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"EQUAL IN STATUS, IN NO WAY SUBORDINATE": INTERWAR NEW ZEALAND, IMPERIAL INTERNATIONALISM, AND THE ACQUISITION OF INTERNATIONAL LEGAL PERSONALITY

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Abstract:

This paper discusses New Zealand's gradual acquisition of a separate international legal personality distinct from that of the United Kingdom in the interwar period. Focusing on the period between the end of the First World War and the election of the First Labour Government in 1935, it argues that New Zealand's approach to external relations and international status in this period was driven by an imperial internationalist outlook aimed primarily at using international institutions to cement imperial interests. In particular, New Zealand's sub-imperial aspirations in respect of acting as a League of Nations mandatory motivated its decision to remain within the League system, contributing significantly to its emergence as a distinct international actor. The process of New Zealand's gradual acquisition of international legal personality is contrasted with the example of Newfoundland, which, although similarly predisposed against international engagement, lacked a sub-imperial interest to bring it into the League system.

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I Introduction

New Zealand lacks a Saleem Sinai. There is nobody who can claim, like Rushdie's protagonist, to have, "at the precise instant … of arrival at independence … tumbled forth into the world", their fate and their country's closely intertwined.[1] This is because New Zealand does not have a generally-accepted appointed time upon which independence was achieved; its statehood arrived, in Crawford's terms, through "gradual devolution of international personality" rather than an explicit grant of independence.[2]

This paper examines New Zealand's acquisition of a distinct international legal personality while a self-governing Dominion[3] in the 1920s and early 1930s. Its focus is not on establishing a critical date on which New Zealand definitively obtained international status but seeks to explore what New Zealand's gradual steps toward statehood during its successive periods of conservative government before 1935 reveal about the relationship between imperialism and international law. It ultimately concludes that New Zealand's approach to external relations – including its acquisition of international legal personality – reflect an imperial internationalist approach to foreign relations and international law, one particularly coloured by sub-imperialism and participation in the League of Nations' mandates system. After outlining the relevant theories of internationalism and the concept of international legal personality, it outlines New Zealand's acquisition of an independent legal personality through an examination of its interwar external relations. Lastly, it examines as a counterfactual the Dominion of Newfoundland, whose loss of self-government and ultimate federation with Canada indicates the process of "de-dominionisation"[4] was highly contingent.

II Theoretical Overview

This part outlines the ideologies and conceptual frameworks relevant to understanding New Zealand's acquisition of international legal personality in the interwar era: namely internationalism, imperial internationalism, and sub-imperialism.

A Internationalism

Internationalism means many things to many people. At its broadest, internationalism can be understood as an ideological framework emphasising transnational cooperation: "the idea that

[1] Salman Rushdie *Midnight's Children* (Vintage Books, London, 2010 [1981]) at 3.
[2] See James R Crawford *The Creation of States in International* Law (2nd ed, Oxford University Press, 2007) at 349.
[3] Alongside Australia, Canada, South Africa, and Newfoundland.
[4] See generally Jim Davidson "De-Dominionisation Revisited" (2005) 51 AJPH 108.

nations and peoples should cooperate instead of preoccupying themselves with their respective national interests or pursuing uncoordinated approaches to promote them."[5] In an internationalist framework, this cooperation is primarily facilitated through the presence of international institutions, including general frameworks of international law. A history of the prohibition of the use of force defines internationalists as those who "maintain[] … that the best way to resolve controversies [is] through international institutions."[6] Although earlier instances of international cooperation and legal institutionalism exist,[7] internationalism "came of age" in the 1920s,[8] as the League of Nations provided for the institutionalisation and performance of the concept, including through a secretariat that constituted a "genuinely transnational officialdom".[9] The League of Nations – and the broader League system it underpinned – represents a sea change in the history of international law, cementing the arrival of the modern international institution as "a new actor in the international system, providing international law with a new range of ambitions and techniques for the management of international relations."[10]

The strand of internationalism most associated with the League of Nations is liberal internationalism, of which Wilsonian internationalism is considered either synonymous or a subset.[11] Wilsonian internationalism, in addition to advocating for an institutionalised legal order that provides for collective security, emphasises democratic values and the right to self-determination that, although initially applied primarily in respect of European peoples, later formed one of the bases for anti-colonial demands for independence.[12] Relevantly for the question of international legal personality, such emphasis represented a challenge to the positivist paradigm of international law in which sovereign states are the sole subjects of international law.[13]

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[5] Akira Iriye *Global Community: The Role of International Organizations in the Making of the Contemporary World* (University of California Press, Berkeley, 2002) at 9—10.
[6] Oona A Hathaway and Scott J Shapiro *The Internationalists: And Their Plan to Outlaw War* (Penguin Books, London, 2018) at xxi.
[7] HL Randall "The Legal Antecedents of a League of Nations" (1919) 28 Yale LJ 301 at 309—313.
[8] Daniel Gorman *The Emergence of International Society in the 1920s* (Cambridge University Press, Cambridge, 2012) at 3.
[9] Susan Pedersen "Back to the League of Nations" (2007) 112 Am Hist Rev 1091 at 1112; and Casper Sylvest *British Liberal Internationalism, 1880—1930: Making Progress?* (Manchester University Press, Manchester, 2009) at 197—199.
[10] Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2004) at 115.
[11] Sylvest, above n 9, at 235; and Beate Jahn "Liberal Internationalism: Historical Trajectory and Current Prospects" (2018) 94 Intl Aff 43 at 45.
[12] Gorman, above n 8, at 3—8.
[13] See Leonard V Smith "The Wilsonian Challenge to International Law" (2011) 13 J Hist Intl L 179.

The "Wilsonian moment", as it came to be known, did not realise its proponents' aspirations for the maintenance of collective security and the achievement of national self-determination. The League of Nations ultimately failed to successfully guarantee collective security and bring about an end to interstate conflict, as it could not "offer a significant counterweight to the aggression and revanchist ambitions of nation-states."[14] To some extent, this failure was exacerbated by the legacy of wartime appeals to nationalism and the nation-state among both the Allies and Central Powers, the latter of whom were excluded from the process of the League's formation.[15] Moreover, the self-determination principle within Wilsonian internationalism played a role in the League system's ultimate collapse: the vague parameters of how self-determination was to be defined allowed for the elision of nationhood and ethnicity.[16] Newly formed nation-states regarded the minority protection guarantees contained in the Paris peace treaties as "unacceptable interferences in their newly won sovereignty",[17] while the language of self-determination was later appropriated by Nazi Germany, seeking to justify its annexation of the Sudetenland from Czechoslovakia.[18] The disconnect between the initial "utopian dimension of internationalism" with its promise of "an end to war between states",[19] and the ultimate cataclysm of World War II (WWII) has led to the internationalism of the period often receiving the pejorative label of "idealism".[20]

Despite its strong associations with the League of Nations and the interwar period generally, liberal or Wilsonian internationalism should not be considered the *only* form of internationalism in the period, or even within the League itself. Wertheim argues the League's political and anti-formalistic ethos, in comparison to the more strictly legalistic framework of the Hague Conferences of 1899 and 1907, meant the institution represented a victory between competing internationalisms, rather than of internationalism over nationalism.[21] Other relevant

[14] Jörn Leonhard *Pandora's Box: A History of the First World War* (Belknap Press, Cambridge (MA), 2018) at 903.
[15] At 902—903.
[16] Patricia Clavin "Europe and the League of Nations" in Robert Gerwarth (ed) *Twisted Paths: Europe, 1914—1945* (Oxford University Press, Oxford, 2007) 325 at 326.
[17] Leonhard, above n 14, at 903.
[18] Clavin, above n 16, at 326—327.
[19] Leonhard, above n 14, at 904.
[20] See generally EH Carr *The Twenty Years' Crisis, 1919—1939* (Palgrave Macmillan, London, 2016 [1939]). See also Hans J Morgenthau *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf, New York, 1949) at 373–378; and Hans J Morgenthau *Scientific Man vs Power Politics* (University of Chicago Press, Chicago, 1946) at 105 and following.
[21] Stephen Wertheim "The League of Nations: A Retreat from International Law?" (2012) 7 J Glob Hist 210 at 211.

interwar internationalisms include transnational communism of the Third International,[22] pacifist cosmopolitanism,[23] and most relevantly for this paper, imperial internationalism.

B Imperial Internationalism

The relationship between imperialism and international law is longstanding. As Mégret notes, key moments in the development of international law – Westphalia, Versailles, and the era of decolonisation – have been tied to the dissipation of imperial rule, while imperial polities have simultaneously looked to international law to gain legitimation.[24] Thus, paradoxically, while "international law may well express an ethos that is fundamentally at odds with that of imperialism, it has also proved very capable of justifying imperialism."[25] Recent scholarship on the history of international law emphasises the interrelationship of legal arrangements within the British Empire and the creation of international law. Contrary to a formalistic approach to international legal history, in which pre-20th century developments are shaped solely by sovereign states, of which global empires are merely one type, it is clear that "[British] Imperial law stood at the intersection of the forces of internal and external order – between what we would now call international relations … and rule over composite polities", and that we must "recognise the deeply generative legal politics of an imperial world."[26]

If Wilsonian ideals of self-determination underpinned part of the conceptual basis for the League system, distinctly imperial notions of world order were equally influential.[27] Casting the British Empire as a "successful experiment in international government",[28] its proponents advanced the ideology of imperial internationalism: "efforts by imperial states to build international rules, relations, and institutions to support their imperial projects."[29] Proponents of imperial internationalism at the League's foundation include the British classicist Alfred

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[22] Perry Anderson "Internationalism: A Breviary" (2002) 14 New Left Review 5 at 14—16.
[23] Mark Mazower *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, Princeton, 2009) at 31—32.
[24] Frédéric Mégret "International Law as Law" in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge University Press, Cambridge, 2012) 64 at 84.
[25] At 84.
[26] Lauren Benton and Lisa Ford *Rage for Order: The British Empire and the Origins of International Law, 1800—1850* (Harvard University Press, Cambridge (MA), 2018) at 26—27. On the relation between imperialism and the creation of international law, see generally Antony Anghie "Imperialism and International Legal Theory" in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press, Oxford, 2016) 156; Lauren A Benton *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press, Cambridge, 2010); and Jennifer Pitts *Boundaries of the International: Law and Empire* (Harvard University Press, Cambridge (Mass), 2018).
[27] Gorman, above n 8, at 311—312.
[28] Mazower, above n 23, at 37.
[29] G John Ikenberry *A World Safe for Democracy: Liberal Internationalism and the Crises of Global Order* (Yale University Press, New Haven, 2020) at 68. See also Gorman, above n 8, at 11.

Zimmern: founder of the League of Nations Society, contributor to Foreign Office drafts on a post-war international institution in 1918, and the "preeminent theorist of internationalism" in the interwar period.[30] Zimmern characterised the British Empire as a progressive historical antecedent for the League, arguing the Royal Navy had acted as an "international police force" and "champion of common human rights", combating the slave trade in the 19th century.[31] As a characterisation, this overlooks the extent to which British oceanic order depended on a patchwork of bilateral treaties, imperial admiralty law and prize courts, creating a "clumsy hybrid creation" that "at times smacked of imperial ambition".[32] Similarly, Zimmern's description of the British Empire as a consensual, cooperative "Commonwealth", modelled on the example of classical Athens, simultaneously emphasises the relations between the metropole and predominantly white Dominions while eliding the shaper and coercive ends of imperial rule to which much of the Empire's population was subject.[33]

As with liberal internationalism, imperial internationalism possessed a non-state component. Discourses of imperial internationalism were supported by actors from outside officialdom, notably in church missionary societies and economic associations with "vested interests in the continuation of the colonial project".[34] Imperial internationalism represented the dominant ideological framework for successive New Zealand governments at the time: while the Labour Party and radical opinion presented a critique of the expansion of the imperial project, these voices failed to win office throughout the 1920s, losing out amid a "conservative and imperial-minded" political culture.[35]

The imperial internationalist nature of the League system can be seen in its recalibration of the Wilsonian notion of self-determination to limit its applicability to colonised peoples in the

[30] Mazower, above n 23, at 68 and 79—80.
[31] Martha Aggernaes Ebbesen "From Empire to Commonwealth and League of Nations: Intellectual Roots of Imperialist-Internationalism, 1915—1926" (PhD thesis, Lancaster University, 2019) at 209 and forward.
[32] Benton and Ford, above n 26, at 147.
[33] Mazower, above n 23, at 102—103.
[34] Miguel Bandeira Jerónimo "Imperial Internationalisms' in the 1920s: The Shaping of Colonial Affairs at the League of Nations" (2020) 48 J Imp & Commonw Hist 866 at 868. Note that what I term "imperial internationalism", in line with Gorman and Ikenberry's usage, is referred to by Bandeira Jerónimo as "internationalist imperialism".
[35] John Darwin *The Empire Project: The Rise and Fall of the British World-System, 1830—1970* (Cambridge University Press, Cambridge, 2009) at 398; and Peter Franks and Jim McAloon *Labour: The New Zealand Labour Party, 1916—2016* (Victoria University Press, Wellington, 2016) at 80—81.

