the twentieth century with internationalised care-taker models in the form of League of Nations Mandates and United Nations Trust Territories. Nefarious behaviour attended the colonial regimes and indeed the internationally supervised ones, from depopulation and resource exploitation in the nineteenth century, to nuclear testing and the continued plunder of resources in the twentieth. Colonial law and international law (both Western in their perspective) were used to enable this behaviour, despite a broader pattern of ostensibly reluctant colonisation, particularly by the British. At the same time, these governance regimes were relatively diverse and sometimes unusual, making them interesting from a technical perspective. Joint governance in particular was frequent, something one might attribute to the perennial search in the South Pacific for economies of scale, but more often was simply a means for colonial powers to neutralise any rival’s preponderance of influence over a territory pending its ultimate division amongst themselves. As a collection these regimes thus have an intrinsic interest as they serve as models of how international law can be instrumentalised. Their analysis also serves as a reminder of the region’s legal history, here from a Western perspective, something on which there is too little dedicated literature1 – and which the current struggle for influence in the region renders timely.

This article addresses the legal models and methods used to colonise the South Pacific, focussing first on the informal empire in the last third of the

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1 Historians have occasionally focussed on the legal nature of the regimes created in this region, notably as it relates to the exercise of consular jurisdiction. See for instance Scarr, Deryck. *Fragments of Empire. A History of the Western Pacific High Commission 1877–1914* (Canberra: Australian National University Press, 1967). A recent legal study of interest is Storr, Cait. *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (Cambridge: Cambridge University Press, 2020), which as the author claims takes a socio-legal focus and is confined to Nauru. This article, covers the region more broadly and takes a very different approach, one grounded in general international law and assessed from a doctrinal perspective.
nineteenth century and up to World War I; a period in which control is gained by the Western powers but responsibility averted since in most cases sovereignty over the territories concerned is not yet acquired. The legal methods used by the British (for whom the Empire had become an 'intolerable nuisance') and to a lesser extent the United States (ideologically averse to colonisation) in order to establish initial control, stand out because of the way that each projected their municipal laws; in the case of the British with the humanitarian purpose of ending human trafficking. The article's second focus is on the more innovative structures created to colonise Pacific island territories, more specifically those involving joint governance. The condominium emerges as a model of choice to manage disputes between the powers and was principally used to address their geo-strategic concerns both in the region and globally.

Overall, the methods of colonisation used in the South Pacific reveal a story of colonisation by stealth. In both the nineteenth and twentieth centuries, law is in the Pacific at the service of Western capital but it was nonetheless subtle and complex; something to which the contemporary world needs to stay alert, not only because the colonial legacy remains to be liquidated in the South Pacific, but also as other players, both state and non-state, enter the region.

1 The Informal Empire: 1874–1914: Creeping Jurisdiction and Domestic Law Methods of Control

Several factors account for the relatively eclectic nature of the South Pacific's colonial regimes. Notable amongst them is that they were more the product of expediency than design. It has been suggested that unlike Africa towards the end of the nineteenth century, there was relatively little scramble by the European powers for the small and remote territories of the South Pacific. Certainly the British, dominant in the region, were not motivated to acquire further colonies. Instead, territorial control and later acquisition in the South Pacific was generally achieved so that Western powers might control their often unruly nationals located there; in order to liquidate their problems with other

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2 For instance McIntyre, W. David. *The Imperial Frontier in the Tropics, 1865–1875* (London: MacMillan 1967) especially chapter 12.
3 The position in 1889: Taylor, Alan J. P. *Germany’s First Bid for Colonies 1884–1885* (London: MacMillan, 1938), 25.
4 The region’s non-self-governing territories are: American Samoa, Guam, French Polynesia, New Caledonia, Pitcairn Islands and Tokelau.
5 Campbell, Ian C. *A History of the Pacific Islands* (Brisbane: University of Queensland Press, 1989), 145.
powers elsewhere in the globe; avoid unnecessary entanglements with them in the region itself; and, in the case of Great Britain, so that it might appease its antipodean colonies in Australia and New Zealand who viewed the South Pacific as a ‘British Lake’ and so, contrary to the wishes of the mother country, sought territorial acquisition in the region. These motives had humanitarian, economic, diplomatic and strategic aspects; each roughly in that order becoming more prominent over the course of the nineteenth and early twentieth centuries, although economic concerns were ever a constant. That said, in line with colonial governance in many parts of the globe, the regimes imposed in the late nineteenth century on the South Pacific island territories betrayed the nature of the colonial project at the time: a means of assuring control of a foreign territory and its resources – or at least the exclusion of others – with little, and preferably no, assumption of responsibility for the territories and peoples thereby subjected.

In terms of legal method, control without responsibility was achieved in two ways. It is useful to overview these here before detailing them below. The first method was by extending the reach of domestic law into foreign lands, notably through the exercise of consular or extra-territorial jurisdiction. In the case of the Pacific this was modelled less on the capitulations regime of the Levant (which was reflected for instance in the British Foreign Jurisdiction Act of 1843)\(^6\) and more on those established by the United States in Asia around 1860 (China, Siam and Japan).\(^7\) Nonetheless, personal jurisdiction over nationals would be asserted by the colonial power as an exception to the usual plenary jurisdiction of the territorial state, both as a matter of prescription and enforcement. In the Pacific these nationals were in fact generally the most influential players in the territories at the time, thus informally securing Western influence. Importantly, under general international law consular jurisdiction was premised on treaties (including, in British practice, implied treaties by ‘sufferance’\(^8\)) between the host and the sending state and so implicitly acknowledged the Western powers’ formal lack of sovereign interest in the territory in which jurisdiction was to be exercised. In the Pacific, however, few such treaties existed. As will be seen, on the basis of advice that the local populations did not have treaty-making capacity, the British extension of extra-territorial jurisdiction was mostly unilateral. As if to reinforce, however, that

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\(^6\) Foreign Jurisdiction Act (1843), 6 and 7 Vict., c 94.

\(^7\) For an early article on how extra-territorial jurisdiction progressed colonisation, in this case in Siam, see Sayres, Francis B. ‘The Passing of Extraterritoriality in Siam’. *American Journal of International Law* 22(1) (1928), 70–88.

\(^8\) Foreign Jurisdiction Act 1843 (n. 6).
legally the islands remained foreign territory, in addition to the dispatch of consuls, naval expeditions would in the event of perceived injuries inflicted on Western nationals, undertake ‘reprisal-style’ punitive operations against local populations9 – legally characterised as ‘war’,10 even where the sovereignty of the target was not recognised. Ultimate control could thus be maintained by the powers over local populations without taking on the responsibility that accompanies sovereignty.

A second nineteenth century legal method by which the powers exerted control without responsibility, and to which consular jurisdiction was generally the precursor, was the creation of international legal structures, such as protectorates, lease-like arrangements, or indeed – a method favoured in the Pacific – condominiums.11 Some writers see these techniques as a means of de facto or disguised cession;12 however for those who do not accept that bare ‘fact makes law’, it is sufficient to observe that in different ways these legal models split the attributes of sovereignty – jurisdiction and control –, from the ultimate holder of sovereignty, sometimes in perpetuity. These methods rely directly on international law constructs, invariably the unequal treaty, and will be described here as the international law scaffolding of colonial regimes (as noted above, in contrast consular or extra-territorial jurisdiction in the Pacific relied predominantly on domestic law alone for legal justification). In the Pacific these international law models occasionally followed those established by colonial regimes elsewhere. But the island territories of the Pacific being regarded in the main as so-called ‘backward territories’13 rather than

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9 Neff, Stephen C. War and the Law of Nations. A General History (Cambridge: Cambridge University Press, 2005), 229, where instances of such expeditions in the Pacific are also cited.
10 Hall, William E. A Treatise on the Foreign Powers and Jurisdiction of the British Crown (Oxford: Clarendon Press, 1894 / Darmstadt: Scientia Verlag Allen, 1979 [reprint]), 234, para. 104.
11 On the protectorate as a means of gaining control without responsibility, see Lindley, Mark F. The Acquisition and Government of Backward Territory in International Law (New York: Negro University Press, 1926), 182; Anghie, Antony. Imperialism, Sovereignty and the Making of International Law (Cambridge: Cambridge University Press, 2004), 87. Whilst not dealing with these particular models, at least explicitly, on the idea of ‘quasi-sovereignty’ see Benton, Lauren. ‘From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty’. Law and History Review 26(3) (2008), 595–619. Also approaching the topic from the perspective of recognition of sovereignty and personality: Anghie, Anthony. ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’. Harvard International Law Journal 40(1) (1999), 1–80.
12 Perrinjaquet, J. ‘Des annexions déguisées de territoires’. Revue générale de droit international public 16 (1909), 316–367.
13 For instance Lindley, The Acquisition 1926 (n. 11).
states capable of concluding treaties\(^{14}\) (regardless of how unequal), political models in the image of their international law scaffolding counter-parts were used: the colonial protectorate (a claim of right vis-à-vis other powers to annex a territory in the future) rather than the protectorate of the Law of Nations (an agreement between the power and state object of the protection); and the 'appurtenance' (within the meaning of US domestic law) rather than, for instance, a perpetual lease (created by an international agreement). In effect these methods – political projections of power in the image of legal models – were no more than projections of domestic regulation onto foreign soil and as such mere fact for the purposes of the law.\(^{15}\) In some circumstances these facts might nonetheless be relevant when captured by a rule of international law for the acquisition of title, for instance, occupation of a terra nullius. Conceptually different amongst the scaffolding techniques being introduced here – and so reserved for Section 2 below –, was the condominium or looser forms of joint governance by international agreement, since resting on the basis of treaties between the powers themselves. As noted, this was a relatively prevalent method of colonisation in the region.

1.1 *The Perversion of Humanitarian Ends: The Unilateral Extension of Extraterritorial Jurisdiction*

In the nineteenth century consular jurisdiction was often provided for in treaties of amity and commerce, and this was also the case in the Pacific where it was established by Western states in two of the polities that they recognised as states: Tonga (with Germany on 1 November 1876; Great Britain on

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14 As will be seen, this was the view expressed by British Legal Officers in the executive. By at least the 1920s, some judicial decisions would differ: *George Rodney Burt (United States) v Great Britain (Fijian Land Claims)*, Decision of 26 October 1923, RIAA, vol. VI, 93–99, 99 and *Isaac M. Brower (United States) v Great Britain (Fijian Land Claims)*, Decision of 14 November 1923, RIAA, vol. VI, 109–112, 110 in which Fiji’s 1874 Agreement of cession was dealt with as a treaty. Contrast: *PCA, Island of Palmas case (Netherlands v United States of America)*, Decision of 4 April 1928 RIAA vol. II, 829–871, 858, where an agreement with local chiefs was not considered a treaty but could underpin a later basis for sovereignty. In terms of for instance German practice, title was acquired by unilateral declaration of the Emperor (the Schutzgebiet), not by virtue of the agreements concluded by habilitated trading companies with local chiefs, which were not considered treaties: see Alexandrowicz, Charles H. ‘Le rôle des traités dans les relations entre les puissances européennes et les souverains africains’, in *The Law of Nations in Global History*, eds. David Armitage and Jennifer Pitts (Oxford: Oxford University Press, 2017), 223–229, 227.