Global South,[36] and most notably in the way the architects of the League responded to the break-up of the Ottoman and German colonial empires.

1 Imperialism and international legal personality

The effect of imperialism on the development of international law is particularly evident with respect to international legal personality. The conventional wisdom that the Peace of Westphalia in 1648 ushered in the age of sovereign states as the primary subjects of international law is inextricably linked with a broader imperial context: as well as planting the germ that developed into the doctrine of sovereign equality of states, the Peace regulated "'internal' imperial problems … [and] laid down a new constitutional basis for the Holy Roman Empire."[37]

By the end of the 19th and the beginning of the 20th century, imperial notions of world order coloured the prevailing views of international legal personality and statehood. Nineteenth century jurisprudence allowed only "civilised" states to be treated as subjects of international law, with the question of a state's civilisation determined by reference to European forms of political, social, and cultural practices and institutions.[38] Generally speaking, "the subjects of international law were an elite club of Western states", with "subjugated peoples and states … excluded from the law's purview."[39] Moreover, subjects of international law did not enjoy equal status. States that met the racialised criteria of "civilisation" were thereby considered to belong within the "Family of Nations", itself subdivided into categories, including Great Powers, smaller states, half-sovereign and even part-sovereign states.[40]

The creation of the League of Nations began a gradual shift away from imperial, 19th century notions of international legal personality. Its members, open to "fully self-governing State, Dominion or Colony" were accorded equal treatment.[41] The League's institutional practices partially reflected the principle of sovereign equality. It emphasised states' rights not to be bound against their will such that certain binding decisions could only be made unanimously,

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[36] See generally Adom Getachew *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton University Press, Princeton, 2019) at ch 2; and Peter Price "Of Solemn Pacts and Paper Scraps: International Law and the Purpose of War, 1914—1918" (2016) 71 Intl J 5 at 7.
[37] Janne Elisabeth Nijman *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMS Asser, The Hague, 2004) at 32—33.
[38] Susan Marks "Empire's Law" (2003) 10 Ind J Glob L Stud 449 at 459.
[39] BS Chimni "Legitimating the international rule of law" in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge University Press, Cambridge, 2012) 290 at 300.
[40] Alison Pert "The Development of Australia's International Legal Personality" (2017) 34 Aust YBIL 149 at 157—158.
[41] Covenant of the League of Nations, art 1.

limiting the League's effectiveness as an organisation.[42] Moreover, the participation in the League of non-European states such as Haiti, Liberia, and Ethiopia represented a gradual expansion in the bounds of "international society" as conceptualised at the time.[43]

Despite these gradual shifts, much of the League's legal architecture reflects an imperial outlook on international legal personality.[44] States' ability to participate in the League varied according to power and status, in line with the "Family of Nations" approach to international society. Contrary to subsequent practice at the United Nations (UN), the League doubted microstates' ability to carry out the obligations of membership,[45] and considered "limited forms of membership" for small states, such as associate membership, limited voting rights or representation through agency of a larger state.[46] The treatment accorded to Liberia and Ethiopia, on whom "special obligations designed to correct internal deviations and deficiencies" were imposed, reflected an imperial mindset within the League system that remained deeply sceptical of African self-rule.[47] Conversely, membership for the predominantly European-populated Dominions remained acceptable, as "they posed less of a threat in the racial terms in which the distinction between the civilized and uncivilized worlds was largely perceived."[48] While the terminology of the "Family of Nations" had largely given way to the League's "international society", its underlying assumptions as to variegated and unequal sovereignties remained. Moreover, Zimmern and other imperial internationalists undertook a discursive shift, describing each individual nation as a "distinct family of mankind".[49] The framing of the nation in familial terms would ultimately be deployed to fortify imperial rule against growing demands for self-determination: "If nations were primarily

[42] See Hans Kelsen "The Principle of Sovereign Equality of States as a Basis for International Organization" (1944) 53 Yale LJ 207 at 212.
[43] Getachew, above n 36, at 41, citing Hedley Bull "The Emergence of a Universal International Society" in Hedley Bull and Adam Watson (eds) *The Expansion of International Society* (Clarendon Press, Oxford, 1984) 123.
[44] Martti Koskenniemi and Ville Kari "Sovereign Equality" in Jorge E Viñuales (ed) *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, Cambridge, 2020) 166 at 173—175.
[45] Michael M Gunter "Liechtenstein and the League of Nations: A Precedent for the United Nation's Ministate Problem?" (1974) 68 AJIL 496 at 498–499.
[46] Getachew, above n 36, at 41.
[47] At 62.
[48] Edward Keene *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, Cambridge, 2002) at 131.
[49] Jeanne Morefield *Covenants without Swords: Idealist Liberalism and the Spirit of Empire* (Princeton University Press, Princeton, 2005) at 216.

spiritual and familial, the appropriate response to nationalist movements, from Zimmern's perspective, was not political but cultural autonomy."[50]

2 Imperial internationalism and the Mandates system

The influence of imperial internationalism on the League of Nations is most clearly seen in the mandates system, to which former territories of the Ottoman and German colonial empires were subject. Under this system, former German and Ottoman territories were divided up into mandates, each administered by a League member (a "mandatory") on behalf of the League and subject to the supervision of a Permanent Mandates Commission (PMC).[51] While the mandates system remains the best-known development toward the internationalisation of colonial administration, it drew on 19th century antecedents; the Conferences of Berlin and Brussels[52] provided international fora in which imperial powers sought to legitimate and justify their expansion and continued rule.[53]

While the mandate system is often presented as a compromise "between the British Dominions' demand to annex former German colonies and the need to pay lip service to Wilsonian idealism",[54] the League Covenant's provision for mandates adopts wholesale the quintessentially imperial language of a civilising mission:[55]

> … there should be applied the principle that the well-being and development of such peoples [in former German and Ottoman colonies] form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

[50] At 217.
[51] Ruth Gordon "Mandates" (February 2013) Max Planck Encyclopaedia of Public International Law <www.opil.ouplaw.com/home/mpil>.
[52] 1884—1885 and 1889—1890, respectively.
[53] Miguel Bandeira Jerónimo "A League of Empires: Imperial Political Imagination and Interwar Internationalisms" in Miguel Bandeira Jerónimo and José Pedro Monteiro (eds) *Internationalism, Imperialism and the Formation of the Contemporary World: The Pasts of the Present* (Palgrave Macmillan, Cham (Switzerland), 2018) 87 at 91.
[54] Mazower, above n 23, at 45.
[55] Covenant of the League of Nations, art 22.

Jan Smuts, the South African Prime Minister most associated with the creation of the mandates system, would later adopt its development-oriented lexicon to argue for the continuation of colonial rule during and after WWII, "recast[ing] colonialism as a kind of depoliticised guidance toward higher standards of living."[56] Getachew argues that, contrary to the traditional framing of mandates as a compromise between imperial and liberal/Wilsonian internationalism, Wilson was a willing participant in the process of "reassociating" self-determination, recasting the principle "from a right to which all people were entitled to an achievement of historical development and a specific inheritance of the Anglo-Saxon race."[57] Wilson and Smuts shared an upbringing in racially stratified societies and continued to hold racist views doubting Black capacity for equal self-rule while in office.[58] Moreover, the internationalisation of colonial administration would directly benefit American economic interests through the "open door policy", allowing equal commercial access to the mandates for all states.[59] Dissatisfaction with the mandate model was quickly evident. Taking place in parallel to the Paris Peace Conference was the first Pan-African Congress, which passed a resolution calling for direct League administration of mandates rather than the deputization of colonial powers.[60]

Despite its clearly imperial origins, the international scrutiny provided by the mandates system would ultimately contribute to the end of colonial rule. The institutional framework of the mandates system "admitted, however weakly, that its subjects might evolve to a point where colonial control might expire", particularly in the Class A mandates.[61] Following WWII, the mandates system was replaced by the UN Trust Territory system, which positioned itself as a "temporary institution to assist with the establishment of structures for self-government, without denying the general capacity of and right to self-determination."[62] These changes would come later in time, however. The 1920s and early 1930s, with which this paper is concerned, was a low-water mark for self-determination within the mandates system, discarded in favour of a legitimating programme that was "paternalistic and

[56] Mazower, above n 23, at 56. See Jan Christian Smuts "The British Colonial Empire" *Life* (New York, 28 December 1942) at 13–14.
[57] Getachew, above n 36, at 46.
[58] Margaret MacMillan *Peacemakers: Six Months that Changed the World* (John Murray, London, 2003) at 97; and Ebbesen, above n 31, at 28.
[59] Anghie, above n 10, at 143—145.
[60] MacMillan, above n 58, at 114.
[61] Gordon, above n 51, at [1].
[62] Nele Matz "Civilization and the Mandate System under the League of Nations as Origin of Trusteeship" (2005) 9 Max Planck YB UN L 47 at 50.

authoritarian, rhetorically progressive and politically retrograde — a programme perfectly tailored to the task of rehabilitating the imperial order".[63]

C Sub-Imperialism

New Zealand's experience of acquiring independence is fundamentally distinct from subsequent processes of decolonisation: "from the perspective of first nations, governments in the dominions were also agents and instigators of colonial rule."[64] Sub-imperialism applies this same thought externally, as the self-governing Dominions sought out colonies of their own. Sub-imperialism has a noted place in New Zealand political history; an early iteration is found in proposals by Premier Julius Vogel in 1873 for New Zealand to be the seat of government for a larger Dominion encompassing much of Polynesia.[65]

Sub-imperialism was a particular focus of Richard Seddon, New Zealand's longest-serving Premier,[66] who sought the expansion of New Zealand's domestic colonial framework further into the Pacific, and oversaw the exercise of a sub-imperial function with respect to the Cook Islands and Niue.[67] Seddon repeatedly and unsuccessfully sought to achieve sub-imperialist ambitions in Samoa, arguing in 1894 for its trifurcated administration to be replaced by a New Zealand-administered protectorate.[68] Importantly, the sub-imperialist tendency shared by successive governments – particularly the Vogel, Atkinson, and Seddon ministries – was rooted in racialised notions that New Zealand, as a predominantly European – and importantly, British – state, was destined to advance colonial rule throughout the South Pacific.[69] A similar sub-imperialist tendency among Australian colonial and post-Federation politicians influenced its development of international legal personality.[70] As will be seen later in this paper, the ultimate realisation of New Zealand's sub-imperial aspirations through acting as a League of Nations

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[63] Susan Pedersen *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, Oxford, 2015) at 111.
[64] AG Hopkins "Rethinking Decolonization" (2008) 200 Past and Present 211 at 223—224.
[65] W David McIntyre *Dominion of New Zealand: Statesmen and Status, 1907—1945* (New Zealand Institute of International Affairs, Wellington, 2007) at 32.
[66] 1893—1906.
[67] Damon Salesa "New Zealand's Pacific" in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, Melbourne, 2009) 149 at 155 and forward. See also Tom Brooking "A Noisy Sub-imperialist: Richard Seddon and the Attempt to Establish a New Zealand Empire in the Pacific, 1894—1901" (2014) 2 Journal of New Zealand & Pacific Studies 121.
[68] Brooking, above n 67, at 125; and Timothy C Winegard *Indigenous Peoples of the British Dominions and the First World War* (Cambridge University Press, Cambridge, 2014) at 54.
[69] David Hackett Fischer *Fairness and Freedom: A History of Two Open Societies* (Oxford University Press, New York, 2012) at 335.
[70] Cait Storr "'*Imperium in Imperio*': Sub-Imperialism and the Formation of Australia as a Subject of International Law" (2018) 19 Melb J Intl L 335.

mandatory in respect of Samoa was a crucial factor in New Zealand's pathway to a separate international legal personality.