15 *PCIJ, Certain German Interests in Polish Upper Silesia (Merits)*, Judgment of 25 May 1926, *PCIJ* Reports, Series A, No. 7, 19.
29 November 1879; and the United States (US) on 2 October 1886)\textsuperscript{16} and in Samoa with the same three powers in 1878–1879; chronologically: Germany, then the United States, and finally Great Britain.\textsuperscript{17} In the other island territories of the Pacific, Western powers would sometimes dispatch consuls where their nationals were located\textsuperscript{18} but no agreements with local rulers for the exercise of extra-territorial jurisdiction existed there.

1.1.1 The Strategic Backdrop and British Policy of Minimum Intervention

Of the four principal powers in the Pacific – Great Britain, France, Germany\textsuperscript{19} and the US --, the British developed the most far reaching domestic law structures for the exercise of consular jurisdiction in the region, extending to territories where no sovereign was recognised. Whilst the principal British legislative vehicle for the extension of consular jurisdiction, the 1843 Foreign Jurisdiction Act, accepted that such jurisdiction could be established not only by express treaty but also as a result of ‘sufferance’, the latter was rare in practice and was never applied in the Pacific. Instead the British more ambitiously asserted jurisdiction on the basis of statute in these territories with which, as will be seen, the British Law Officers would repeatedly advise, no treaty relations could be established.

But the geo-strategic context in which the British operated in the region was complex. In general, state formalised colonisation of the Pacific island territories was reluctant for most of the nineteenth century, and this was

\textsuperscript{16} With Germany by art. 9, Tonga-Deutscher Freundschaftsvertrag, 1 November 1876, Reichsgesetzblatt, 1877, 521; Great Britain, by art. 3, Treaty of Friendship between Great Britain and Tonga, 29 November 1879, British and Foreign State Papers 70 (1878–1879), 9; and the United States by art. 12, Treaty of Amity, Commerce and Navigation, 2 October 1886, 2 Malloy 1781. Cited in Liu, Shih Shun. Extraterritoriality: Its Rise and its Decline (New York: Columbia University Press, 1925), 97, fn. 3. Once Tonga came under British protection, German and American consular rights were abrogated. Ibid., 142.

\textsuperscript{17} With the United States by art. 4, Treaty of Friendship and Commerce, 17 January 1878, Malloy 2, 1575; Germany by art. 7, Treaty of Friendship between Germany and Samoa, 24 January 1879, British and Foreign State Papers 70 (1878–1879), 244; Great Britain by arts. 4 and 5, Treaty of Friendship between Great Britain and the King and Government of Samoa, 28 August 1879, British and Foreign State Papers 70, 134. Cited in Liu, Extraterritoriality 1925 (n. 16), 97.

\textsuperscript{18} The presence of their nationals was such that by the 1840s, Samoa, Fiji, New Hebrides and New Caledonia were on the lists of islands to be visited by warships and reported on by consuls: Brookes, Jean I. International Rivalry in the Pacific Islands 1800–1875 (Berkeley: University of California Press, 1941), 171.

\textsuperscript{19} The term is used to cover the German Confederation (1815–1866), the North German Confederation (1866–1871) and the German Empire (1871–1918).
notably the case for Great Britain, the dominant player in the region. It is true that Great Britain had been the first European Power to settle in the Pacific and early in the century the newly established penal colony of New South Wales (NSW), jealously guarded the Australian continent’s eastern seaboard against the arrival of any other power either to its shores or elsewhere in the region. In this endeavour it was joined by like-minded New Zealand in 1840, which was initially attached to the NSW. Some scholars suggest that the colony’s early attitude was prompted by the fact that its borders were originally defined in all directions except to the east, leading to a sense of entitlement in respect of Pacific territories. The French believed that from 1871 the future ‘great Australian Empire’ had a policy of conquest of the Pacific. Indeed, Australasian aspirations grew over the course of the century: whether it was fears of French and American expansion (the interests of both these states in the region being partly prompted by the still distant prospect of a Panama canal); the need to secure trade routes such as the mid-century highway across the Pacific created by the gold rush, followed by steam travel and the need not only for coaling stations, but later cable stations. The route through the Torres Strait, just to Australia’s north and leading to China, would also become strategic, with Germany present in that area. So important was the Pacific, that these antipodean colonies’ expansionist aspirations have been widely credited with being a principal cause of Australian federation. Moreover, in 1883 the colonies of NSW, New Zealand, Queensland and Victoria would demand that Great Britain annex all the remaining Pacific territories, something that Great Britain refused to do. Indeed, and in contrast, from Great Britain’s perspective the territories of the Pacific were too small and distant to warrant expense or risk entanglement with other powers. These tensions informed British policy in the region until at least the end of the World War One.

Great Britain’s policy in the Pacific of minimum intervention (the 1840 acquisition of New Zealand being the notable exception) led it to concede territory to France that might have more readily fallen to British colonisation. This was the case of Tahiti (attached to France in 1842 as a protectorate).

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20 Brookes, *International Rivalry 1941* (n. 18), 20; Grattan, C. Hartley, *The United States and the Southwest Pacific* (Melbourne: Oxford University Press, 1961), 122.

21 Politis, Nicolas. ‘La condition internationale des Nouvelles-Hébrides’. *Revue générale de droit international public* 8 (1901), 121–152, 131.

22 Confederation and Annexation Bill, 1883. Appendix to the Journals of the House of Representatives 1884 Session 1, A-O3C, available at: https://paperspast.natlib.govt.nz/parliament/AJHR1884-I.2.1.2.6 (last accessed on 6 January 2022).

23 Note that the French tried to annex Tahiti in 1843 but were forced to back down. See Bennion, Tom. ‘Treaty-Making in the Pacific in the Nineteenth Century and the Treaty
extending to other parts of the eastern Pacific from 1842, and New Caledonia with its undefined ‘dependencies’ annexed in 1853.24 The United States, officially averse to foreign acquisition until the late nineteenth century and in any event more interested in the northern Pacific (notably Hawaii) than its southern parts, nonetheless had commercial and strategic interests in the area and was already by mid-century keen to ensure US presence in Samoa, due notably to the development of steam traffic and the excellent Samoan harbour at Pago Pago on the island of Tutuila. New Zealand had particular concerns around US expansionism and this would influence British action in Samoa and later in Micronesia.25 Great Britain’s Pacific policy was also influenced by Germany. Although Germany was initially reluctant to embark on colonial acquisitions, its stance officially changed in 1884. AJP Taylor asserts that Germany’s behaviour in the Pacific at that date was undertaken with a view to causing friction with the British in order to attract the French, although by the end of the decade relations with Great Britain reached a high point.26 With large commercial interests in the region since the mid nineteenth century, Germany ultimately annexed the Marshall Islands and part of New Guinea in 1884 and their administration was then placed in the hands of two chartered companies which lasted until 1895 in the case of the Marshall Islands, and until i889 in the case of New Guinea, at which times these territories came directly under state administration.27 Germany would complete its Pacific acquisitions in the next couple of years further to spheres of influence treaties concluded in 1885–86;28

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24 See French Notification of the Occupation of New Caledonia and the Isle of Pines by France, 24/29 September 1853, British and Foreign State Papers 76 (1884–1885), 863–864. The 29 September Notification which bore on the Isle of Pines, stipulated that the local chief would continue to govern, under French authority.

25 Generally on New Zealand-US relations, see Lissington, M. P. New Zealand and the United States 1840–1944 (Wellington: Department of Internal Affairs, 1972).

26 Taylor, Germany’s First Bid 1938 (n 3), 6, 96–98.

27 Campbell, A History of the Pacific Islands 1989 (n. 5), 163–164.

28 Understandings between Germany and France and Germany and Spain are referenced by Scholefield, Guy, The Pacific: Its Past and Future and the Policy of the Great Powers from the Eighteenth Century (London: John Murray, 1920), 103. Of particular interest here is the Declaration between Great Britain and Germany relating to the demarcation of British and German Spheres of Influence in the Western Pacific, 6 April 1886, British and Foreign State Papers 77 (1885–1886), 42.
acquiring sovereignty over the North Solomon Islands in 1885, Nauru in 1888, and in 1889 over the Mariana Islands, the Caroline Islands and Samoa.

Against that strategic backdrop, notably of the 1880s, one should also consider the actual process of colonisation in the region which was prompted by the arrival much earlier in the nineteenth century of Western traders, soon followed by missionaries. Escaped felons also roamed the region. The pattern of colonisation would thus begin as it often did elsewhere in the world, first with state control and only later acquisition. Control was first directed at unruly nationals, and to do so in the South Pacific, Great Britain initially exercised admiralty jurisdiction over British subjects on foreign soil under NSW Acts of 1817 and 1828. The 1817 Act bore on murder and manslaughter committed within islands or places not within the British dominions nor subject to the jurisdiction of any European state or the United States of America by a person sailing on a British ship or who had quit a British ship to live in such islands, and enabling the trial and punishment of such persons in any dominion of the Crown. The 1828 Act conferred jurisdiction on the Courts of New South Wales and Van Diemen’s Land (Tasmania) to try and punish offenses of whatever nature committed in the Pacific Ocean by persons specified in the 1817 Act. Neither of these Acts were effective in practice because they required apprehension and transport of offenders hundreds of miles from the islands where the crimes were committed to their place of trial. So in 1872 and 1875 two further Acts, both known as the Kidnapping Acts (officially the Polynesian Islanders’ Protection Acts), were adopted. The 1872 Act was minor, but targeted the emerging labour traffic even when unaccompanied by violence (violence being required under the 1817 and 1828 legislation), and sought to remedy other deficiencies in the previous Acts by allowing the taking of evidence outside the jurisdiction where it was assumed the defendants would be tried – the Australian colonies and New Zealand, by then separated. On the other hand, the 1875 Kidnapping Act was one of the most important to govern the British

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29 For instance Lindley, *The Acquisition* 1926 (n. 11), 182; Koskenniemi, Martti. *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), 110–112.
30 *Punishment of Offences in the Islands and on the Seas of the South Pacific*. 57 Geo III. C.53. See Jenkyns, Henry. *British Rule and Jurisdiction beyond the Seas* (Oxford: Clarendon Press, 1932), 143.
31 *Australian Courts Act*, 9 Geo IV. C. 83.
32 *Pacific Islanders’ Protection Act* (1872), 35 and 36 Vict. C 19. Not to affect the Australian Courts Act (n. 31).
33 *Pacific Islanders’ Protection Act* (1875), 38 and 39 Vict. C 51.
presence in the Pacific. And indeed it marked a decisive turning point for Great Britain’s legal stance in the region.