III Statehood and International Legal Personality

This part of the paper outlines the concept of international legal personality, with a particular focus on the jurisprudence of interwar courts and tribunals. It also examines the *inter se* doctrine, a conception of intra-imperial relations unique to British legal thought that further complicated the question of the Dominions' acquisition of international legal personality.

A General Overview

At its core, possessing international legal personality means that an entity is "a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims."[71] International legal personality is a broad concept, capable of differentiated categories, as subjects of international law "are not necessarily identical in their nature or in the extent of their rights."[72] States are "the traditional and most important subjects of international law", possessing "all international legal rights and are subject to all international legal duties."[73]

The four criteria for statehood, generally accepted as the starting point for any discussion of the concept,[74] come from the 1933 Montevideo Convention, which clarified that:[75]

> The State as a person of international law should possess the following qualification: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.

It is this fourth criterion, which encompasses the notion of sovereignty or independence, that is generally most contested when determining whether a particular entity should be considered a state as a matter of public international law. It is simultaneously paradoxical, setting out as a prerequisite for statehood what "might more properly be regarded as a consequence of

[71] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 179.
[72] At 178.
[73] Christian Walter "Subjects of International Law" (May 2007) Max Planck Encyclopaedia of Public International Law <www.opil.ouplaw.com/home/mpil>.
[74] Crawford, above n 2, at 45–46; and Vaughan Lowe *International Law* (Clarendon Press, Oxford, 2007) at 153.
[75] Convention on the Rights and Duties of States 165 LNTS 19 (opened for signature 26 December 1933, entered into force 26 December 1934), art 1.

Statehood", and useful in explaining why entities such as component units of a federal polity are not states as a matter of public international law.[76]

Independence and sovereignty are closely linked in outlining the fourth criterion for statehood. A classic statement of the principle, itself dating from the interwar period, comes from Judge Huber in the *Island of Palmas* arbitration:[77]

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.

This definition encompasses two principles: first, the centralisation of state organs within one polity; and secondly, the exclusion of any other state from the exercise of public order, subject to the caveat that "any interference by such [external] legal orders, or by an international agency, must be based on a title of international law."[78]

B Statehood and International Legal Personality in the Interwar Era

The interwar period is an important inflection point in the history of international legal personality. Throughout the 19th century, "states were the only subjects of international law", all other entities being "objects" of international law whose rights and obligations arose through state consent.[79] However, as we have seen, the imperial notion of a "Family of Nations" allowed for variegated and differentiated classes of sovereignty among states subject to international law. British imperial policy in regions as diverse as the Río de la Plata and the Kingdom of Tahiti depended on "imperial notions of divisible sovereignty", bolstering the sovereign claims of "quasi-independent states" and preventing the formation of regional hegemons.[80] Imperial approaches to variegated sovereignty are of particular importance to New Zealand's history, in light of debates around the reconcilability of the English and Te Reo texts of Te Tiriti o Waitangi and the extent to which instructions to early colonial officials mandated the recognition of extant Māori sovereignty.[81] The early 20th century and the advent

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[76] Art 2. See also Giovanni Distefano *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Brill Nijhoff, Leiden and Boston, 2019) at 81—82; and Lowe, above n 74, at 157.
[77] *Island of Palmas (Netherlands v United States of America) (Award)* (1928) 2 RIAA 829 at 838.
[78] James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 119.
[79] Alberto Costi and Nathan Jon Ross "International Legal Personality" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 75 at 77.
[80] Benton and Ford, above n 26, at 176—179.
[81] See David V Williams "Originalism and the constitutional canon of Aotearoa New Zealand" in Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, Abingdon (Oxon), 2019) 57 at 63—70; contrast Margaret Mutu "Constitutional Intentions: The

of the League system marked a shift away from imperial notions of variegated sovereignty, toward what Ikenberry terms the "Westphalian state system", in which international institutions and international law shifts to one in which sovereign nation-states rather than empires are the key actors.[82]

While it is clear today that subjects of international law are a broader category than sovereign states, it is important to remember the legal and historical context of interwar approaches to this subject. Unlike the UN, whose international legal personality was judicially confirmed,[83] the question of the League of Nations' status at international law "was much debated and never authoritatively settled".[84] The historical context is particularly relevant: in the wake of World War I (WWI), international legal scholars and practitioners sought to justify the utility and existence of international law as a coherent framework capable of governing state behaviour.[85] One influential group known as the "restorative scholars" argued that international law existed in line with the 19th century voluntarist model,[86] emphasising the centrality of sovereign states as the sole subjects of international law, such that international law could be defined as "law *between* and not above sovereign states".[87] Importantly, this attempt to recreate the 19th century emphasis on voluntary cooperation between sovereign states did not seek to similarly preserve the corresponding imperial approach to variegated or divisible sovereignty.

The influence of the restorative scholars' approach can be seen in judgments of the Permanent Court of International Justice (PCIJ) which imposed high barriers as to the question of whether an entity counted as a sovereign state, and thereby a full subject of international law, or otherwise reflected the 19th century voluntarist approach to international law. Take the Court's formulation of the famous *Lotus* principle:[88]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the

Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia, Wellington, 2010) 15. See also Waitangi Tribunal *Report on the Orakei Claim* (Wai 9, 1987) at 179—180.

[82] Ikenberry, above n 29, at 68—69 and 212—216.

[83] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, above n 71.

[84] Quincy Wright "The Jural Personality of the United Nations" (1949) 43 AJIL 509 at 510.

[85] Nijman, above n 37, at ch 3.

[86] See Charlotte Ku "Global Governance and the Changing Face of International Law" (2001 John W Holmes Memorial Lecture, Annual Meeting of the Academic Council on the United Nations System, Puebla (Mexico), June 2001) at 8—14.

[87] Nijman, above n 37, at 116—117.

[88] *The SS "Lotus" (France v Turkey) (Judgment)* (1928) PCIJ (series A) No 10 at 18.

> relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

The relation between the *Lotus* principle and voluntarist approaches to international law is well-documented,[89] but equally important is its framing of international law as governing "relations between independent States", implying a strict states-only approach to international legal personality.[90] The conflation of international legal personality with statehood would also occur in contemporary scholarship.[91]

While the Court did not directly adjudicate on the exact international personality of New Zealand or other Dominions, a useful discussion emerges from the Court's engagement with the Free City of Danzig. The Free City (present day Gdańsk, Poland) was an internationalised territory, placed under the League of Nations' protection by the Treaty of Versailles, with a separate treaty relationship establishing that Danzig's foreign relations would be exercised by Poland.[92] In 1930, the Governing Body of the International Labour Organization (ILO), in light of a request from the Free City to join the Organisation, requested an advisory opinion on the question: "Is the special legal status of the Free City of Danzig such as to enable the Free City to become a Member" of the ILO?[93]

The Court, by six votes to four, concluded that the Free City of Danzig could not become an ILO member absent an agreement with Poland "ensuring in advance that no objection could be made by the Polish Government to any action which the Free City might desire to take as a Member of that Organization".[94] This finding was rooted in the principle that Poland was not obliged to undertake foreign relations on behalf of Danzig that would prejudice Polish interests. In his separate opinion, Judge Anzilotti – a scholar of the restorative school[95] – argued the majority had not addressed the correct question; Judge Anzilotti considered no entity could join the ILO without also being a member of the League of Nations,[96] and as such the Court should

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[89] See An Hertogen "Letting *Lotus* Bloom" (2015) 26 EJIL 901.
[90] Roland Portmann *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) at 42.
[91] See for example Frederick Sherwood Dunn "The New International Status of the British Dominions" (1927) 13 Va L Rev 354 at 355.
[92] Crawford, above n 2, at 236—241.
[93] Manley O Hudson "The Ninth Year of the Permanent Court of International Justice" (1931) 25 AJIL 1 at 4 and forward.
[94] *Free City of Danzig and International Labour Organization (Advisory Opinion)* (1930) PCIJ (series B) No 18 at 15—16.
[95] Nijman, above n 37, at 116—117.
[96] *Free City of Danzig and International Labour Organization (Advisory Opinion)*, above n 94, at 19 per Anzilotti J.

have declined to give an opinion as the question was premised on a false hypothesis.[97] Judge Anzilotti found, in any event, that Danzig's foreign relations being conducted by Poland did not automatically preclude Danzig from undertaking the duties of an ILO member. The membership of self-governing Dominions and Colonies in the League allowed polities that, "though enjoying a very wide measure of self-government, [did] not or [did] not necessarily possess the right themselves to conduct their foreign relations" to be eligible for ILO membership.[98] Judge Anzilotti's approach simultaneously confirms that League membership is not coterminous with sovereign statehood, while implicitly conceding the potential for entities other than sovereign states to enter into relations governed by international law.[99]

Although the Court's jurisprudence accepted the international legal personality of *sui generis* entities such as the Free City of Danzig, it retained a consistently high threshold for determining when an entity had achieved full international legal personality as a sovereign state. In 1920, the League's International Committee of Jurists had to determine the international legal status of Finland following its 1917 declaration of independence from Russia.[100] The Committee stated it was difficult to exactly pinpoint the date on which the Finnish Republic became a sovereign state, but that it was not "until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops."[101] As Crawford notes, this approach "sets the bar very high and would have embarrassing consequences if generally applied."[102] While the Committee's statement is generally cited in respect to the "government" criterion for statehood,[103] it remains relevant to the fourth Montevideo criterion inasmuch as capacity to enter into relations with other states is a conflation of the notions of government and independence.[104]

Also relevant is the Court's approach to the gradual erosion of imperial authority. In 1937, the Court was called upon to decide what rights the Ottoman Empire had in respect of the islands

[97] Hudson, above n 93, at 7.
[98] *Free City of Danzig and the International Labour Organization (Advisory Opinion)*, above n 94, at 21—22.
[99] On this see also *Jurisdiction of the Courts of Danzig (Advisory Opinion)* (1928) PCIJ (series B) No 15 at 17; and *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* (1932) PCIJ (series A/B) No 44 at 23—24.
[100] "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question" (1920) 3 LNOJ Special Supplement 3.
[101] At 9.
[102] Crawford, above n 78, at 120.
[103] Costi and Ross, above n 79, at 87.
[104] Crawford, above n 2, at 62.

of Crete and Samos by 1913. The majority adopted a highly stringent test, stating that the relevant question as to the islands' detachment from the Empire was whether "every political link between the Ottoman Empire and the islands [had] disappeared",[105] a threshold that would likely leave New Zealand and other Dominions non-sovereign components of the British Empire until well into the post-war era.[106]

Lastly, the Court's approach in this period emphasises the linkages between legal independence and economic autonomy.[107] The clearest indication comes from the *Austro-German Customs Union* case.[108] The Court had to determine whether a proposed customs union between the two states violated Austria's undertaking with the League to "abstain from any act which might directly or indirectly or by any means whatever compromise her independence,"[109] and a 1922 Protocol by which Austria undertook to abstain "from any economic or financial engagement calculated directly or indirectly to compromise this independence".[110] The Court, by eight votes to seven, determined that the union would be incompatible with the 1922 Protocol,[111] defining Austrian independence as the:[112]

> … continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.