The 1875 Act was a response to changes in the social environment. An economic shift to plantations, especially in Fiji from the late 1850s, but particularly in the late 1860s, led both to settlement and so the increase in the number of Europeans and Americans present, as well as to a labour shortage, resulting in inter-island labour trafficking. Plantations from the Australian colony of Queensland to Peru would source labour from across the region, but particularly from the New Hebrides (now Vanuatu), Gilbert (now Kiribati) and the Solomon Islands.\textsuperscript{34} The American Civil War (1861–1865) exacerbated the problem by driving up demand for cotton.\textsuperscript{35} Local rulers struggled to control settler behaviour, including their involvement in labour trafficking, which was occasionally state tolerated.\textsuperscript{36} Regulation could as a result be difficult: for the French, for instance, keen to encourage plantations in Tahiti, indentured labour was encouraged, though where that ended and blackbirding began, could be hard to tell.\textsuperscript{37} Most of the trafficking was conducted by British subjects, but French, German and American citizens were also involved.\textsuperscript{38} Whilst maintaining its refusal to acquire territories, Great Britain found that the presence of consuls and the occasional dispatch of naval ships was insufficient to control this behaviour and from at least 1867 London was increasingly concerned about the Pacific labour trade.\textsuperscript{39}

In response, the Queensland Polynesian Labourers Act, assented to by the British in 1868, proved only a partial palliative by requiring that labourers only be brought to Queensland under licence in accordance with the terms of the legislation.\textsuperscript{40} Moreover, the Pacific labour trade supplied not only Queensland

\begin{itemize}
\item \textsuperscript{34} Scarr, \textit{Fragments of Empire} 1967 (n. 1) 16.
\item \textsuperscript{35} See Derrick, Ronald A. \textit{A History of Fiji}, vol. 1 (Suva: Fiji Government Press, 1946), 167.
\item \textsuperscript{36} Ward, John M. \textit{British Policy in the South Pacific} (1786–1893) (Sydney: Australasian Publishing Co, 1948), 160–170.
\item \textsuperscript{37} Newbury, C. W. ‘Aspects of French Policy in the Pacific, 1853–1906’. \textit{Pacific Historical Review} 27(1) (1958), 45–56, 49. For the ordonnance regulating indentured labour, see Bulletin officiel des établissements français de l’Océanie, 1864, 127.
\item \textsuperscript{38} Brookes, \textit{International Rivalry} 1941 (n. 18) 151.
\item \textsuperscript{39} Ibid., 297. For an account of how the British constructed violence at the frontier as humanitarian intervention see Banivanua Mar, Tracey. ‘Frontier Space and the Reification of the Rule of Law: Colonial Negotiations in the Western Pacific, 1870–1874’. \textit{Australian Feminist Law Journal} 30(1) (2009), 23–39.
\item \textsuperscript{40} Queensland Polynesian Labourers Act, 31 Vict., no. 47. Note that Australians had engaged early in the traffic of islanders, including Ben Boyd as early as 1847, and in the 1860s Captain Robert Towns, after whom the Queensland city of Townsville is still named. See Ward, \textit{British Policy} 1948 (n. 36), 221–222.
\end{itemize}
but also Fiji, Tahiti, Peru and other groups of Pacific islands\textsuperscript{41} and these were all unaffected by the Queensland Act. An attempt to reach international agreement with the United States in 1873 to extend the 1862 Slave Trade Treaty\textsuperscript{42} to the Pacific was the one international effort that the British undertook, but this too was unsuccessful.

The problem of law and order became so vexatious that finally, in a departure from its policy of non-intervention, the British in 1874 – a year before the Kidnapping Act – annexed Fiji, which was at the heart of the trafficking. This was done pursuant to an agreement of cession, making Fiji a ceded colony under British law\textsuperscript{43} – and for which laws were then directly promulgated and enforced under British law.

In short, the legal rationale for Fiji’s annexation was that no solution had been found to question of how to extend to Fiji Britain’s 1843 Foreign Jurisdiction Act\textsuperscript{44} and more broadly illustrated the various legal issues and tentative solutions on offer. As noted, the 1843 Act required either a treaty with a local ruler or that it be imposed as a result of sufferance (this being shorthand for ‘grant, usage or sufferance’), and in the early 1860s, the British considered that no local ruler in Fiji had capacity to confer such express or tacit permission.\textsuperscript{45}

\textsuperscript{41}  Ibid., 222.
\textsuperscript{42}  Treaty between the United States of America and Great Britain for the Suppression of the African Slave Trade, 7 April 1862, Hertslet’s Commercial Treaties 11 (1864), 1066.
\textsuperscript{43}  As a colony, Fiji became an annexed territory, British law distinguishing in respect of such territories between settled territories (e.g. the Australian colonies, Pitcairn), and ceded (Fiji) or conquered territories (often difficult to distinguish from ceded territory). Whilst British subjects in settled colonies took with them the rights of British subjects including representative government, in ceded colonies individuals only enjoyed those rights allowed to the inhabitants as the Crown chose – and hence their later name ‘Crown colonies’: Wight, Martin. British Colonial Constitutions 1947 (Oxford: Clarendon Press, 1952), 5.
\textsuperscript{44}  Foreign Jurisdiction Act 1843 (n. 6), 6 and 7 Vict. C. 94.
\textsuperscript{45}  Contrast the later Burt and Brower awards (n. 14). The 1843 Act provided that ‘Her Majesty might by Order in Council exercise jurisdiction in foreign countries where jurisdiction had been obtained by treaty, capitulation, grant, usage or sufferance’ and that such jurisdiction is the same as if the territory were acquired by conquest or cession. 6 and 7 Vict., c. 94 (n. 6). Amendments brought to the Act in 1865 (28 and 29 Vict., c. 116) and 1875 (38 and 39. Vict., c. 85) were in this regard not relevant. See Ward, British Policy 1948 (n. 36), 270 footnote 11.

Writing in 1892, Piggott asks how sufferance might coexist with treaty as a basis for the exercise of extraterritorial rights. He replies by reference to ‘The Laconia’ case that the treaty is just one form of proof of the ‘full knowledge’ required and that ‘active assent’ or ‘silent acquiescence’ suffice; ultimately the right to exercise jurisdiction not resting on the treaty per se but on natural justice. Piggott, Francis Taylor. Extraterritoriality. The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries (London: William
Various alternative solutions had been tried, beginning with the local British consul establishing in 1860 a ‘Mercantile Court of Fiji’ consisting of American and British consuls and assessors, together with a series of rules regarding land purchases; the legality of which were contested (because they were *ultra vires* under British law, though with the consent of Fiji settlers and chiefs).\(^4^6\)

State-building was also attempted when in 1865 the various Fijian chiefs, under European influence, confederated under Chief Cakobau (pronounced Thakombau) although success was tempered in 1867 by the secession and creation of a separate Confederation of North and East Fiji (the Lau Confederation). In the same year, Cakobau’s confederation was, under American settler influence, transformed into a kingdom modelled on Hawaii. This Kingdom of Bau had a system of government consisting of two chambers – one for the settlers and one for locals, with a secretary of state, ministries of war, police and courts.\(^4^7\)

The British consul refused to recognise the kingdom and warned British subjects, then about 90% of the settler population, that their rights of British protection might be prejudiced if they placed themselves under the Kingdom of Bau’s authority. As soon as the Kingdom sought to levy taxes the settlers disregarded the demands for payment and the Kingdom became dead-letter.\(^4^8\)

Thus state-building (in the image of the Western state) was in effect prevented – Fiji was trapped, unable alone to be perceived as ‘civilised’ under Western standards and effectively, because of a legal threat, unable to develop into a nation in the image of Western ‘civilisation’. Finally, in 1867, tensions brewing over a Fijian debt owing since 1858 to US nationals came to a head. Motivated in part by the need to dispense with this debt, Cakobau, not for the first time, sought to cede the islands to the British who turned down the offer.\(^4^9\) The 1867 request was however, an opportunity to revisit the possibility of the British extending consular jurisdiction to Fiji.

If in 1863, the British view was that treaty relations were not possible with Cakobau, by 1868 legal advice stated that consular jurisdiction might be

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46 Derrick, *History of Fiji* 1946 (n. 35), 151, note 8. See also McIntyre, *The Imperial Frontier* 1967 (n. 2) 220.

47 Brookes, *International Rivalry* 1941 (n. 18), 144.

48 Derrick, *History of Fiji* 1946 (n. 35), 164.

49 A previous attempt had been made in 1858, also prompted by the same debt he owed the US. Derrick *History of Fiji* 1946 (n. 35) 139. Later in 1869 expressions of interest for annexation were sought from the Americans, Prussians and French, Derrick, *History of Fiji* 1946 (n. 35), 192, prompting Australian and New Zealand anxiety, Brookes, *International Rivalry* 1941 (n. 18), 151.
possible, not on the basis of treaty or on ‘sufferance’ (as it had been in Africa in the Gold Coast50), but simply on the basis of statute. A draft Order in Council51 authorised Consuls to exercise civil and criminal jurisdiction, with prisoners and appeals to go to NSW. Disparate legal concerns then frustrated the process. There were fears that a new precedent would be set, ‘establishing a practice until then unknown’. What if the territory were acquired by another power? If the consuls exercised jurisdiction over other powers’ nationals, such as the French and Americans, then there would presumably be an expectation of reciprocity elsewhere, subjecting British subjects to French and American courts.52 Other objections were raised such as cost (always a big concern of the British in relation to empire building in the Pacific), and the need to establish courts and administration, all of which implied the presence of a government.53 The legislative process was halted.54

With consular jurisdiction dropped, discussion turned to whether NSW might annex Fiji – a few years earlier discussion was of the Australian colony of Victoria doing so. However the Australian colonies did not want the expense and felt the matter to be an Imperial one.55 By 1873 Fiji was on the point of anarchy and ultimately annexation by Great Britain was settled upon.

1.1.2 Extension of the British Machinery of State
The 1874 annexation of Fiji was for the time being the exception and the problem of labour traffic elsewhere remained. To address this problem a decision was made to exercise extra-territorial jurisdiction in those territories not subject to a ‘civilised power’ simply by statute, thus reviving the 1868 advice.