The reasoning of the case has been subject to criticism,[113] and today the minority judgment is considered to reflect the correct approach to sovereignty and independence, recognising the compatibility of state independence with treaty regimes that restrict the exercise of some sovereign powers.[114] However, the particular attention paid to economic independence as a feature of sovereignty in the Court's opinion is reflective of its importance in interwar

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[105] *Lighthouses in Crete and Samos (France v Greece)* (1937) PCIJ (Series A/B) No 71 at 103.
[106] William C Gilmore *Newfoundland and Dominion Status: The External Affairs Competence and International Law Status of Newfoundland, 1855—1934* (Carswell, Toronto, 1988) at 202. Compare Crawford, above n 2, at 356—358.
[107] See Anghie, above n 10, at 180—181.
[108] *Customs Regime between Austria and Germany (Advisory Opinion)* (1931) PCIJ (series A/B) No 41.
[109] Treaty of Peace between the Allied and Associated Powers and Austria [1919] UKTS 11 (opened for signature 10 September 1919, entered into force 16 July 1920), art 88.
[110] Ralf Alleweldt "Customs Regime between Germany and Austria (Advisory Opinion) (August 2009) Max Planck Encyclopaedia of Public International Law <www.opil.ouplaw.com/home/mpil> at [2].
[111] *Customs Regime between Austria and Germany (Advisory Opinion)*, above n 108, at 53.
[112] At 45, per Bustamante, Guerrero, Rostworowski, Fromageot, Altamira, Urrutia and Negulesco JJ.
[113] See Crawford, above n 2, at 63—64.
[114] Costi and Ross, above n 79, at 94.

jurisprudence, and bears consideration in light of the economically dependent relationship between New Zealand and the United Kingdom throughout the early-to-mid 20th century.[115]

C Imperial Constitutional Law and the inter se *doctrine*

An additional complication to the Dominions' acquisition of an independent legal personality is the *inter se* doctrine: although not recognised as a rule of customary international law,[116] it governed the manner in which the Dominions and the United Kingdom envisioned their relations vis-à-vis one another, and was a source of confusion for external states attempting to identify the Dominions' international status.[117] Rooted in the concept of the indivisibility of the Crown, the *inter se* doctrine argued that relations between the Dominions and the United Kingdom, or between the Dominions themselves, were regulated by a form of municipal law – imperial constitutional law – rather than international law.[118] The *inter se* doctrine effectively squared the circle of managing Dominion participation in international affairs, most notably as members of the League of Nations, with their shared allegiance to the Crown and resultant juridical indivisibility.[119] In an approach often seen with common law constitutional developments, the *inter se* doctrine did not attempt to resolve the ambiguity around the Dominions' international status, but rather capitalised on the ambiguity to the Dominions' advantage, creating a "constitutional and procedural fluidity [which] allowed Britain and the Dominions to choose when and how to cooperate on international issues in the 1920s."[120]

The *inter se* doctrine also captures a uniquely interwar debate around the interrelation of domestic and international legal frameworks. International law generally operates distinctly from municipal law, as demonstrated by the rule that a state's internal law cannot be used to justify non-compliance with an international treaty obligation.[121] However, jurists in the interwar period were "acutely aware that internal sovereignty and external sovereignty were

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[115] FLW Wood "The Fourth British Empire" in JC Beaglehole (ed) *New Zealand and the Statute of Westminster: Five Lectures* (Whitcombe & Tombs, Wellington, 1944) 106 at 129—130.
[116] MHM Kidwai "International Personality and the British Dominions: Evolution and Accomplishment" (1975) 9 UQLJ 76 at 103; and Franklin Berman "Treaty-making within the British Commonwealth" (2015) 38 MULR 897 at 911–912, citing JES Fawcett *The Inter Se Doctrine of Commonwealth Relations* (Athlone Press, London, 1958) at 22–23.
[117] Pert, above n 40, at 188.
[118] RY Jennings "The Commonwealth and International Law" (1953) 30 BYIL 320 at 320.
[119] See, in a municipal/imperial context, the discussion in Janet McLean *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, Cambridge, 2012) at 211—214.
[120] Gorman, above n 8, at 23—24.
[121] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 27.

intimately connected",[122] as interwar arbitral tribunals and courts grappled with the shift toward a Westphalian state order premised on sovereignty equality.[123]

The implications of the *inter se* doctrine were that agreements within the Empire were not treaties *stricto sensu* and could not be registered with the League Secretariat, and that disputes between imperial polities would be non-justiciable before international tribunals.[124] Thus, for example, a dispute between the Dominions of Newfoundland and Canada regarding the delimitation of their land border was submitted to the Privy Council in accordance with an imperial legislative provision allowing for referrals by the monarch on "any such other matters whatsoever as His Majesty shall think fit".[125] In its judgment, the Privy Council canvassed relevant international law regarding the doctrine of discovery, watershed boundaries, and the territorial rights acquired under international law through occupation of a sea-coast.[126]

However, the operation of this doctrine was both challenged from within the imperial system,[127] and disregarded from without.[128] Within the *inter se* polities, the creation of the Irish Free State as a Dominion in 1922 complicated matters: the Anglo-Irish Treaty of 1921 was successfully registered with the League Secretariat in 1924, along with a published note of protest from Alexander Cadogan, head of the Foreign Office's League section.[129] More broadly, it was clear the doctrine would not be accepted by the international community in light of British and Dominion membership in the League of Nations, whose Covenant contained "obligations … imposed in the most specific terms on every member of the League", incompatible with the full operation of the *inter se* doctrine.[130]

The *inter se* doctrine, considering its lack of international acceptance, was "born a dying duckling."[131] Its effect would end up being primarily to confuse outside states, who did not

[122] Anghie, above n 10, at 134.
[123] Benedict Kingsbury "Sovereignty and Equality" (1998) 9 EJIL 599 at 606—609.
[124] SA de Smith *The New Commonwealth and Its Constitutions* (Stevens & Sons, London, 1964) at 11.
[125] Judicial Committee Act 1833 (Imp) 3 & 4 Will IV c 41, s 4.
[126] *Re Labrador Boundary* [1927] 2 DLR 401 (PC) at 414 and forward. See also H Lauterpacht "Decisions of Municipal Courts as a Source of International Law" (1929) 10 BYIL 65 at 74; and AFN Poole "The Boundaries of Canada" (1964) 42 Can Bar Rev 100 at 122—123.
[127] Berman, above n 116, at 905—906.
[128] At 911—912; and de Smith, above n 124, at 11.
[129] Treaty between Great Britain and Ireland 26 LNTS 9 (6 December 1921); and Communication from the British Government 27 LNTS 449 (27 November 1924).
[130] Jennings, above n 118, at 333; Berman, above n 116, at 901—902; and de Smith, above n 124, at 11.
[131] de Smith, above n 124, at 11.

know what to make of some Dominions' "assertion of international personality to states outside the Empire but not *inter se*."[132]

IV New Zealand's Interwar External Relations

Well before New Zealand emerged as a subject of international law in the interwar period, it possessed a permanent population, defined territory, and government. Accordingly, this part of the paper examines New Zealand's steps toward establishing the capacity to enter into relations with other states.

A Developments before 1919

Prior to 1919, New Zealand possessed significant local autonomy and its own responsible government but lacked a general external affairs competence, in line with the colonial governance framework outlined by Lord Durham in 1839.[133] However, there are some important developments and features to note. The first is that throughout the 19th century, the New Zealand Government entered into various Crown-Māori agreements which, although not directly governed by international law, possessed a similar scope and subject matter to international treaties, covering the formation of regional political frameworks, territorial dispositions, and post-conflict peace settlements.[134] Contrary to New Zealand's subsequent aversion to an expanded treaty-making power, its delegate to the first Colonial Conference in 1887 argued for the power to negotiate commercial and tariff agreements with external states.[135] By 1907, New Zealand and other self-governing colonies possessed the power of negotiating binding commercial treaties, but their operationalisation remained subject to the final approval of the Colonial Office and Board of Trade in London.[136] New Zealand was also able to enter into intra-imperial agreements not formally considered treaties owing to their position *inter se*, such as a 1906 Customs Treaty with South Africa.[137]

In September 1907, a proclamation by King Edward VII redesignated the Colony of New Zealand as the Dominion of New Zealand.[138] Beyond connoting the constituent polities of the British Empire that possessed responsible government, the exact modalities of Dominion status

[132] Pert, above n 40, at 188.
[133] See JC Beaglehole "The Old Empire and the New" in JC Beaglehole (ed) *New Zealand and the Statute of Westminster: Five Lectures* (Whitcombe & Tombs, Wellington, 1944) 1 at 16 and following.
[134] See generally RP Boast "Treaties Nobody Counted On" (2011) 42 VUWLR 653.
[135] Kidwai, above n 116, at 79.
[136] At 82.
[137] *New Zealand Consolidated Treaty List, as at 31 December 1996: Part 1 (Multilateral Treaties)* (Ministry of Foreign Affairs and Trade, Wellington, 1997) at 5 and 9 fn 17.
[138] "The Dominion of New Zealand" [1907] I AJHR A2a.

were unclear. The Dominions did not possess an international legal personality distinct from the United Kingdom: although New Zealand participated in technical organisations such as the Universal Postal Union (UPU) and had separate representation at international conferences on radiotelegraphy and maritime safety, it lacked a general treaty-making competence or right of legation.[139] Separate representation in institutions such as the UPU were not taken to be significant: the Dominions had developed separate postal systems as part of their internal self-rule, and participation in the UPU "was considered to be so 'technical' as hardly to impinge on the sphere of foreign affairs at all."[140] The 1912 edition of Oppenheim's authoritative *International Law* summarises the prevailing position:[141]

> Colonies rank as territory of the motherland, although they may enjoy complete self-government and therefore be called Colonial States. Thus, if viewed from the standpoint of the Law of Nations, the Dominion of Canada, the Commonwealth of Australia, New Zealand, and the Union of South Africa are British territory.

The continued management of external relations from Westminster was accompanied by a principle that Dominions were to be consulted on questions of foreign affairs in which Dominion interests were involved.[142] However, an exceedingly narrow interpretation was given to "Dominion interests", such that consultation was not observed in respect of the Empire's participation in major political treaties such as the 1909 Declaration of London, and the Hague Conventions of 1899 and 1907,[143] with Britain's adherence sufficient to bind the Dominions.[144] New Zealand, along with the whole of the Empire, was bound by King George V's declaration of war against Germany in 1914, following an ultimatum given to Germany by the British Government.[145]

The Dominions' participation in WWI highlighted the need for a greater voice in imperial foreign policy, beginning with Dominion representation in the Imperial War Cabinet in 1917, which included the promise of a clearer constitutional settlement following the war's

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[139] McIntyre, above n 65, at 60; and Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) at 250.
[140] PJ Noel-Baker *The Present Juridical Status of the British Dominions in International Law* (Longmans, London, 1929) at 46.
[141] L Oppenheim *International Law: A Treatise* (2nd ed, Longmans, London, 1912) vol 1 at 231. Contrast William Thomas Worster "Territorial Status Triggering a Functional Approach to Statehood" (2020) 8 Penn St J L & Intl Aff 118 at 132.
[142] Noel-Baker, above n 140, at 46.
[143] At 47—48; and Kidwai, above n 116, at 94.
[144] Robert B Stewart *Treaty Relations of the British Commonwealth of Nations* (Macmillan, New York, 1939) at 127–130 and 133; and Malcolm M Lewis "The International Status of the British Self-Governing Dominions" (1922–1923) 3 BYIL 21 at 23–24.
[145] Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (Auckland University Press, Auckland, 2017) at 293—294.

conclusion.[146] At the 1917 Imperial War Conference, Canadian Premier Robert Borden proposed a resolution advancing the right of Dominions to have "an adequate voice in foreign policy" alongside "continuous consultation in all important matters of common Imperial concern".[147] This resolution was seconded by New Zealand Prime Minister William Massey, who expressed a desire for the continuation of Dominion representation in an Imperial Cabinet following the end of the war.[148]

B Participation in International Institutions

1 The Paris Peace Conference

A dramatic change came in 1919 where New Zealand, along with the other Dominions and India,[149] were given individual representation at the Paris Peace Conference and became separate signatories to the Treaty of Versailles.[150] As with Dominion participation in the Imperial War Cabinet, separate representation at Paris was framed as a direct result of the Dominions' wartime sacrifices in the name of imperial interest.[151] However, the individual representation was that of component entities in a larger British Empire Delegation, and the separate signatures were under a single "British Empire" heading, consisting of different plenipotentiaries of the Head of State invested with full powers in respect of each Dominion's territory.[152]

Separate Dominion representation at Paris was controversial. The strongest opposition came from France, which saw Dominion representation as six British votes, and briefly considered advocating for separate representation of its own colonies.[153] The powers negotiated a compromise wherein the Dominions, though independently represented, would not have a separate vote from the British Empire delegation.[154] New Zealand used its platform as the Paris Peace Conference to emphasise its interests on Samoan annexation,[155] and in presenting, along

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[146] Storr, above n 70, at 357; and McIntyre, above n 65, at 69—70.
[147] *Imperial War Conference, 1917: Extracts from Minutes of Proceedings and Papers Laid Before the Conference* (Cmd 8566, 1917) at 40–41 and following.
[148] At 44–45.
[149] Though not Newfoundland.
[150] Quentin-Baxter and McLean, above n 145, at 286—287.
[151] See CD Allin "Neutrality of British Dominions" (1922) 20 Mich L Rev 819 at 837; A Berriedale Keith *Letters and Essays on Current Imperial and International Problems, 1935—6* (Oxford University Press, London, 1936) at 4—5; and Quentin-Baxter and McLean, above n 145, at 25.
[152] Kidwai, above n 116, at 96—97.
[153] Gerald Chaudron *New Zealand in the League of Nations: The Beginnings of an Independent Foreign Policy, 1919—1939* (McFarland, Jefferson (NC), 2012) at 12; and MacMillan, above n 58, at 52–53.
[154] Chaudron, above n 153, at 12.
[155] See pt IV.F below.

with Australia, the most vocal opposition to Japan's proposed racial equality clause, drawing on a racially-motivated opposition to Asian immigration present among New Zealand political élites at the time.[156]

Although this can be classified as a possible critical date for New Zealand independence,[157] the prevailing contemporary opinion was that, in so doing, the Dominions acquired some more limited form of international status.[158] Berriedale Keith argues the development was important in advancing imperial constitutional conventions, but irrelevant from the standpoint of international law, as the Dominions would have been bound by the treaty even in the absence of their separate signatures.[159] The international legal significance of the Paris Peace Conference was downplayed within New Zealand. As Massey told the House of Representatives: "We signed [the Treaty of Versailles] not as independent nations in the ordinary sense of the term. We signed it as the representatives of self-governing nations within the Empire".[160] Similarly, British Prime Minister Lloyd George was comfortable telling the House of Commons in 1921, when discussing the meaning of Dominion status in light of the Anglo-Irish Treaty, that the "instrument of the foreign policy of the Empire is the British Foreign Office."[161]

2 The League of Nations

In separately signing the Treaty of Versailles, New Zealand, along with the other Dominions except Newfoundland, became founding members of the League of Nations,[162] and entitled to membership of the ILO.[163] While it may be tempting to conclude that League membership in of itself constituted international recognition of New Zealand statehood, there are various

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[156] MacMillan, above n 58, at 328; and Sekhar Bandyopadhyay "Reinventing Indian Identity in Multicultural New Zealand" in Henry Johnson and Brian Moloughney (eds) *Asia in the Making of New Zealand* (Auckland University Press, Auckland, 2015) 125 at 127—128. See also Keene, above n 48, at 130 on the utilisation of anti-Asian rhetoric by opponents of American membership in the League of Nations.