50 ‘... acquired by usage, sufferance and the tacit assent of the natives, and which were extended by treaties in the next 25 years.’ Allott, Antony N. ‘Native Tribunals in the Gold Coast 1844–1927’. Journal of African Law 1(3) (1957), 163–171, 168. Piggott cites Zanzibar as another case and believed it to be the only one: Piggott, Extraterritoriality 1892 (n. 45), 51.
51 Brookes, International Rivalries 1941 (n. 18), 158; McIntyre, The Imperial Frontier 1967 (n. 2), 223. So for instance the 1907 Order in Council relative to the New Hebrides would provide ‘Whereas by Treaty, grant, usage, sufferance and other lawful means, his Majesty has jurisdiction within the Pacific Ocean known as the New Hebrides...’, British Order in Council providing for the Exercise of His Majesty’s Jurisdiction in the Pacific Ocean Islands of the New Hebrides in accordance with the Convention of 23 October 1906, as amended by Notes of 29 August 1907, London 2 November 1907, British and Foreign State Papers 100 (1906–1907), 119. Emphasis added.
52 Brookes, International Rivalries 1941 (n. 18), 158.
53 Ibid.
54 McIntyre, The Imperial Frontier 1967 (n. 2) 223.
55 See generally Fawcett, James E. S. The British Commonwealth in International Law (London: Stevens & Sons, 1963) on colonies’ legal competencies under the law of the British Empire.
Crucially, the 1875 Kidnapping Act’s scope was extended beyond its original aim of regulating labour traffic, to providing for jurisdiction more broadly over British subjects in territories of the Pacific not subject to any ‘civilised power’; section 6 stipulating that it was:

lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean not being within Her Majesty’s dominions, nor within the jurisdiction of any civilized power in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory.56

This was novel legislation, a unilateral decision to exercise sovereign competency, including enforcement jurisdiction, over nationals in foreign territory. Moreover, when operationalised in 1877, the Act’s geographic scope of application would be extensive, only later reduced as territories fell to the spheres of influence or sovereignty of other powers.57 At the same time, section 7 of the Act was stated to apply only to territories over which the British did not claim sovereignty nor those falling within the jurisdiction of ‘any civilized power’:

nothing herein or in any such Order in Council contained shall extend or be construed to extend to invest Her Majesty ... with any claim or title whatsoever to dominion or sovereignty over any such islands or peoples inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion.

Equally significant, and in order to preclude any perceived British need for future annexations in the region, the 1875 Kidnapping Act, also by its section 6 envisaged the creation of a court – what would become the Western Pacific High Commission (WPHC). The 1877 Order in Council operationalising this decision conferred on the WPHC extensive powers, creating a court with civil, criminal and admiralty jurisdiction. Whilst no treaty-making power was conferred on the High Commissioner in 1877, two years later he acquired limited authority to ‘make regulations to enforce on British subjects [only] observance of any... and between Her Majesty and any King, Chief or other authority in

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56 Section 6, Pacific Islander Protection Act 1875, 38 and 39 Vict., c. 51.
57 Contrast in this regard section 5, 1877 Order in Council (British and Foreign State Papers 68 (1886–1887), 325) creating the WPHC and defining its scope of operation with section 4 of the 1893 amendment (Hertslet’s Commercial Treaties 19 (1895), 570) which is circumscribed to British protectorates and territories.
the Western Pacific Islands and for ensuring friendly relations between British subjects and those authorities.\textsuperscript{58} In 1881 the High Commissioner indicated that he would register land titles acquired by British subjects in the independent territories, making them enforceable. Moreover, any governor in the Australian colonies or Fiji could deliver licences for Pacific Islander labour. Thus British machinery of state was being established in areas over which the British did not claim sovereignty. The Navy’s intervention was still deemed ‘necessary’ as the Order did not extend jurisdiction to situations where British subjects were the victims of crimes committed by foreigners in foreign territory\textsuperscript{59} (which is to say the local population); a task that it had nonetheless informally exercised since the 1850s.\textsuperscript{60} In sum, McIntyre describes the WPHC as ‘an experiment in providing order and jurisdiction without assuming sovereignty – an exercise, in fact, in informal empire.’\textsuperscript{61} And indeed the WPHC would become the administrative vehicle for British colonial expansion in the Pacific.

Consolidation of jurisdiction occurred over the following decades. Because the 1875 Kidnapping Act only applied to territories not within the jurisdiction of ‘any civilised Power’, Tonga and Samoa, as recognised ‘civilised powers’, were instead a priori subject to the 1843 Foreign Jurisdiction Act.\textsuperscript{62} The situation of Samoa was however complicated as a result of civil war in 1875, which according to the British, meant Samoa was incompetent to sign a treaty, there being no government, prompting the adoption of the Foreign Jurisdiction Amendment Act of 1878 which provided that ‘where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction’ Great Britain would have jurisdiction.\textsuperscript{63} The exercise of consular jurisdiction was further and significantly consolidated by the 1890 Foreign Jurisdiction Act since it now applied both to territories recognised by Britain as states as well

\textsuperscript{58} Section 7, Western Pacific Amendment Order (1879), Hertslet’s Commercial Treaties 14 (1883), 871.

\textsuperscript{59} Scarr, Fragments of Empire (n. 1), 47–49.

\textsuperscript{60} Ward, British Policy in the South Pacific 1948 (n. 36), 172.

\textsuperscript{61} McIntyre, The Imperial Frontier 1967 (n. 2), 355.

\textsuperscript{62} After Tonga became a British protectorate in 1900 (a Protected State in the terminology of the British law), by imperial order of 26 June 1932, Germany renounced its capitulatory rights in Tonga effective 1 September 1932 and the United States, likewise on 28 July 1919 when the UK notified the American government of the denunciation of the treaty of 2 October 1886, on behalf of the Queen of Tonga; Liu, Extraterritoriality 1925 (n. 16), 142.

\textsuperscript{63} Foreign Jurisdiction Amendment Act (1878), 41 and 42 c.67. When, however, the US concluded their treaty of friendship with Samoa in 1878 the British resolved that the unamended 1843 Act could in any event apply in Samoa as well. Bennion, ‘Treaty-Making in the Pacific’ 2004 (n. 23), 197.
those territories that neither benefitted from this recognition nor were in the hands of another ‘civilised’ power.  

Soon after, Great Britain would declare protectorates over a number of the Pacific territories subject to the Act, including the Gilbert and Ellice groups (today Kiribati and Tuvalu) in January and September 1892 respectively, as well as the Solomon Islands in June 1893. At least one author suggests that the former were undertaken pursuant to agreements between the local chiefs and Great Britain, as then required under general international law where political communities existed. The obligations subscribed to by treaty were considered moral not legal though views have varied. Whilst no agreement was concluded in respect of the Solomon Islands, British legal opinion of the time considered that if an administration were established, this defect could be cured. Indeed, another author points out that when it came to the Gilbert and Ellice groups (today Kiribati and Tuvalu), there was no formal treaty, but merely evidence of a negotiation. In New Guinea, the local chiefs were simply told of the proclamation of a British protectorate in November 1884. So too in 1888, when the British declared a protectorate over the Cook Islands, the Chiefs were merely informed. Clearly, in the eyes of the powers, these were not protectorates of the Law of Nations but colonial protectorates proclaimed in relation to territories whose local rulers were often (though depending on the legal source consulted) not considered sovereign under international law. At the same time, as colonial protectorates the territories remained foreign under British law, whilst also signalling to other powers an entitlement to annexation within the protectorate boundaries (often themselves defined by prior spheres of influence treaties). As such the concept was more a political rather than

64 Section 2 provided: ‘Where a foreign country is not subject to any government from which Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty’s subjects for the time being resident in or resorting to that country and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act.’
65 Bennion, ‘Treaty-Making in the Pacific’ 2004 (n. 23).
66 The Berlin Act was in this regard considered a codification of general international law: Lindley, The Acquisition of Backward Territory 1926 (n. 11), 148.
67 Contrast for instance Wight, British Colonial Constitutions 1952 (n. 43), 8–9 with Bennion, ‘Treaty-Making in the Pacific’ 2004 (n. 23), 177.
68 Lindley, The Acquisition of Backward Territory 1926 (n. 11), 176.
69 Morrell, Britain in the Pacific 1960 (n. 23), 274 and 277; picked up by Bennion, ‘Treaty-Making in the Pacific’ 2004 (n. 23), 177.
70 Morrell, Britain in the Pacific 1960 (n. 23), 257–258.
71 Ibid., 285, Bennion, ‘Treaty-Making in the Pacific’ 2004 (n. 23), 179, fn. 74.
72 Supra (n. 28).
a legal category, the substance of the situation rather than its form (or title) being determinative of the legal status of the territory involved.

Indeed, consular jurisdiction under the 1890 Act would be exercised differently according to the type of territory to which the Act was being applied. Jurisdiction remained strictly consular in the case of protectorates with which formal treaties had been concluded – in the Pacific, more or less the only case of Tonga. In the case of colonial protectorates however, jurisdiction extended to judicial and administrative functions, as it had done unofficially since the 1850s, the territory remaining foreign until annexed as a Crown colony (the case for instance of Gilbert and Ellice from 1916).

In 1893 the WPHC was officially transformed into a colonial administration, applicable to territories under British sovereignty or control. Jurisdiction was extended to subjects of the other powers and to some locals. The WPHC’s jurisdiction thus extended to territories of differing legal nature, principally: the Gilbert and Ellice Islands Colony (GEIC), including the Phoenix Group since 1937, which included Canton and Enderbury, under the joint control of the British and the US; the British Solomon Islands Protectorate, Tonga (a Protected State), New Hebrides (a condominium with France) and Pitcairn Island (a settled colony); as well as sundry islands. The High Commissioner had direct legislative authority in three out of the five dependencies: GEIC (after periods of protection, various islands were brought within the colony between 1915 and 1937), the Solomon Islands (a colonial protectorate), Pitcairn (a settled colony with its own constitution and a legislature, chief magistrate

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73 Alexandrowicz, ‘Le rôle des traités’ 2017 (n. 14), 227; Crawford, James R. C. The Creation of States in International Law (Cambridge: Cambridge University Press, 2nd ed. 2007), 299–300.
74 Crawford, ibid, 300.
75 In these cases, jurisdiction over residents from foreign powers stemmed from the general international law provisions found in an Order of the Berlin Act (1885) relative to Africa, see Scarr, Fragments of Empire 1967 (n. 1) 255; Lindley, The Acquisition of Backward Territory 1926 (n. 11), 300.
76 Wight, British Colonial Constitutions 1952 (n. 43), 10; Fawcett, The British Commonwealth 1963 (n. 55), 124 et seq.; Ward, British Policy in the South Pacific 1948 (n. 36), 171.
77 Wight, British Colonial Constitutions 1952 (n. 43), 19 since although consisting of 146 clauses, dealing with courts, law, rules of procedure, and registrations, only one clause concerns the establishment of a legislature.
78 Pacific Order in Council of 1893, British Foreign and State Papers 85 (1892–1893), section 4, 1957–1958. The revamped WPHC has been described as ‘most legally undeveloped constitution of the [British] Empire’ Wight, British Colonial Constitutions 1952 (n. 43), 19.
79 Pacific Order in Council of 1893, British Foreign and State Papers 85 (1892–1893), section 5, 1958.
80 Wight, British Colonial Constitutions 1952 (n. 43), 76.
and four other officers, all under the authority of the WPHC). The other two territories under WPHC jurisdiction were Tonga, a Protected State governed by constitutional monarchy, and the New Hebrides, a condominium — and on which further below.