[157] Quentin-Baxter and McLean, above n 145, at 25; and Kenneth Keith "New Zealand" in Simon Chesterman, Hisashi Owada and Ben Saul (eds) *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, Oxford, 2019) 796 at 797.

[158] Keith, above n 151, at 4—5; Crawford, above n 2, at 364; and Melissa Conley Tyler, Emily Crawford and Shirley V Scott "Australia's International Personality: Historical, Legal and Policy Perspectives" in Donald D Rothwell and Emily Crawford (eds) *International Law in Australia* (3rd ed, Thomson Reuters, Sydney, 2016) 1 at 5.

[159] Arthur Berriedale Keith "The International Status of the Dominions" (1923) 5 J Comp Legis & Intl L (3d ser) 161 at 163—164.

[160] (17 October 1919) 185 NZPD 519.

[161] FR Scott "The End of Dominion Status" (1944) 38 AJIL 34 at 36. See generally (14 December 1921) 149 GBPD HC 27 and following.

[162] Keith, above n 157, at 797.

[163] Noel-Baker, above n 140, at 90.

complicating factors. The first concerns the League's criteria for entry, stated as being open to any "fully self-governing State, Dominion or Colony",[164] indicating Dominion status fell short of statehood.[165] This provision allowed the continuing ambiguity around the exact international status of Dominions to be resolved at a later date.[166]

As with separate Dominion representation at the Paris Peace Conference, Dominion membership in the League was politically contentious, prompting the "six or one question": were the Dominions and Britain juridically distinct, or was a single entity being given a bloc vote?[167] United States Senators opposed to American ratification of the Treaty of Versailles highlighted Dominion membership in the League, and an associated risk that the United States thereby occupied "a place of inferiority in power and representation" as a key concern.[168] Henry Cabot Lodge, the Senate Foreign Relations Committee chair, proposed a series of reservations, including that the United States would not be bound by any decision "in which any member of the League and its self-governing dominions, colonies, or parts of empire, in the aggregate have cast more than one vote."[169] The Lodge Reservations were rejected by the Senate, leading to the eventual rejection of the Treaty itself.[170]

New Zealand's political leadership, concerned with maintaining imperial unity and content to leave foreign relations primarily in Westminster's hands,[171] were reticent to ascribe international significance to League membership. Massey had initially argued for Dominion representation at the League to adopt the model of the Paris Peace Conference, that of component units of a single British Empire delegation.[172] His position having been overruled,

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[164] Covenant of the League of Nations, art 1.
[165] Crawford, above n 2, at 364; and *Free City of Danzig and International Labour Organization (Advisory Opinion)*, above n 94, at 21—22.
[166] Gorman, above n 8, at 35.
[167] At 40—42.
[168] John Cooper Milton *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (Cambridge University Press, Cambridge, 2001) at 217–219.
[169] Quoted in Ronald E Powaski *American Presidential Statecraft: From Isolationism to Internationalism* (Palgrave Macmillan, Cham (Switzerland), 2017) at 107. See also George W Egerton "Britain and the 'Great Betrayal': Anglo-American Relations and the Struggle for United States Ratification of the Treaty of Versailles, 1919–1920" (1978) 21 Historical Journal 885 at 891–893.
[170] Charles A Kupchan *Isolationism: A History of America's Efforts to Shield Itself from the World* (Oxford University Press, New York, 2020) at 251 and following. President Wilson's opposition to the Lodge Reservations primarily concerned their effect Article 10 of the League Covenant, the effect of which, Wilson felt, would be to undermine collective security: G John Ikenberry *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Revised ed, Princeton University Press, Princeton, 2019) at 153–154. See generally NK Meaney "The British Empire in the American Rejection of the Treaty of Versailles" (1963) 9 AJPH 213.
[171] Angus Ross "New Zealand and the Statute of Westminster" in Norman Hillmer and Philip Wigley (eds) *The First British Commonwealth: Essays in Honour of Nicholas Mansergh* (Frank Cass, London, 1980) 136 at 137—140.
[172] Chaudron, above n 153, at 33.

the New Zealand Government then adopted the position that League membership was an exceptional case, one that did not imply a general international legal personality distinct from the United Kingdom.[173] Sir John Salmond, as New Zealand's delegate to the 1922 Washington Conference on disarmament, summarised the New Zealand position. The significance of New Zealand participation at that Conference was:[174]

> … not that those Dominions have acquired for either international or constitutional purposes any form of independent status, but that they have now been given voice in the management of the international relations of the British Empire as single, undivided unity — relations which were formerly within the exclusive control of the Government of Great Britain.

With respect to League membership, Salmond continued:[175]

> By the special and peculiar organization of that body, self-governing colonies are admitted as members in their own right as if they were independent States. Although by constitutional and international law such colonies are merely constituent portions of the Empire to which they belong, they are entitled by express agreement to be treated, so far as practicable, as if they were independent. But no such principle was recognized at Washington, or exists except for the special purposes of the League of Nations.

In effect, Salmond's argument puts the position of New Zealand at international law as that of a unit within a larger federal state, capable of exercising various devolved competences, but falling short of statehood inasmuch as its devolved competences with respect to foreign relations remain ultimately subject to discretionary devolution from the metropole.[176] This placed New Zealand in a position well-known to international lawyers: German Länder and Swiss Cantons possess a treaty-making power under their domestic constitutions that, emanating from a domestic delegation of power, does not create a separate international legal personality but rather allows them to enter into international agreements "as agents for the union."[177] It also implicitly aligns New Zealand's place in the interwar British Empire with Joseph Ward's unsuccessful proposal for an Imperial Federation advanced at the 1911 Imperial Conference.[178]

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[173] Gerald Chaudron "The League of Nations and Imperial Dissent: New Zealand and the British Labour Governments, 1924—31" (2011) 39 J Imp & Commonw Hist 47 at 48.
[174] "Conference on the Limitation of Armaments" [1922] I AJHR A5 at 14.
[175] At 15.
[176] See Distefano, above n 76, at 64.
[177] Crawford, above n 78, at 105; and Distefano, above n 76, at 82. On the role of Canadian provinces in the treaty-making process, particularly treaties in respect of matters that fall within provincial jurisdiction, see Laura Barnett *Canada's Approach to the Treaty-Making Process* (Library of Parliament, publication no 2008-45-E, 1 April 2021) at 8–9.
[178] See McIntyre, above n 65, at 53—57.

The argument that Dominion membership in the League did not imply a general international legal personality was shared by scholars at the time.[179] The 1920 edition of Oppenheim's *International Law* confirmed the Dominions' position "underwent a fundamental change" as a result of League membership, giving them "a position in International Law."[180] However, this position "defie[d] exact status", and the treatise is explicit in stating League membership should not lead self-governing Dominions to be treated as sovereign states generally.[181] Henri Rolin, arguing against a generalised Dominion legal personality outside of League matters, cites Salmond's remarks at the Washington Conference as representing "the exact formula … as to the Dominions' status".[182]

In addition to disputing that League membership created a separate international legal personality, New Zealand governments approached the League with suspicion throughout the 1920s, as they remained "convinced that a strong British Empire was the best hope for international peace and security."[183] Moreover, New Zealanders by and large demonstrated a minimal interest in foreign affairs throughout this period, limiting the political incentive for the Government to demonstrate a depth of international engagement.[184] New Zealand favoured a strong centralisation of League affairs within Britain. Its delegate initially proposed that all communications between the Dominions and the League pass through a secretariat in London, operating in consultation with the British Government – a position rejected by the other Dominions.[185] Along with an ideological commitment to imperial strength, budgetary and resourcing constraints likely also influenced New Zealand's stance: New Zealand lacked a diplomatic corps at time of the League's founding,[186] and closely scrutinised its contributions

[179] Keith, above n 159, at 165.
[180] L Oppenheim *International Law: A Treatise* (3rd ed, Longmans, London, 1920) vol 1 at 170. See also William Edward Hall *A Treatise on International Law* (A Pearce Higgins (ed), 8th ed, Clarendon Press, Oxford, 1924) at 34–35; and Lewis, above n 144, at 33–34.
[181] Oppenheim, above n 180, at 170 and 126. See also Hall, above n 180, at 35.
[182] Henri Rolin "Le Statut des Dominions" (1923) 4 Revue de Droit International et de Legislation Comparée (3 série) 195 at 223: "la formule exacte, traduisant la portée du Pacte de la Société des Nations, quant au statut des Dominions, est celle qu'a donnée, dans un rapport officiel, l'un des plus éminents jurisconsultes du monde britannique, Sir John Salmond, juge de la Cour Suprême de la Nouvelle-Zélande."
[183] Chaudron, above n 173, at 47.
[184] Lorna Lloyd "Loosening the Apron Strings: The Dominions and Britain in the Interwar Years" (2003) 369 Round Table 279 at 280. See also Editorial "Swelled Heads & Great Powers" *The Evening Post* (Wellington, 10 September 1926) at 6; and Bruce S Bennett *New Zealand's Moral Foreign Policy 1935-1939: The Promotion of Collective Security through the League of Nations* (New Zealand Institute of International Affairs, Wellington, 1988) at 81–82.
[185] Noel-Baker, above n 140, at 97—98.
[186] Sally Marks "Small States at Geneva" (1995) 157 Wld Aff 191 at 191.

to the League budget, occasionally being listed as a member in default of its obligations following depression-era economising.[187]

Why, then, did New Zealand remain in the League, despite membership creating, in Massey's words, "a tangle from which he would like to get free if possible"?[188] League membership, although creating international obligations of minimal interest to New Zealand, did accomplish the goal of strengthening New Zealand's equality of status *within* the British Empire.[189] Additionally, New Zealand membership was framed as a way to strengthen and amplify the Empire's voice on the international stage,[190] reflecting an imperial internationalist approach to external affairs. Lastly, it allowed New Zealand a platform from which it could speak on its specific interests where appropriate, including on dispute resolution and its sub-imperial position in Samoa, as discussed below.

C Changes to Imperial Constitutional Law

As we have seen, it was possible in the early 1920s to argue that New Zealand, along with other Dominions, had only achieved a functional international status conterminous with its League membership. Subsequent clarifications of imperial constitutional law, decided at a series of Imperial Conferences over the decade, expanded Dominion autonomy and made clear to outside states their generalised international legal personality.

1 The 1926 Imperial Conference

The 1926 Imperial Conference is a pivotal moment in the development of Dominion legal personality. It arrived at a point in time when Dominions increasingly sought to expand and give legal form to their international status: Canada was represented by William Lyon Mackenzie King, who sought lessened British influence over Dominion matters following the "King-Byng Affair", in which the Governor-General had refused King's request for the dissolution of Parliament, and greater legal autonomy following a Privy Council judgment voiding a Canadian statute that had abolished Privy Council appeals in criminal trials.[191] Meanwhile in South Africa, Smuts had been replaced as Prime Minister by the Boer

[187] Chaudron, above n 153, at 101.
[188] Peter J Yearwood *Guarantee of Peace: The League of Nations in British Policy, 1914-1925* (Oxford University Press, Oxford, 2009) at 194 fn 317.
[189] Lloyd, above n 184, at 280.
[190] (16 March 1921) 190 NZPD 169. See also Chaudron, above n 153, at 44 and forward.
[191] Peter C Oliver "'Dominion Status': History, framework and context" (2019) 17 ICON 1173 at 1176; JC Beaglehole "The Statute and Constitutional Change" in JC Beaglehole (ed) *New Zealand and the Statute of Westminster: Five Lectures* (Whitcombe & Tombs, Wellington, 1944) 33 at 55—56; and *Nadan v The King* [1926] AC 482 (PC).

secessionist JBM Hertzog, who proposed the Conference adopt a declaration explicitly describing the Dominions as independent states.[192] These positions were opposed by New Zealand, whose then-Prime Minister Gordon Coates was described by a Dominions Office undersecretary as "intensely proud of being part of the Empire and far more anxious that she should remain so than that any form of international status should be secured", content to defer to London on foreign policy matters.[193]

Ultimately, the Conference produced the following authoritative statement on Dominion status, commonly known as the Balfour Declaration after the former British Prime Minister who chaired the Inter-Imperial Relations Committee. Great Britain and the Dominions were defined as:[194]

> … autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

That this definition represented a compromise was evident. As Wheare observed, "for South Africa and the Irish Free State, they were autonomous communities – but, on the other hand, for New Zealand and Australia, say, they were within the British Empire";[195] Dunn described a formula "that at one and the same time divides the indivisible and yet keeps the whole intact."[196] In effect, the Balfour Declaration left it to subsequent Dominion practice to see which would predominate: equal status and non-subordination, or common allegiance and imperial linkages.[197] In the following years, it would become clear, including to external states, that the former principle won out and the Dominions would possess an independent generalised international legal personality.[198]

2 The Statute of Westminster

As important as the Balfour Declaration had been in outlining the significance of Dominion status, as a report of an Imperial Conference, it lacked any direct legislative or executive effect

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[192] McIntyre, above n 65, at 119—120.
[193] Ross, above n 171, at 139—140.
[194] "Imperial Conference 1926: Summary of Proceedings" [1927] I AJHR A6 at 8.
[195] KC Wheare *The Statute of Westminster and Dominion Status* (3rd ed, Oxford University Press, Oxford, 1947) at 28.
[196] Dunn, above n 91, at 354.
[197] Stewart, above n 144, at 363.
[198] See Arthur Berriedale Keith *The Dominions as Sovereign States: Their Constitutions and Governments* (Macmillan, London, 1938) at 35.

within the imperial polities.[199] Following discussions at the 1930 Imperial Conference, the British Parliament introduced legislation to do away with "the remaining vestiges of legislative restraints on the Dominion competence" and any "lingering disbeliefs … with regard to the real implications of the Dominion Status".[200] The result was the Statute of Westminster. The Statute removed the remaining limitations on Dominions' legislative competence: legislation would not be voided for repugnancy with English law,[201] Dominions could pass legislation with extraterritorial effect,[202] and the British Parliament could not legislate for a Dominion except by consent.[203] Once enacted, the legal separation of Dominions from Westminster was complete. Viscount Sankey noted in a Privy Council judgment that "the Imperial Parliament could, as a matter of abstract law, repeal or disregard s 4 of the Statute", his Lordship was clear this was theoretical and "has no relation to realities",[204] and de Smith notes this dictum "may well have been good English law; but it was not necessarily good [Dominion] law".[205]

New Zealand approached the Statute of Westminster with suspicion, playing "an almost entirely negative role" in its formulation.[206] George Forbes, the Prime Minister at the time, shared his predecessor's view that preserving imperial unity took priority over clarifying the modalities of Dominion status.[207] New Zealand successfully sought to be excluded from the Statute's operative provisions until adopted by its own Parliament,[208] which did not take place until 1947.[209] This reflected the longstanding principle of conservative New Zealand governments favouring imperial unity and taking a minimal interest in devolving external affairs competences: as Forbes told the 1930 Imperial Conference, on constitutional issues "we have had no complaints to make and no requests to put forward."[210] The economic context of the depression is equally important, as the Government aimed to avoid any change to New Zealand's constitutional place within the Empire that could potentially limit its access to credit on the London market at favourable rates.[211] New Zealand's delayed adoption of the Statute

[199] Noel-Baker, above n 140, at 137.
[200] Kidwai, above n 116, at 114.
[201] Statute of Westminster 1931 (Imp) 22 & 23 Geo V c 4, s 2(2).
[202] Section 3.
[203] Section 4.
[204] *British Coal Corp v The King* [1935] AC 500 (PC) at 520 per Viscount Sankey LC.
[205] de Smith, above n 124, at 8.
[206] McIntyre, above n 65, at 131.
[207] (11 August 1930) 225 NZPD 139.
[208] Andrew Ladley and Elinor Chisholm "Who Cut the Apron Strings and When? Adopting the Statute of Westminster in New Zealand in 1947" (2008) 60(2) Pol Sci 15 at 19; and Statute of Westminster 1931, above 201, s 10. This provision applied also to Australia and Newfoundland.
[209] Statute of Westminster Adoption Act 1947.
[210] *Imperial Conference 1930: Appendices to the Summary of Proceedings* (Cmd 3718, 1930) at 248.
[211] Ladley and Chisholm, above n 208, at 20.

meant that legislation giving effect to international conventions in the mid-1930s was either reserved for His Majesty's pleasure or given effect only with prior authorisation through imperial legislation.[212] However, these remaining constraints were minor, such that figures in the First Labour Government, when justifying an independent foreign policy in the late 1930s, could state "under the Statute of Westminster ours is a sovereign country".[213]

D Treaty-Making

An independent treaty-making power is a crucial indicator of international legal personality: Stewart describes the Dominions' gradual acquisition of such power the "most revealing element" of their equality of status established in the 1920s.[214] The self-governing Dominions were denied an independent treaty-making power before WWI as, in the Colonial Secretary's terms, to grant such power "would be to give them an international status as separate and sovereign States".[215]

Dominion treaty-making practice was ambiguous in the first half of the 1920s. The practice established at Versailles – separate signatures under a "British Empire" heading, with His Majesty's ratification withheld until approval from each Dominion Parliament and Westminster[216] – was not carried forward into the 1923 Treaty of Lausanne, signed by Britain alone and without separate Dominion representation at the preceding conference.[217] The Dominions did not attend the Locarno Conference in 1925, though the resulting treaty excluded its application to the Dominions in the absence of their express acceptance.[218] Bilateral treaties with extra-imperial states could be equally perplexing: in 1923, Canada concluded the Halibut Fisheries Treaties with the United States, the first such agreement made by a Dominion without British involvement.[219] However, the United States Senate officially described the treaty as

[212] Keith, above n 157, at 813, citing the Shipping and Seamen (Safety and Load Line Conventions) Act 1935, and the Whaling Industry Act 1935. On the process of reservation of Dominion legislation, see Wheare, above n 195, at 63.
[213] (21 July 1938) 251 NZPD 133. See also W David McIntyre "The Development and Significance of Dominion Status" (revised ed, paper presented to Dominion status symposium, Wellington, 26 September 2007) at 8.
[214] Stewart, above n 144, at 364.
[215] Quoted in Kidwai, above n 116, at 80.
[216] Stewart, above n 144, at 368.
[217] Lloyd, above n 184, at 281. Mirroring what had occurred at the Paris Peace Conference, France threatened to require separate representation for French protectorates in North Africa if separate Dominion representation were allowed at Lausanne: McIntyre, above n 65, at 99–100. See also (6 June 1924) 174 GBPD HC 1620–1621.
[218] Pert, above n 40, at 174.
[219] Kidwai, above n 116, at 82.

one between the United States and Great Britain, even briefly proposing a reservation purporting to bind all British nationals and vessels, causing consternation in London.[220]

New Zealand resisted expanding Dominion treaty-making powers. As Canada took steps toward the independent negotiation and ratification of trade arrangements, New Zealand once again presented a unitary empire: in 1921 the Acting Prime Minister informed an American Consular Agent:[221]

> The Dominion of New Zealand does not assume authority to communicate directly with the Government of the United States or of any country other than Great Britain, and it is an invariable rule that communications from any foreign country to the Government of New Zealand must be in the form of communications to the Government of Great Britain.

New Zealand's position would not last, considering Canada's bilateral treaty-making and the separate Dominion acceptance provided for at Locarno. The 1926 Imperial Conference clarified that the Dominions had the complete freedom to conclude agreements with external states, without first acquiring British approval or agency.[222] Multilateral treaties, whether conducted under League auspices or not, would be signed and ratified individually by each Dominion.[223] This process was followed in the Kellogg-Briand Pact of 1928. The separate Dominion invitations from the United States to the conference preceding the treaty can be seen "as evidence of full recognition of the Dominions' international status" from a major power outside the League of the Nations.[224] Despite its previous reticence, New Zealand availed itself of independent treaty-making powers once confirmed in 1926, entering into its first extra-imperial bilateral treaty without United Kingdom involvement in 1928: an exchange of notes on a commercial *modus vivendi* with Japan.[225]

E Collective Security and the Use of Force

1 Judicial Dispute Settlement

One development inaugurated by the League system was the PCIJ, "the first permanent international tribunal with general jurisdiction".[226] In 1921, New Zealand was the first

[220] William Harrison Moore "The Dominions and Treaties" (1926) 8 J Comp Legis & Intl L (3d Ser) 21 at 25; and Gilmore, above n 106, at 79.
[221] Quoted in Noel-Baker, above n 140, at 144. See also Chaudron, above n 173, at 49.
[222] Lloyd, above n 184, at 287—288.
[223] Noel-Baker, above n 140, at 185—186.
[224] Pert, above n 40, at 175. See also Kidwai, above n 116, at 106.
[225] *New Zealand Consolidated Treaty List*, above n 137, at 9.
[226] "Permanent Court of International Justice" International Court of Justice <www.icj-cij.org>.

Dominion to assent to the United Kingdom signing on its behalf the Protocol of Signature establishing the Court.[227] Crucially, signing this Protocol did not entail accession to the Optional Clause by which states consented to the Court's compulsory jurisdiction,[228] a topic that would recur throughout the 1920s.

In 1924, the United Kingdom, under the Labour Government of Ramsey MacDonald, supported the proposed Geneva Protocol, which aimed to avert conflict by establishing a binding international arbitral process over all disputes that could lead to war.[229] The Dominions were far less enthusiastic,[230] and New Zealand's outright opposition to the Protocol put it in "the unfamiliar role of imperial dissenter".[231] In light of Dominion opposition, of which Australia and New Zealand were the most vocal, the British Foreign Secretary announced the Empire's rejection of the Protocol in March 1925, and the instrument never materialised.[232] The 1926 Imperial Conference, at which the Balfour Declaration was issued, noted the feeling of Dominion governments that it was "at present premature to accept the obligations" contained in the Optional Clause, and referred to an understanding that neither the British nor any Dominion government "would take any action in the direction of the acceptance of the [Optional Clause] without bringing up the matter for further discussion."[233]

Two factors, each distinctly tied to imperial internationalism, influenced New Zealand's opposition to compulsory judicial dispute settlement. The first, rooted in New Zealand's dependence on Royal Navy for its international security, was a desire to avoid any potential legal constraints on British belligerent rights at sea.[234] The second was the preservation of New Zealand's highly restrictive immigration policies, which successive governments feared would be adjudged by the PCIJ to be contrary to international law.[235] Both factors position New Zealand, and its pro-imperial administration, as a self-appointed defender of imperial interests – British naval supremacy and a racialised immigration policy – against a more liberal internationalist Labour administration in London.

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[227] Lorna Lloyd "'A Springboard for the Future': A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice" (1985) 79 AJIL 28 at 46.
[228] Statute of the Permanent Court of International Justice, art 36(2).
[229] Gorman, above n 8, at 44—45.
[230] At 45.
[231] Chaudron, above n 173, at 54.
[232] Chaudron, above n 153, at 61—62.
[233] "Imperial Conference 1926: Summary of Proceedings", above n 194, at 17.
[234] Lloyd, above n 227, at 36.
[235] Keith, above n 157, at 806; and Chaudron, above n 153, at 61.