Thus, by combining the regulation of different types of territorial unit under the one law – the Foreign Jurisdiction Act –, and under one administration – the WPHC –, these territories had become colonies in everything but (municipal) legal status. In this way, joint governance, a recurring phenomenon in the Pacific, consolidated and furthered the colonial project. This would continue to be the case well into the twentieth century as will be seen in Section 2 below.

1.2 Economic Ends: Concessions and ‘Appurtenances’

If the protectorate was a legal mechanism that split internal from external sovereignty thereby shielding the protecting state from responsibility for domestic issues, leases were another method of gaining control of a territory without responsibility. Leases and lease-like arrangements were quite commonly used at the end of the nineteenth century. So-called leases in perpetuity were created by unequal treaties and ‘ran with the land’, entitling the state lessee to exercise exclusive jurisdiction and control over the territory, which is to say all the attributes of sovereignty. Sometimes described as disguised cessions, — and indeed, the presence of such leases tended to put an end to consular jurisdiction in the territories concerned, — leases in perpetuity were common practice for the European Powers in China and in US practice in the Americas. Perpetual leases were not, however, a feature of South Pacific colonisation, at least in their pure form; which is to say as a result of a treaty between two states. Instead, variants existed that built on a private law conception of territory as property. A spectrum of legal practices surrounded the exploitation of a foreign territory’s resources and as in the previous section, they relied upon municipal law of the Western powers. In most cases, the grant by a power of a concession to a company in respect of a foreign Pacific island territory would be an immediate precursor to the actual acquisition of title, whether in respect of a terra nullius or politically organised territories. But some British and US practice sought through the use of municipal law, mere control, without the responsibility entailed by sovereignty.

81 Wight, British Colonial Constitutions 1952 (n. 43), 76.
82 Ibid., 8.
83 See Liu, Extraterritoriality 1925 (n. 16), 18.
Unlike the perpetual leases described above, temporary leases or concessions were a feature of British Pacific practice. Where the territories wereterrae nullius, these concessions were necessarily created by unilateral act rather than agreement. In some cases despite an avowedly economic purpose, the conferral of these concessionary rights might at the same time constitute displays of sovereign competence, depending on whether the acts were à titre de souverain and the requisite intention to occupy was present.84 The British grant of concessions was indeed in some cases a means of acquiring title by settlement.85 But in other cases, the leases were temporary. Instances of the British granting leases to private companies for the mining of guano in Pacific territories now part of Kiribati, but over which it was not sovereign at the time of the grant, include: Flint Island and Malden;86 Kirimati (or Christmas) Island from 186587 – an island that was only permanently settled in 1882 when plantations and a fishing industry were established –; and Starbuck Island where a concession was granted in 1866.88 Lindley points out that the Kirimati lease was temporary and that ‘it would seem that the grant of the leases amounted to the exercise of a partial sovereignty which was good as against any state that could not show a prior title’.89 In this way, other powers were excluded (and on which further see Part 2) but the economic exploitation of the territory was carried out without any immediate claim to its sovereignty. In terms of French practice one can note that the concession granted over Clipperton Island, a terra nullius, also occurred prior to that state’s declaration of sovereignty over the island and was the act supporting the French claim.90 Of course

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84 Note that Pacific practice is not generally seen to require effective occupation; occupation alone, albeit à titre de souverain being considered sufficient for acquisition of title to a terra nullius. Orent, Beatrice and Pauline Reinsch. ‘Sovereignty over Islands in the Pacific’. *American Journal of International Law* 35(3) (1941), 443–461, cited by Hébié, Mamadou. ‘The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion’, in *Research Handbook on Territorial Disputes in International Law*, eds. Marcelo G. Kohen and Mamadou Hébié (Cheltenham: Edward Elgar, 2019), 36–86, 83.

85 Hall, *A Treatise* 1894/1979 (n. 10) 233.

86 Rousseau, *Droit international public*, vol. III (Paris: Sirey, 1974), 153.

87 Initially granted in 1865, cancelled in 1869, renewed in 1871 – with the island annexed by the British in 1888. The US also claimed Kirimati on the basis of the Guano Islands Act (1856).

88 Ward, *British Policy in the South Pacific* 1948 (n. 36), 161.

89 Lindley, *The Acquisition and Government of Backward Territory* 1926 (n. 11), 7.

90 The concession was granted on 8 April 1858 and sovereignty proclaimed in November 1858. King of Italy, *Clipperton Island Case (France v Mexico): Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*.
each concession had to be assessed on its merits to determine whether it was granted with an intention to occupy.

Controversial as a category in itself were acts performed by US citizens in respect of terrae nullius pursuant to the Guano Islands Act of 1856, and later occasionally argued by the US, to constitute proof of title to territory.91 Ideologically averse to colonisation (at least until the end of the century) the US nonetheless had an interest in the Pacific’s resources, notably in Micronesia, as well as strategically located territories that could be used for coaling or cable stations. Under the 1856 Guano Islands Act private US citizens could, subject to conditions, claim uninhabited islands, islets, cays as well as rocks, for guano production, with the consequence that the territory would then ‘appertain’ to the US.92 The term sovereignty was not used in the Act, but did appear in earlier iterations of the bill. The term’s absence has led some authors to conclude that the 1856 Act did not necessarily refer to sovereignty.93 Moreover, a claimant might, pursuant to be the Act, be granted the exclusive right to exploit the resource until it was exhausted, making the grant a temporary one only and thus arguably depriving it of the requisite intention to acquire title by occupation. Whilst US court cases were ambiguous on the matter, even favouring sovereignty in the sense that the territories ‘belonged’ to the United States even if they were not part of it, in practice, the US executive repeatedly denied that it was sovereign over these territories.94 This mechanism enabling the exploitation of resources in foreign lands can arguably thus be seen as an approximation of a lease-type arrangement in that full use of the land is conferred without responsibility. It was, as Duffy Burnett concludes, an attempt to acquire the benefits of empire, without the burdens of sovereignty.95

There were cases in the Pacific where, despite the broader policy of non-acquisition of title, the resources were so exceptionally valued, such as the

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91 For instance US claims in relation to Kirimati or to Canton and Enderbury. For the Act itself: US, Guano Islands Act, 18 August 1856, 48 U.S.C. § 1411.
92 See Duffy Burnett, Christina. ‘The Edge of Empire and the Limits of Sovereignty: American Guano Islands’. American Quarterly 57(3) (2005), 779–803.
93 The view taken by Kohen, Marcelo G. Possession contestée et souveraineté territoriale (Geneva / Paris: Graduate Institute Publications / Presses universitaires de France, 1997), 220. See also Smith, Robert W. ‘The Maritime Boundaries of the United States’. Geographical Review 71(4) (1981), 395–410, 410 where his view on the 1856 Act is that: ‘[t]he American claim had virtually no legal merit ...’.
94 Duffy Burnett, ‘The Edge of Empire’ 2005 (n. 92), 797. Court decisions include Jones v United States 137 US 202 (1890), Downes v Bidwell 182 US 244 (1901).
95 Duffy Burnett, ‘The Edge of Empire’ 2005 (n. 92), 798.
phosphate rich territories of Nauru and Banaba (Ocean) Island, that acquisition of title was prompt and legally straightforward. This has been noted above in respect of terrae nullius. In respect of territories that were not terrae nullius, legal approval under the relevant power's municipal law of the economic exploitation of resources in foreign territory again tended to precede, almost immediately, acquisition of title to the territory. This was the case in both Nauru and Banaba (Ocean) Islands, the two phosphate rich territories of the Pacific mercilessly exploited for their resources.

Pursuant to the Anglo-German treaty of 10 April 1886, Nauru fell within German sphere of influence and was placed within Germany’s Marshall Islands Protectorate in April 1888 (meaning under the Schutzgebiet system that almost immediately sovereignty would be acquired by unilateral imperial decree). No agreement was reached with the Nauruan chiefs – the island was simply seized, with the chiefs held hostage and told on 1 October 1888 that the island now fell to German sovereignty. But it was earlier, in January 1888, that the German Jaluit trading company secured concessionary rights from the German Imperial government, albeit with respect to land not already owned by the indigenous population, whose private rights were thus respected. As noted, actual control of Nauru by the Jaluit Company on behalf of the Imperial government would not occur until October 1888. In 1900 the Jaluit Company assigned its rights to mine Nauru’s phosphate to the British owned Pacific Islands Company in exchange for royalties from mining both on Nauru and neighbouring British controlled Banaba Island. Mining would only begin in 1907. With the outbreak of World War One, Nauru was seized by Australian troops and would remain in the hands of the British – governed from the WPHC – until 1921 when the Mandates system was created. Thus when mining began, the territory was under German sovereignty but the legal enabling occurred, in the eyes of the German trading company, prior to German acquisition of the territory.

In the case of Banaba (Ocean) Island, located 191 miles from Nauru but within the British sphere of influence, the local population granted by agreement of 3 May 1900, an initial 99 year lease for the exploitation of guano (in

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96 Morrell, Britain in the Pacific 1960 (n. 23), 269.
97 This account is given by Certain Phosphate Lands in Nauru (Nauru v Australia), Memorial of the Republic of Nauru, vol. 1, April 1990, 6–8. Another account indicates in contrast that the concession was granted in 1905: Charteris, Archibald H. ‘The Mandate over Nauru Island’. British Yearbook of International Law 4 (1923–1924), 137–152, 138.
98 This history is detailed in Certain Phosphate Lands in Nauru (Nauru v Australia), Memorial of the Republic of Nauru, vol. 1, April 1990, 6–8.
99 Ibid., 12.
exchange for £50-rent per year) to Pacific Islands Company.\textsuperscript{100} On the same day the British flag was hoisted but it was not until an elaborate ceremony a year later on 28 September 1901 that Ocean Island was placed within the Gilbert and Ellice Island Protectorate;\textsuperscript{101} an apparently unilateral move undertaken to render the phosphate exclusive to the Pacific Islands Company.\textsuperscript{102} The Pacific Phosphate Company, a reconstituted Pacific Islands Company, circumvented the obligations it had not to remove phosphate where there were trees or by acquiring locally owned land, by covenanting with the owners the transfer of the phosphate on their lands.\textsuperscript{103} The Colonial Office sought legal opinion on how the Banabans might be protected and a negotiated settlement between the Company and Colonial Office resulted, marginally improving the financial compensations paid to the local inhabitants.\textsuperscript{104} Ultimately Banaba’s population was removed by the British to the Fijian island of Rabi, where they enjoy special status under the Kiribati constitution – under whose sovereignty Banaba (Ocean) Island currently falls.