By 1929, Ramsey MacDonald had returned to Downing Street following a period of Conservative Party government, and resumed governmental support for the Optional Clause, this time bolstered by the Dominions' signatures of the Kellogg-Briand Pact.[236] With opposition from the other Dominions more muted, New Zealand signed the Optional Clause in 1929, though stressed its decision was motivated by a desire to maintain a unified imperial policy.[237] To accommodate New Zealand (and Australian) positions, the accession to the Optional Clause included a reservation as to matters falling exclusively within their internal jurisdiction, designed to preclude the justiciability of New Zealand and Australian immigration policy.[238]

The Dominions' accession to the Optional Clause also included a reservation as to disputes *inter se*, the inclusion of which paradoxically indicates the doctrine lacked force as a rule of international law and thus needed the reservation to be effectual.[239] The establishment of a permanent judicial body within the Empire to deal with *inter se* disputes was discussed but never materialised;[240] following WWII, disputes between Commonwealth members were heard at the International Court of Justice in cases where reservations did not preclude the Court's jurisdiction.[241]

2 War and Automatic Belligerency

Unlike the international legal order established under the UN, the League system continued to recognise war as a valid method of dispute resolution in limited circumstances, including to enforce the judgment of an international court or tribunal.[242] Whether a British declaration of war would bind the Dominions was much discussed in the interwar period. By 1922, it was clear that, regardless of the legal position, Dominion practice with respect to armed conflict was shifting.[243] The clearest example came with the Chanak Crisis of 1922, where the British Government, fearing it may be drawn into a war against Turkey in the Dardanelles, called upon the Dominions for military cooperation.[244] Most Dominions vocally asserted their right to

[236] Chaudron, above n 153, at 77.
[237] At 80.
[238] H Lauterpacht "The British Reservations to the Optional Clause" (1930) 29 Economica 137 at 150-151.
[239] Jennings, above n 118, at 326; and Berman, above n 116, at 915.
[240] Keith, above n 198, at 137—138.
[241] Berman, above n 116, at 918—921.
[242] Covenant of the League of Nations, art 12. See also Hathaway and Shapiro, above n 6, at 105—106.
[243] Allin, above n 151, at 837.
[244] See generally Robert Gerwarth *The Vanquished: Why the First World War Failed to End, 1917—1923* (Penguin Books, London, 2017) at ch 15.

independently decide whether to contribute forces, while New Zealand pledged to commit forces on the night it received communication from London.[245]

The question of whether Dominions would be automatically bound by a British declaration of war was complicated by imperial constitutional doctrine. Dominion Governors (or Governors-General) exercised royal prerogatives such as the calling and dissolution of Dominion legislatures but were not taken to be invested with prerogatives relating to foreign relations: Dominion plenipotentiaries obtained their credentials from the monarch directly, and Dominion Governors did not possess the prerogative of making war.[246] However, this position remained debatable, particularly in light of the Locarno Treaties of 1925 which, despite guaranteeing Germany's western frontiers and envisioning war to safeguard this compact, was stated to not bind Dominions without their assent.[247]

In 1935, Forbes told the House of Representatives that, despite differing opinion in other Dominions, "the legal position as we accept it in New Zealand" was that British involvement in war automatically entailed New Zealand involvement.[248] The question of automatic belligerency would primarily be settled by practice in WWII: Irish neutrality remained consistent with Commonwealth membership,[249] while Michael Joseph Savage's statements on New Zealand participation emphasised independence and voluntary cooperation;[250] New Zealand's declaration of war against Japan later in the conflict would commence from a different date than Britain.[251]

F New Zealand as a League Mandatory

One of the pivotal outcomes for New Zealand from the League's founding was its acquisition of a Mandate over the former German Samoa. At the Paris Peace Conference, Massey, along with the South African and Australian Prime Ministers, argued strenuously for outright annexation of former German colonies, supporting Australia's Billy Hughes in the face of

[245] Dunn, above n 91, at 362—363; and Will Harvie "The Chanak Affair: NZ Committed to another war at Gallipoli in 1922" (7 December 2019) Stuff <www.stuff.co.nz>.
[246] Herbert A Smith "British Dominions and Foreign Relations" (1926) 12 Cornell LQ 1 at 3—4; and Noel-Baker, above n 140, at 229—230.
[247] Lloyd, above n 184, at 293. See also Noel-Baker, above n 140, at 334—335.
[248] (19 February 1935) 241 NZPD 82—83.
[249] RO McGechan "Status and Legislative Inability" in JC Beaglehole (ed) *New Zealand and the Statute of Westminster: Five Lectures* (Whitcombe & Tombs, Wellington, 1944) 65 at 71.
[250] McIntyre, above n 65, at 168—170.
[251] (9 December 1941) 100 *New Zealand Gazette* 1; Scott, above n 161, at 44; Pert, above n 40, at 185; and Kidwai, above n 116, at 111. See also McGechan, above n 249, at 75.

criticism from Wilson that Dominion demands for annexation were holding up proceedings.[252] From 1920, until its conversion to a UN Trust Territory in the wake of WWII, New Zealand administered Samoa as a Class C Mandate, allowing for the direct application of New Zealand municipal law.

The Samoa mandate raised questions of imperial constitutional law, considering New Zealand's inability to legislate extraterritorially at the time the mandate was conferred.[253] An imperial Order-in-Council was issued in 1920, conferring on New Zealand the power to "make laws for the peace, order, and good government of the Territory of Western Samoa", subject to and in accordance with the post-war treaties of peace.[254] The majority of the Full Court of the Supreme Court confirmed the imperial Order-in-Council to be the jurisdictional basis for New Zealand's mandatory administration,[255] in contrast to Australian and South African judgments which determined extraterritoriality was no impediment to acting as a League mandatory.[256] By the 1940s, the need to remove any potential ambiguity around New Zealand's ability to legislate in respect of Samoa was emphasised by advocates of adopting the Statute of Westminster.[257]

New Zealand, in line with its sub-imperial political aspirations, "established the British colonial model as the basis for civil administration", primarily appointing career military officers "who tended to take an autocratic approach to governance" as Administrators.[258] Although initially concerned by the additional financial burden international oversight of mandate administration entailed,[259] sub-imperialism was a clear theme in the political discussion on the mandate within New Zealand. In 1919, Massey explained his hope Samoa would remain British (that is, under New Zealand administration) "indefinitely", while his Attorney-General spoke of Samoa's

[252] McIntyre, above n 65, at 79; FM Brookfield "New Zealand Citizenship and Western Samoa: A Legacy of the Mandate" (1983) 5 Otago LR 367 at 371; and MacMillan, above n 58, at 111—114.
[253] See Statute of Westminster 1931, above n 201, s 3.
[254] Western Samoa Order in Council 1920, cl 3; and Foreign Jurisdiction Act 1890 (Imp) 53 & 54 Vict c 37. The Order is reproduced in (4 June 1920) 55 *New Zealand Gazette* 1819. An Order-in-Council issued under imperial legislation in the 1920s similarly provided for New Zealand's authority over the Ross Dependency in Antarctica: Ross Dependency Boundaries and Government Order in Council 1923; and British Settlements Act 1887 (Imp) 50 & 51 Vict c 54. See also Joanna Mossop "Antarctica" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 273 at 274–276 and 298–300.
[255] *Tagaloa v Inspector of Police* [1927] NZLR 883 (SC).
[256] McGechan, above n 249, at 80, citing *Jolley v Mainka* (1933) 49 CLR 242 and *R v Christian* (1923) 2 ILR 27 (South Africa Supreme Court Appellate Division).
[257] McGechan, above n 249, at 79—80 and 84.
[258] Ministry for Culture and Heritage "New Zealand in Samoa: Colonial Administration" (28 July 2014) NZ History <www.nzhistory.govt.nz>.
[259] Graham Hassall "New Zealand, the League of Nations, and the Mandate over Western Samoa: The Early Years" (2016) 22 NZACL Yearbook 21 at 22—23.

future integration into New Zealand.[260] Opposition to the New Zealand administration grew in response to its heavy-handed tactics, including the disruption of the *matai* social structure and regular use of banishment without trial; this culminated in the Mau movement, "the most protracted, well-organised, and impressive campaign for self-determination of any mandated territory."[261] A direct link between the imperial and sub-imperial can be seen in the advice given to the Government by Governor-General Charles Fergusson, a British career military officer who consistently advocated "for the maintenance of imperial prestige in Samoa through the use of violence."[262] After Black Saturday, where New Zealand police constables fired upon peaceful Mau demonstrators, killing 11, Fergusson advised for the maintenance of "authority and prestige" while Prime Minister Ward sent a (selective) account of events to the League Council, seeking to "to enlist the League in its effort to stabilise its rule."[263]

The importance of the Samoa mandate for New Zealand's development of international legal personality is twofold. First, on a practical level, it provided an important incentive for Empire-oriented conservative politicians to remain in the League despite their mistrust of other, more liberal internationalist aspects of the institution. As then-Attorney General Francis Bell wrote in 1922:

> Massey … thinks the League is utterly useless and our expenditure in relation to it is wasted … I have only taken the argument that we can not help the expenditure so long as we are a mandatory, and he has seen the force of that.[264]

Secondly, while the administration of a Class C Mandate is colonial in nature, one crucial distinction lay in the reporting obligation to which all mandatories, including New Zealand, were subject. The internationalisation of imperial (or in New Zealand's case, sub-imperial) administration was crucial,[265] not least in establishing mandatories as subjects of international law possessing distinct obligations.[266] The League of Nations mandate for Samoa set out that any dispute between New Zealand and a League member with respect to the interpretation or application of the mandate agreement would be submitted to the PCIJ:[267] this helped clarify

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[260] Brookfield, above n 252, at 371.
[261] Pedersen, above n 63, at 169.
[262] Patricia O'Brien "From Sudan to Sāmoa: imperial legacies and cultures in New Zealand's rule over the Mandated Territory of Western Samoa" in Katie Pickles and Catharine Coleborne (eds) *New Zealand's Empire* (Manchester University Press, Manchester, 2015) 127 at 130—131.
[263] At 141; and Pedersen, above n 63, at 188—189.
[264] Chaudron, above n 153, at 44.
[265] See generally Pedersen, above n 63.
[266] *Jolley v Mainka*, above n 256, at 282—283 per Evatt J.
[267] League of Nations Mandate for German Samoa, reproduced in sch 1 of the Samoa Act 1921, art 7.

New Zealand's separate status from the United Kingdom early in the interwar period, as in such a case New Zealand "would be the defendant, and the *sole defendant*."[268] The PCIJ confirmed that mandatory powers are internationally responsible for breaches of the mandate agreement by the mandate's administration,[269] while the International Court of Justice would later confirm that mandatories were obligated by international law to comply with the reporting requirements contained in art 22 of the League Covenant and communicate any petitions from the mandate's population.[270]

The mandates system also sparked a debate as to whether the mandates themselves possessed sovereignty, and if so, in what form.[271] In 1950, McNair J considered that the sovereignty of a mandated territory "is in abeyance", and that upon independence, "sovereignty will revive and vest in the new State."[272] This ambiguous position strengthened the international status of New Zealand and other Dominion mandatories, as it confirmed their position as "advanced nations" under art 22 of the Covenant,[273] capable of maintaining "overwhelming sovereign authority" over an external territory with its own sovereignty in abeyance.[274] Finally, New Zealand's position as a mandatory power, responsible in its own name to the League for the performance of the mandate agreement, conclusively precluded any argument that Dominions were anything less than full, separate, and equal members as far as League matters were concerned.[275]

G Newfoundland as Counterfactual

Rather than examining a further aspect of New Zealand external relations, this section aims to demonstrate the significance of New Zealand's interwar external relations to its acquisition of international legal personality, through a brief discussion of Newfoundland: a polity that, despite its similar historical trajectory to New Zealand, ultimately did not see its Dominion status crystallise into statehood.

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[268] Noel-Baker, above n 140, at 105 (emphasis added). See also Anghie, above n 10, at 123.
[269] *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* (1924) PCIJ (series A) No 2 at 23. See also James C Hales "The Creation and Application of the Mandate System" (1939) 25 Transactions of the Grotius Society 185 at 259—260.
[270] *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128 at 136—138.
[271] See generally Anghie, above n 10, at 148 and forward.
[272] *International Status of South-West Africa (Advisory Opinion)*, above n 270, at 150.
[273] Hales, above n 269, at 202.
[274] Gordon, above n 51, at [52].
[275] Noel-Baker, above n 140, at 106—107.