Thus it can be seen that during the colonisation process economic drivers were occasionally such that they prompted swift acquisition of title. For the US, averse to colonisation, the 1856 Guano Islands Act was a mechanism, not entirely dissimilar to the lease, to acquire control without sovereignty. For the British, temporary leases were a means of reserving resources to themselves, to the exclusion of other powers but again, without the expense and other responsibilities entailed by the acquisition of title to sovereignty.

2 Geo-Strategic Ends and Joint Colonial Governance in the South Pacific: Neutralisation and the Condominium

The joint exercise of authority over Pacific territories had been in the contemplation of Western powers quite early. For instance the British Colonial Office suggested in the late 1860s that Fiji should be placed under the joint protection of the Australian colonies and this remained in contemplation until 1870.\textsuperscript{105} Short of resources the colonies asserted that it was an Imperial matter to be dealt with from London. Indeed, the British counted on the offer being

\textsuperscript{100} Scarr, \textit{Fragments of Empire} 1967 (n. 1), 270.
\textsuperscript{101} Morrell, \textit{Britain in the Pacific} 1963 (n. 23), 279.
\textsuperscript{102} See Scarr, \textit{Fragments of Empire} 1967 (n. 1), 270–271.
\textsuperscript{103} Ibid., 272.
\textsuperscript{104} Ibid., 276–278.
\textsuperscript{105} Ward, \textit{British Policy in the South Pacific} 1948 (n. 36), 202.
refused.\textsuperscript{106} The joint exercise of authority would nonetheless become quite common in the region at the end of the nineteenth century and when undertaken by sovereign states could follow one of several models. A legal model of particular interest in the Pacific, is the condominium.

The term condominium is often used to cover different situations.\textsuperscript{107} Broadly defined by Politis in 1901 as leaving a territory in a state of ‘in-division’ meaning that it cannot be unilaterally divided, in a strict sense a condominium is a situation of joint sovereignty – one in which the territory in question is foreign to the each of those states participating in the condominium and has therefore been characterised by Coret as sovereignty vesting in a ‘partial international community’.\textsuperscript{108} Three situations have been broadly termed condominiums in the Pacific: Samoa from 1889 to 1899, the New Hebrides from 1887/1906 to 1980, and Canton and Enderbury, two strategically located islands in the Phoenix Group in what is now Kiribati, from 1939 to 1979. In each case the legal regime was a mechanism for managing the participating powers’ rivalries; as Moye states, a means of keeping each on a footing of equality and precluding each of them from gaining individual control of the territory.\textsuperscript{109} Indeed, sometimes easily confused with the condominium, and often a precursor to it, the neutralisation of territory, was also quite common in the late nineteenth century in the South Pacific. The powers neutralised a territory by agreeing not to acquire it, thereby excluding each other’s preponderance of influence. It can be contrasted to the spheres of influence or paramountcy treaty in which the powers, generally as a precursor to the creation of a colonial protectorate, reserved a territory for themselves. The neutralisation treaty generally preceded the creation of joint governance. As a form of joint exercise of authority, in practice condominium regimes tended to be particularly chaotic.

\subsection*{2.1 Joint Protectorate over Samoa}
Samoa’s joint protectorate of 1889–1899 was also the culmination of several attempts at joint governance of the island group. Rousseau considers that it was a (joint) protectorate within the strict legal meaning – created by treaty between protected and protector states, with the external affairs power reserved for the protector states; as opposed to being a colonial protectorate,
whose legal features, he admits, jurists have had trouble defining, although as seen above, is perhaps best viewed as an agreement between powers inter se to reserve territory for themselves. Certainly, the immediate legal difference with the model established by France and the United Kingdom in the New Hebrides is that the Samoan king consented to the imposition of the protectorate there, at least formally, whereas no local administration accepted by treaty the regime imposed in the New Hebrides. If the Samoan situation is indeed one of a true protectorate, then it is one of only two joint protectorates catalogued in the nineteenth century.

The powers’ interests in the Samoan islands readily explains the 1889 legal outcome of a joint protectorate. Of the four principal powers in the Pacific in the mid to late nineteenth century, France had little interest in Samoa, content with its 1853 acquisition of New Caledonia. On the other hand, Samoa was a significant German trading station from the 1850s and a consul was located there from 1871. Indeed, Samoa became Germany’s most important Pacific interest, but, as noted, until 1884 Germany had no interest in acquiring colonies. The Americans were particularly interested in the deep water harbour at Pago Pago and the communications advantages the territory presented. Due to whaling activities, a US consul had been established there as early as 1839. Indeed the US administration of President Grant favoured Samoa’s annexation but Congress did not support the move. If, after 1884, Germany would seek to annex Samoa, the US preferred local sovereignty, preferably under its influence (much in the same way as it had operated in Fiji). The British were not interested in Samoa, except to the extent that its Australasian colonies, notably New Zealand, were particularly keen to acquire the territory. Indeed, after Germany’s 1884 annexation of New Guinea and in the midst of the Samoan crisis (detailed below), New Zealand expressed interest in a federation with Samoa and was prepared to pay for Samoa and Tonga’s annexation to New Zealand. Until 1884, none of the powers were interested in its acquisition.

That said, the exclusion of the other powers from the Samoan island group was sought by the Western powers in the Pacific. Thus in terms of legal relations, on 3 July 1877, Germany concluded a treaty with Samoa establishing consular jurisdiction but also prohibiting Samoa from granting preferential

110 Rousseau, Charles. Droit international public, vol. 11 (Paris: Sirey, 1974), 277.
111 Rousseau also cites the joint protectorate over Krakow from 1815–1846 under the common protection of Austria, Prussia and Russia pursuant to the treaties of 3 May annexed to the Final Act of the Congress of Vienna of 9 June 1815, ibid.
112 Brookes, International Rivalries 1941 (n. 18), 29.
113 Scholefield, Guy. The Pacific 1920 (n. 28), 154; Ward, British Policy in the South Pacific 1948 (n. 36), 304.
trading rights to other powers and, on Germany’s interpretation, prohibiting Samoa from accepting protection of another power.114 However, a few months later, on 17 January 1878, Samoa concluded a treaty of amity and commerce with the US, which in addition to securing consular jurisdiction also secured trading rights, including most favoured nation (MFN) status, and provided to the US the right to offer good offices should Samoa have a difference with another power – something the Germany saw as a breach of its 1877 treaty with Samoa.115 This led to a second German-Samoan treaty, concluded on 24 January 1879, establishing consular jurisdiction and securing for Germany the same trading rights as the US, including MFN treatment. Finally, on 28 August 1879 Samoa concluded a treaty with Great Britain that was in the same terms as the ones concluded with the US and Germany. Because of the similarity of their terms, these three treaties have been characterised by Moye as in effect a first attempt at condominium.116

Indeed, only a few days after the conclusion of the Anglo-Samoan treaty, WPHC High Commissioner, Gordon, proposed a condominium over the municipality of Apia. This was a compromise solution: Samoa having again descended into civil war and an offer by the Samoan king first of cession to the British and then of joint protection by the three powers, both having been rejected. Gordon’s solution, confined to Apia, was implemented by the treaty of 2 September 1879117 concluded between the three powers (represented by their consuls and ships’ captains then in port) and which the Samoan king then accepted.118 The agreement created a municipal council made up of the powers’ three consuls (article 2), conferring on them the right to make and enforce regulations (article 3), tax buildings and lands (article 4), and appoint a magistrate in the Apia district (article 5). Moreover, the district was neutralised in the event of civil war (article 9). The agreement explicitly provided that the Samoan flag would fly over the municipality and that territorial integrity was ‘in no way prejudiced’ (article 8). The agreement was to last for four years (article 10) and whilst not officially renewed (and so as a matter of law, it lapsed), would in effect last for so long as the powers could not decide on

114 Scholefield, The Pacific (n. 28), 149–150.
115 See ibid., 150.
116 Moye, ‘La question des îles Samoa’ (n. 109), 129.
117 Convention between Great Britain [Germany and the United States] and the King and Government of Samoa for the government of the Town and District of Apia, 2 September 1879, British and Foreign State Papers 70 (1878–1879), 294–296.
118 Grattan, C. Hartley. The Southwest Pacific to 1900 (Ann Arbor: University of Michigan Press, 1963), 488; Ward, British Policy in the South Pacific (n. 36), 296.
Samoa’s sovereignty – some twenty years.\textsuperscript{119} For the time being, there was control by the powers with little responsibility. There was at this point no transfer of title.

In 1884, the year in which German colonial policy changed, the German consul in Samoa forced the local chiefs to sign a treaty under duress, by which Samoan independence was renounced in favour of a joint regime with the Germans.\textsuperscript{120} Germany claimed that the envisaged co-governance regime was an extension of the 1879 treaty and claimed that it did not encroach on Samoan independence.\textsuperscript{121} The Staatrath (as the envisaged regime was known) was to consist of the consul, two Samoans and two Germans and was to legislate in common for both Germans and Samoans. Germany had the preponderance of influence and this prompted the British to feel entitled to the same pursuant to the terms of their 1879 treaty. One feature of the arrangement concerning consular jurisdiction was that a German defendant in criminal matters would face a joint court comprised of a Samoan and a German judge, rather than being tried by a German court.\textsuperscript{122} Alexandrowicz points out however that it was not unusual in nineteenth century practice, particularly German practice, for joint courts to sit to resolve disputes between Europeans and locals.\textsuperscript{123}

Whilst the 1884 German-Samoa Treaty would never be implemented, German annexation of Samoa nonetheless looked imminent. Indeed, at a conference of the three powers convened in Washington in 1887 to resolve the ongoing situation, Great Britain supported German control of the island group subject to the maintenance of Samoan autonomy and the rights of the other powers. The powers also contemplated making one of the powers (Germany) a mandatory or trustee on behalf of itself and the other two.\textsuperscript{124} However, the US insisted on the absolute equality of the powers and so the conference failed.

Samoa had meanwhile descended into war (1887–1889); a rebellion against the German led regime in Samoa, probably American instigated, famously brought the three powers close to armed conflict. The powers reconvened

\textsuperscript{119} Grattan, \textit{The Southwest Pacific} 1963 (n. 118), 488. Ward details how this would inspire the New Hebrides regime: Ward, \textit{British Policy in the South Pacific} 1948 (n. 36), 298.

\textsuperscript{120} Agreement between Germany and Samoa with reference to jurisdiction over German residents in Samoa, 10 November 1884, \textit{British and Foreign State Papers} 75 (1883–1884), 508–510, 508.

\textsuperscript{121} Scholefield, \textit{The Pacific} 1920 (n. 28), 157; Ward, \textit{British Policy in the South Pacific} 1948 (n. 36), 303.

\textsuperscript{122} Agreement between Germany and Samoa 1884 (n. 120), art. 4, 509.

\textsuperscript{123} Alexandrowicz, Charles. ‘The Role of Treaties in the European-African Confrontation in the Nineteenth Century’, in Armitage/Pitts, \textit{The Law of Nations} 2017 (n. 14), 259–302, 296–297.

\textsuperscript{124} Ward, \textit{British Policy in the South Pacific} 1948 (n. 36), 308.
in Berlin in 1889 and on 14 June 1889 concluded the treaty creating the joint protectorate\(^{125}\) – a treaty to which Samoa was not a party, but to which the Samoan King later assented.\(^{126}\) The Berlin Treaty (1889) in effect replicated the Apia municipality regime and achieved two things: neutralisation of the island group and the creation of a joint protectorate.

Writing in 1899 Moye considered the neutralisation to be unique: it operated inter se the three powers to preclude any one of them from annexing or occupying the territory and had nothing to do with protecting Samoa from other powers or imposing obligations of demilitarisation.\(^{127}\) In fact there are multiple instances of such neutralisation in the Pacific. Thus as early as 1847 France and Great Britain entered an agreement ‘never to take possession ... either absolutely or under the title of Protectorate or in any other form whatever’ of the (now French Polynesian) islands of Huahine, Ra‘iatea, Borabora and adjacent islands.\(^{128}\) These islands would nonetheless ultimately be annexed by France on 16 March 1888. In 1878 the French and British would achieve a neutralisation of the New Hebrides in the same manner as they would do eleven years later in Samoa.\(^{129}\) And in 1885 the British Under-Secretary for the Colonies R. H. Meade contemplated, in a conversation over New Guinea with Dr Busch, Chancellor Bismarck’s private secretary, a similar regime for many of the ‘quasi-civilised islands’ of the region, claiming that the powers should all mutually respect their independence\(^{130}\) – an idea that did not come to pass. This type of neutralisation is in effect a ‘negative’ spheres of influence treaty, designed to exclude the preponderance of influence of any one of the parties rather than conferring it.

In addition to neutralising the territory, the Berlin Treaty (1889) created a protectorate. In proclaiming Samoan independence, the treaty has the appearance of creating a traditional, if joint, protectorate. This is arguably the case as a matter of law but the terms of the treaty also subordinate the territory in respect of its internal governance. Thus, taxes, customs, land sales, the

\(^{125}\) Final Act of the Conference on the Affairs of Samoa, 14 June 14, 1889, British and Foreign State Papers 81 (1888–1889), 1058–1072, 1058.

\(^{126}\) The Samoan King assented to the Treaty of Berlin on April 19, 1890.

\(^{127}\) Moye, ‘La question des îles Samoa’ 1901 (n. 109), 135.

\(^{128}\) Declaration of the Plenipotentiaries of Great and France acknowledging the Independence of the Islands of Huahine, Raiatea, Borabora and the small islands adjacent thereto, in the Pacific Ocean, 19 June 1847, Hertslet’s Commercial Treaties 8 (1851), 998–999, 998. Morrell, Britain in the Pacific 1960 (n. 23), 188.

\(^{129}\) ‘Correspondence between Great Britain and France respecting the Independence of the New Hebrides Group’ January-February 1878, British and Foreign State Papers 69 (1877–1878), 691.

\(^{130}\) Scholefield, The Pacific: Its Past and Future 1920 (n. 28), 139.
Supreme Court and the Apia municipality were all subject to the three powers acting jointly, although when it came to the removal of the Chief Justice, the three powers could act by majority, leaving some influence to at least one power acting alone. Thus arguably only a legal fiction of local sovereignty was maintained whilst as a matter of fact it was abrogated. The matter might appear complicated by the fact that some authors argue that the 1887–1889 civil war in Samoa had extinguished Samoan sovereignty prior to the 1889 Berlin tripartite agreement – in which case the situation certainly could be likened to a colonial protectorate.

Was the protectorate itself (i.e., the protecting entity) a condominium? To the extent that the powers could only act jointly in respect of internal matters suggests a condominium; namely, a legal person distinct from the three powers. But it was arguably not a perfect illustration as, minor though this is, a single state could legally exert some influence when it came to the removal of the Chief Justice.

In sum, in addition to being a neutralisation treaty requiring the powers to abstain from gaining sovereignty in their own right in order to maintain the equality of influence, the Berlin Treaty (1889) also created a regime very closely approximating a condominium in the strict sense of that term by vesting with regard to the positive obligations of governance, the attributes of sovereignty in entities independent of the three powers. However, if the Samoan king remained, as a matter of law, sovereign, – thus making Samoa vis-à-vis the condominium a protectorate –, the de jure distribution of sovereignty’s attributes (but not sovereignty itself), vesting in the condominium, meant that the powers, via the condominium had the benefits of sovereignty without its de jure responsibilities. Power without responsibility was thus acquired – assuming that the condominium institutions could themselves function.

In 1899 the regime fell apart and a new tripartite agreement would be concluded. Further to the Tripartite Convention of 2 December 1899 the US took the east of Samoa including Tutuila and its port at Pago Pago, with Germany and Great Britain agreeing to partition the west. Great Britain would use Samoa to exchange influence with Germany in New Guinea. Under the slightly earlier Anglo-German agreement of 14 November 1899, Germany took all of the west of Samoa and renounced any rights in Tonga and Niue in favour of Great Britain; gave Great Britain the Solomon Islands south of Bougainville and Buka; adjusted boundaries in West Africa; and renounced its extraterritoriality.
in Zanzibar. Each of the powers renounced their extraterritorial rights in the part falling under the sovereignty of the other.133

2.2 New Hebrides

Aware that the Samoan experiment would not work,134 the British nonetheless pursued the same policy – and for broadly the same reasons – in respect of the New Hebrides (pre-independence Vanuatu). Australian, rather than New Zealand, agitation for the island group’s annexation was the immediate motivating factor. On the other hand, the French had been passive in respect of the New Hebrides since New Caledonia’s annexation ‘with dependencies’ in 1853. Not wishing to acquire the territory and because of complications with the French elsewhere, the British also remained non-interventionist despite the increasing clamour from the Australian colonies. The matter was partially resolved in 1878 when the British exchanged notes with the French ensuring non-intervention by the two powers, thus disavowing acquisition of sovereignty.135 With this neutralisation of the territory, annexation would require the other party’s consent.

However, in the 1880s the French adopted a policy of sending recidivist criminals to neighbouring New Caledonia, thereby increasing Australian anxiety, which only heightened when in 1886 the French established a couple of military posts in the New Hebrides. The French assured the British that they had no intention of permanently occupying the islands but the French had given similar undertakings in 1847, in respect of the Society, Low, Austral and Raiatea islands but failed to respect them.136 In the face of continued Australian agitation, France and Great Britain whilst also liquidating the situation of the Suez Canal, as well as that of Raiatea, concluded a treaty on 16 November 1887 creating a Joint Naval Commission to deal with their respective nationals in the New Hebrides.137 Politis characterised this regime as a condominium, albeit of very

133 Convention between Great Britain, Germany and the United States of America for the Adjustment of Questions relating to Samoa, 2 December 1899, British and Foreign State Papers 91 (1898–1899), art. 2, 77; Convention and Declaration between Great Britain and Germany for the Settlement of the Samoan and other Questions (West Africa, Zanzibar etc.), 14 November 1899, British and Foreign State Papers 91 (1898–1899), arts. 1 and 3, 71.

134 Ward, British Policy in the South Pacific 1948 (n. 36), 399.

135 See ‘Correspondence between Great Britain and France’ 1877–1878 (n. 129), 691–692.

136 Scholefield, The Pacific: Its Past and Future 1920 (n. 28), 263–264; Declaration of the Plenipotentiaries 1851 (n. 128), 998.

137 Anglo-French Convention of 16 November 1887, British and Foreign State Papers 79 (1887–1888), 545–550, 545 as implemented by the Anglo-French Declaration of 26 January 1888, British and Foreign State Papers 79 (1887–1888), 545–550, 547.
limited competence, since no British or French naval officer was to act independently under the Joint Naval Commission. The Commission’s mandate, as defined in the annex to the 1888 declaration implementing the 1887 agreement was broadly to protect the property and person of British and French subjects (art. 1) and recourse to military force was limited to situations of absolute necessity only (art 4). The French military posts were removed in 1888.

At the same time as the conclusion of this agreement, the British agreed to the abrogation of the 1847 Declaration of London, noted above, that had neutralised the Society Islands. This enabled the French to gain sovereignty over the Leeward Islands and together with the Marquesas, these would be annexed in 1888, followed a year later by the Austral group and then the Gambiers. The French reaffirmed the protectorate over Wallis but let Easter Island go to Chile whilst the Pitcairn Islands remained British.

The 1887 New Hebrides regime proved wanting, in part because the Naval Commission’s powers were so limited. The first outcome of the 1904 Entente Cordiale in which France and Great Britain liquidated their differences and set up their future World War One alliance, was the London Declaration of 8 April 1904 by which the two states agreed to address the lack of jurisdiction in respect of the New Hebrides’ indigenous population and to settle property disputes without upsetting the status quo. Ultimately this Declaration would become the basis of the condominium created by the Convention of 20 October 1906 (confirmed in 1914). Broadly, whilst each state retained personal jurisdiction over their nationals, in other matters they are to act jointly. The preamble to the General Instructions to the British and French High Commissioners to serve there, dated 29 August 1907 stated, as O’Connell points out, in similar but not identical terms, that their mission was:

138 Politis, ‘La condition internationale’ 1901 (n. 21), 150.
139 Regulations for the Guidance of the Joint Naval Commission annexed to the Anglo-French Declaration of 26 January 1888 (n. 137), 549.
140 Declaration between Great Britain and France concerning Siam, Madagascar and New Hebrides, 8 April 1904, British Foreign and State Papers 97 (1903–1904), 53–55, 54.
141 Convention between Great Britain and France confirming the Protocol signed at London on February 27, 1906, concerning the New Hebrides, 20 October 1906, British and Foreign State Papers 99 (1905–1906), 292–252, 229; pursuant to which General Instructions were issued in 1907: Exchange of Notes between Great Britain and France, 29 August 1907, British and Foreign State Papers 100 (1906–1907), 499–500, 499.
142 Protocol between Great Britain and France respecting the New Hebrides, 6 August 1914, British and Foreign State Papers 114 (1921), 212–257, 212.
to secure the exercise of their paramount rights (*droits de souveraineté*) in the New Hebrides. The two Powers, who were mutually bound not to intervene separately in the New Hebrides, now agree to intervene there together. Instead of remaining mutually exclusive, their paramount rights are combined; the two countries jointly assume jurisdiction (*souveraineté*) in the islands, and thereby provide against the possible appearance of a third power.\(^{143}\)

Thus neutralisation was transformed into condominium in that the two powers would act together in respect of their joint jurisdiction.

The distribution and exercise of power within the New Hebrides is well known,\(^{144}\) but worth briefly revisiting. The British and French each retained personal jurisdiction over their own nationals, with other foreigners to opt into one or other of these systems, whilst the condominium itself looked after the joint utilities.\(^ {145}\) The scope of legislative powers however was ambiguous, especially insofar as the indigenous population was concerned.\(^ {146}\) This arguably gave rise to a system of institutionalised separation of populations according to race: the indigenous population was prohibited from acquiring the status of subject or citizen of either Power, but they were – whilst remaining under the customary authority of the local chiefs – placed under the authority of codified law, in theory codified native law,\(^ {147}\) and the High Commissioners were also given by virtue of article 8(3) of the Protocol general ‘authority over the native chiefs’ with ‘power to make administrative and police regulations binding on the tribes and to provide for their enforcement’. Acts against local tribes were no longer to take the form of punitive expeditions – ‘acts of war’ – but instead they were ‘to deal only with individual natives who have committed outrages…’\(^ {148}\) The cohabitation of these three administrative structures, each over time encroaching upon each other also left gaps in the system. So for instance O’Connell points out that there was ‘no provision for actions in tort or contract between [the indigenous population], they may not form companies,

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143 Exchange of Notes between Great Britain and France 1906–1907 (n. 141).
144 See, for instance, Lindley, *The Acquisition of Backward Territory* 1926 (n. 11), 120. For a detailed analysis see O’Connell, ‘The Condominium’ 1968–1969 (n. 107), 91–141.
145 Convention between Great Britain and France 1905–1906 (n. 141), art. 4.
146 See the analysis by O’Connell, ‘The Condominium’ 1968–1969 (n. 107), 96.
147 Art. 8(4) Protocol, although in practice English and French law applied: O’Connell, ‘The Condominium’ 1968–1969 (n. 107), 136.
148 Lindley, *The Acquisition of Backward Territory* 1926 (n. 11), 367.
they may not register a boat... they may not vote; and until 1967 there was no provision to register births, marriages and deaths among natives ...

Legally speaking the regime was different to the joint protectorate over Samoa not only because there was no recognised local sovereign in the New Hebrides but also because it was intended that the condominium itself, as a legal person distinct from its members, hold sovereignty over the New Hebrides. Ultimately the condominium would be considered in the relationship of ‘protectorate’ (as the protected State) vis-à-vis the United Kingdom when in 1961 it became a Protected State under British law. This meant under British law that it was not part of the dominion of the Crown and the inhabitants were not British subjects. Jurisdiction extended to British residents but not the administration of the country, something as seen, reserved, if ambiguously, to the condominium itself.

2.3 Canton and Enderbury

Sovereignty over the strategically located islands of Canton and Enderbury in the eastern Pacific’s Phoenix group, today part of Kiribati, was disputed in the early twentieth century by both the US and Great Britain. The islands were initially claimed by the US under the Guano Islands Act (1856), but then abandoned, and then claimed by Great Britain, a London based company establishing business there. The islands were however seen as good aircraft refuelling stations, and so in 1939 Great Britain and the US concluded an agreement to establish what is often loosely termed a condominium over the territory. The terms of the agreement nonetheless stipulated that the agreement was without prejudice to the question of sovereignty. Ultimately the dispute would

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149 O’Connel, ‘The Condominium’ 1968–1969 (n. 107), 136.
150 The Pacific’s other Protected State was Tonga. The schedules of The British Protectorates, Protected States and Protected Persons Order 1949 (s1 1949/140) would be amended in 1961 to include both the New Hebrides and Canton and Enderbury as Protected States: New Hebrides Order: s1 1961/1831. Fawcett, The British Commonwealth in International Law 1963 (n. 55), 117.
151 Wight, British Colonial Constitutions 1952 (n. 43), 7.
152 Reeves, Jesse S. ‘Agreement Over Canton and Enderbury Islands’. American Journal of International Law 33(3) (1939), 521–526, 525.
153 ‘Agreement for the Joint Administration of Canton and Enderbury Islands, effected by exchange of notes of 6 April 1939’. Foreign Relations of the United States Diplomatic Papers 1939. General, The British Commonwealth and Europe vol. II, 314–315, available at https://history.state.gov/historicaldocuments/frus1939v02/d280 (last accessed on 19 January 2022).
be liquidated by the Treaty of Tarawa (1979), when the islands would become a part of Kiribati.\textsuperscript{154}

It can be seen that this case is really one of neutralisation, created to preclude a preponderance of influence over the territory, rather than being a situation of condominium in which sovereignty vests in an entity independent of its component parts. Nonetheless, like the New Hebrides, Canton and Enderbury were in 1961 classed as a Protected State under British law.\textsuperscript{155} Whilst arguably not a Protectorate of the Law of Nations, unless the condominium itself is the recognised sovereign, this domestic law characterisation nonetheless signified that sovereignty did not vest in the UK itself given the territory’s neutralisation.

3 The Twentieth Century – Maintaining the Tradition of Joint Governance

Joint governance of South Pacific territories continued in the twentieth century, though sometimes simply driven by expediency. Thus in 1949 Australia administratively joined its NSGT of Papua with the Trust Territory of New Guinea; thereby coupling different types of legal regimes. This can be seen as a continuation of the tendency within the British Empire towards ‘multiple dependencies’ which is to say the bringing together of different types of territories\textsuperscript{156} and as seen above under the WPHC umbrella.

So too, the Mandate over Nauru is a well-known illustration of how joint governance would persist in the region. Following World War One, British Dominions, particularly Australia, had hoped that the Pacific territories ultimately classed as C Mandates would become colonies. Indeed, the C Mandate ‘territories’ (in contrast to the A and B Mandates which bear on ‘peoples’), would mostly be governed by colonies: the Dominions of Australia, New Zealand and South Africa (for the one non-Pacific C Mandate – Namibia). Of the remainder, Japan held the South Seas Mandate (German possessions north of the Equator) and the British Empire held the Mandate for Nauru. The various International Court of Justice (ICJ) cases bearing on these territories attest to their poor treatment at the hands of the mandatory powers, who, in

\textsuperscript{154} Treaty of Friendship (with agreed minute) (US-Kiribati), 20 September 1979, 1643 UNTS 239.

\textsuperscript{155} See Fawcett, \textit{The British Commonwealth in International Law} 1963 (n. 55), 117.

\textsuperscript{156} Wight, \textit{British Colonial Constitutions} 1952 (n. 43), 3, 68–69.
law were not sovereign but had a sacred trust of civilisation, specifically a ‘trust ... to be exercised for the benefit of the peoples concerned who were admitted to have interests of their own’.  

As noted, the 1920 Nauru Mandate was conferred on the British Empire itself: the Council of the League enabling ‘His Britannic Majesty’ to exercise ‘full power of administration and legislation over the territory ... as an integral portion of his territory’, although further to an agreement of 2 July 2019 between Australia, New Zealand and the UK, Australia administered the Mandate, including the mining of phosphate, the latter in turn entrusted to three British Phosphate Commissioners from each of the three mandatory powers. The 2 July 1919 Agreement was an internal Empire instrument rather than a treaty. Nonetheless, and relevant here, the agreed division to which it gave effect (and which predated the Mandate itself) was not coincidental, since established to ‘mediate the rival claims of Australia and New Zealand’.

By contrast, the Trust Agreement for Nauru approved by the United Nations General Assembly on 1 November 1947, conferred on all three states the role of trustee. Article 2 stated:

The Governments of Australia, New Zealand and the United Kingdom (hereinafter called the ‘Administering Authority’) are hereby designated as the joint Authority which will exercise the administration of the Territory.

Article 4 of the Trust Agreement then recognised that further to agreement between the three states, Australia would on behalf of the Administering Authority, ‘continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory’. As the ICJ pointed out in the Certain Phosphates case, this meant that the 2 July 1919 Agreement (as amended in 1923) remained in force, only to be amended in 1965 when the three governments

157 Wording of art. 22 of the League of Nations Covenant, cited in ICJ, Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Exceptions, Judgment of 26 June 1992, ICJ Reports 1992, 256, para. 41.
158 ICJ, Certain Phosphate Lands (n. 158), 256, para 41, citing ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971, 28–29, para. 46.
159 Art. 2 Mandate for Nauru, 17 December 1920, XXX what does this refer to?
160 Agreement between Great Britain, Australia and New Zealand for the Administration of Nauru Island, 2 July 1919, British and Foreign State Papers 113 (1920), 151–153, 151.
161 Fawcett, The British Commonwealth in International Law 1963 (n. 55), 174.
162 Charteris, ‘The Mandate over Nauru’ 1923–1924 (n. 98), 140.
163 Trusteeship Agreement for the Territory of Nauru, 1 November 1947, 10 UNTS 3, 5.
established local Nauruan government appointed by the Governor-General of Australia.

When before the ICJ in 1992 Nauru sought (partial) rehabilitation of its lands, decimated as a result of phosphate mining, Australia argued that Nauru's claim was against the Administering Authority. The court clarified that the Administering Authority ‘did not have an international legal personality distinct from those of the States thus designated’, but reserved for the merits (that never proceeded) Australia's argument that liability was joint and several (solidaire). Joint governance by colonial regimes, even in an international relationship of trust, thus at best obfuscated responsibility, once again revealing itself not to be in the interests of the local populations.

4 Conclusion

The legal means and methods of colonising the South Pacific were not unique to the region, but they were subtle and complex and had certain distinctive features, joint governance being the most notable. In seeking to regulate nationals engaging in heinous economic activities, notably the labour traffic, the institutions of the British state were drawn to the territories and British state based colonisation of the islands began. These projections of domestic law, whilst sometimes mere facts, and as such the mere projection of power, were in other circumstances and for the purposes of acquisition of title, sovereign acts with international legal meaning. Even when, because of overwhelming economic interests, powers were quick to acquire sovereignty, concessions (acts under domestic law) were granted prior to formal steps relative to the acquisition of title to the territory itself. The law generally followed rather than preceded brute power.

In other respects, the powers' principal concern was the exclusion of other powers' influence – much as it is today in the region –; making neutralisation a common nineteenth century feature of the South Pacific. But even in seeking to exclude others through neutralisation, the powers were in fact officialising their presence. Neutralisation and the condominium were key international legal models for colonisation in this region. There was some continuity into the twentieth century, with the Mandate, an institution that was reminiscent,
in fact, if not law, of informal empire. Whilst joint governance in the twentieth century was in many cases self-determined, it today mostly takes place through the many institutions present in the region. But the historical regimes remain as a warning of the legal form that colonisation can take and how indeed it can be projected even when motives are ostensibly virtuous. This is not new knowledge, but knowledge that both needs to be recalled and applied to this region, all the more so as concerns about the impact of foreign influence in the South Pacific increases.

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