1 Historical Overview

The historical development of Newfoundland in some ways parallels New Zealand. Both were given responsible government as colonies within a year of one another, attained Dominion status in 1907,[276] and rebuffed offers to confederate with the larger colonies to their west. Small in size and population, New Zealand and Newfoundland were the most conservative with respect to imperial constitutional reform and most concerned with imperial unity. Newfoundland was the only Dominion aside from New Zealand to offer military support in the Chanak Crisis,[277] and decried the Balfour Declaration, with Prime Minister WS Monroe telling the House of Assembly:[278]

> we are now an autonomous community. … We did not ask for it, nor did we want it, and we did not throw our hats in the air when we got it. It is of no value to us.

Key differences emerge with respect to actions that were formative in New Zealand's gradual acquisition of international legal personality: Newfoundland was considered too small for separate representation at the Paris Peace Conference to be politically tenable,[279] and did not thereby gain League membership.[280] In 1933, a Royal Commission requested by the Newfoundland Government in the wake of depression-era economic collapse recommended the temporary suspension of responsible government,[281] primarily blaming Newfoundland's political class for financial mismanagement.[282] Responding to a request from the Newfoundland legislature, the British Parliament replaced Newfoundland's self-governing institutions with an appointed Commission of Government,[283] a position that subsisted until 1949 when Newfoundlanders voted to federate into Canada as a province.[284]

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[276] Both also celebrated Dominion Day as a public holiday on September 26.
[277] Zara Steiner *The Lights that Failed: European International History, 1919—1933* (Oxford University Press, Oxford, 2005) at 116.
[278] Gilmore, above n 106, at 109. See also William C Gilmore "Aspects of United Kingdom Treaty Practice with Respect to Newfoundland, 1926-1934" (1986) 24 Can YB Intl L 213 at 224—225.
[279] Gilmore, above n 106, at 57—59.
[280] See generally William C Gilmore "Newfoundland and the League of Nations" (1980) 18 Can YB Intl L 201.
[281] Raymond B Blake *Canadians at Last: The Integration of Newfoundland as a Province* (University of Toronto Press, Toronto, 1994) at 14.
[282] *Report of the Newfoundland Royal Commission* (1933) at [120]. But see David Alexander "Newfoundland's Traditional Economy and Development to 1934" in James Hiller and Peter Neary (eds) *Newfoundland in the Nineteenth and Twentieth Centuries: Essays in Interpretation* (University of Toronto Press, Toronto, 1980) 17 at 34—35.
[283] Newfoundland Act 1933 (Imp) 24 Geo V c 2.
[284] HB Mayo "Newfoundland's Entry into the Dominion" (1949) 15 Can J Econ & Pol Sci 505.

2 *Newfoundland's International Legal Personality*

Newfoundland's hesitant approach to foreign relations, particularly its non-membership in the League, left the question of its international legal personality before the suspension of responsible government notably murky. It is common to see academic commentators state the Treaty of Versailles and the founding of the League granted "a definite international status to the Dominions other than Newfoundland."[285] The situation was further complicated by Newfoundland's often fierce resistance to the gradual devolution of Dominion autonomy in external relations, preferring to maintain the imperial status quo.[286]

Despite this, Newfoundland remained included in subsequent reforms to imperial constitutional law that clarified the position of the Dominions generally. Following the Balfour Declaration, it became more difficult to argue that non-membership of the League precluded Newfoundland from enjoying some form of international legal personality, entering into international agreements with external states.[287] Importantly, Newfoundland remained eligible for League membership under art 1 of the Covenant. Between 1926 and the introduction of the Commission of Government in 1934, commentators acknowledged Newfoundland's international personality in line with other Dominions,[288] though many also concluded this status was likely lost in 1934.[289]

Although commentators would ascribe some form of international legal personality to Newfoundland, it is clear its non-membership in the League left its exact status far more controversial than that of other Dominions. The question of Newfoundland's international standing was a matter of dispute between the United Kingdom's Dominions Office and Foreign Office, with Newfoundland's non-participation in the League providing the "cornerstone" of analyses rejecting Newfoundland's legal personality.[290]

The nature of Newfoundland's interwar legal personality was addressed decades later by the provincial Court of Appeal in a reference case concerning offshore mineral rights in the continental shelf, stating that "before the introduction of Commission of Government in 1934,

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[285] Keith, above n 158, at 4—5. See also Crawford, above n 2, at 359; and Noel-Baker, above n 140, at 15.
[286] Gilmore, above n 106, at 77.
[287] See for example the Exchange of Notes between the Governments of the United States of America, Canada, Cuba and Newfoundland, constituting an Agreement Relative to the Assignment of Frequencies on the North American Continent 97 LTNS 301 (28 February 1929). See also Convention of Berne for the Protection of Literary and Artistic Works (Accession of Newfoundland) 142 LNTS 377 (17 November 1933).
[288] See V Kenneth Johnson "Dominion Status in International Law" (1927) 21 AJIL 481 at 481; and Noel-Baker, above n 140, at 203—204.
[289] See Keith, above n 198, at 608—609.
[290] Gilmore, above n 106, at 184; and Gilmore, above n 280, at 203.

Newfoundland had the same degree of sovereignty as that enjoyed by the Dominion of Canada and the Commonwealth of Australia."[291] In a decision subject to academic criticism,[292] the Supreme Court of Canada, in a similar reference case, declined to examine "whether, in the eyes of international law, Newfoundland ever became an independent State."[293] The Court determined that, as a matter of imperial constitutional law, Newfoundland possessed "external sovereignty"[294] until the creation of the Commission of Government in 1934, with the effect that "continental shelf rights available at international law between 1934 and 1949 … did not accrue" to the Crown in right of Newfoundland.[295]

3 Implications for New Zealand

New Zealand had shared many of Newfoundland's positions on the devolution of greater external autonomy to the Dominions. As the smallest and least independence-minded Dominions of the era, the political and legal culture of one would naturally touch on the other; interestingly, KC Wheare's authoritative text on Dominion status addressed both in a single chapter, in contrast to the other Dominions.[296]

Newfoundland's loss of self-government clarified for many New Zealanders the contingent nature of the international legal personality that had been acquired in the interwar era. As Scott noted, that Commission rule could be implemented in a polity covered by the Balfour Declaration and Statute of Westminster proved that the title of Dominion "by itself gives no special international status."[297] This loss of self-government also sparked uniquely imperial anxieties regarding the racialised order on which the Empire was structured. Berriedale Keith bemoaned the Commission of Government in starkly racial terms, stating "[i]ndefinite government by Crown Colony methods of a community of Europeans … is contrary to the genius of the British race."[298] In 1939, as New Zealand's loans fell due and the financial situation appeared perilous, the first British High Commissioner to New Zealand obliquely

[291] *Reference re Mineral and Other Natural Resources of the Continental Shelf* (1983) 145 DLR (3d) 9 (NFCA) at 28, citing Newfoundland legislation in respect of the territorial sea including, *inter alia* the Air Navigation Act 1929 c 15 (Newfoundland); Crown Lands Act 1930 c 15 (Newfoundland); and the Customs Act 1933 (Newfoundland) c 57.
[292] Edward A Fitzgerald "The Newfoundland Offshore Reference: Federal-Provincial Conflict over Offshore Energy Resources" (1991) 23 Case W Res J Intl L 1; and LL Herman "The Newfoundland Offshore Mineral Rights References: An Imperfect Mingling of International and Municipal Law" (1984) 22 Can YB Intl L 194.
[293] *Reference re Newfoundland Continental Shelf* [1984] 1 SCR 86 at 99.
[294] At 104.
[295] At 110. Contrast *Reference re Mineral and Other Natural Resources of the Continental Shelf*, above n 291, at 32–33.
[296] Wheare, above n 195, at ch 9.
[297] Scott, above n 161, at 39.
[298] Keith, above n 198, at 97.

referenced Commission rule, noting the existence of a "rumour that his appointment had a more sinister significance."[299]

The situation of Newfoundland underscores the importance of League membership for developing New Zealand's independent international legal personality. Newfoundland's uncertain position and lack of deep international engagements at the time would have made the revocation of self-government a more readily conceivable proposition.[300] New Zealand, despite its similar aversion to extensive involvement in international affairs, avoided this uncertainty and gained an accepted international legal personality that crystallised into statehood, due in no small part to its membership – particularly its position as a mandatory – in the League of Nations.

In a slightly ironic twist, Newfoundland's fate ultimately became a rhetorical tool for conservative politicians, who, having governed New Zealand continuously from before WWI through the constitutional and international legal shifts of the 1920s, found themselves in opposition following the election of the First Labour Government in 1935. One correspondent informed a local newspaper in 1934 that Newfoundland's loss of self-government "furnished a striking object-lesson to New Zealanders as to what may be done in the future should the politicians continue to spend public monies regardless of the country's ability to repay."[301] By 1938, as the First Labour Government sought re-election, a self-described anti-socialist movement known as Tell New Zealand stated the Government's high taxation and borrowing "will have a consequence akin to that which developed in Newfoundland."[302] The same parties and factions that had previously, alongside Newfoundland, been content to allow the legal and institutional status quo to endure, now stoked public fear at the prospect of a significant imperial intrusion into New Zealand's domestic sphere.

V Conclusion

At the beginning of the 1920s, the question of whether New Zealand possessed a general international legal personality outside of League matters was open to serious doubt. By the end

[299] Malcolm McKinnon *Independence and Foreign Policy: New Zealand in the World Since 1935* (Auckland University Press, Auckland, 1993) at 85.
[300] See relatedly RM Elliot "Newfoundland Politics in the 1920s: The Genesis and Significance of the Hollis Walker Enquiry" in James Hiller and Peter Neary (eds) *Newfoundland in the Nineteenth and Twentieth Centuries: Essays in Interpretation* (University of Toronto Press, Toronto, 1980) 181 at 199.
[301] "An Object-Lesson to Electors" *The Patea and Waverly Press* (Patea, 5 February 1934) at 2.
[302] "Tell New Zealand: Action by Movement: Conference to be Held" *The Evening Post* (Wellington, 9 September 1938) at 16.

of the decade, the existence of the Dominions' international legal personality was well-accepted.[303] International personality depends on an entity being "*capable* of possessing rights and duties and of bringing and being subjected to international claims."[304] While at the time, it remained to be seen whether the Balfour Declaration would be given full effect in practice, with the benefit of hindsight it operates as a suitable pivotal date. At that point "it became possible, as it had not been before, to express inter-Dominion relations with certainty and clarity on the basis of agency and representation."[305] From 1926, New Zealand possessed the capacity to exercise the general complement of rights and obligations of an international person, even those such as the right of legation which it chose to exercise only at a later date.[306] However, the international personality of the Dominions in this period was expressed in *sui generis* terms, rather than sovereign statehood in the conventional sense.[307] It was only after WWII that commentators were generally comfortable identifying Dominion status[308] as "indistinguishable from the full international status of normal statehood."[309]

As discussed, the interwar period marked a shift away from an imperial world order of variegated sovereignty within a "Family of Nations", toward a Westphalian state order in which sovereign equality is an accepted principle of international law.[310] At the same time, the rise of international institutions and multilateral treaty frameworks in the period helped establish the principle that state sovereignty is compatible with cooperation through international legal instruments.[311] As Moore argues, those who rejected the Dominions' international personality were associated with the "tendency of publicists and jurists … to neglect the co-operative relations of political communities, and the extensive organisation of the society of nations for co-operative purposes."[312]

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[303] L Oppenheim and Hersh Lauterpacht *International Law: A Treatise* (5th ed, Longmans, London, 1937) vol 1 at 182–183.
[304] Crawford, above n 78, at 105.
[305] Crawford, above n 2, at 366. See also *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 349—350 per Lord Atkin.
[306] Noel-Baker, above n 140, at 147; McGechan, above n 249, at 68; and Keith, above n 198, at 42.
[307] Johnson, above n 288, at 488; Noel-Baker, above n 140, at 354—356; and Stewart, above n 144, at 379. For discussion of a *sui generis* international status for Dominions by jurists outside the common law world, see Paul Fauchille *Traité de Droit International Public* (Librairie Arthur Rousseau, Paris, 1922) vol 1 at 245 and 220–221, and the discussion in Noel-Baker, above n 140, at 355–356 and 369.
[308] Though many, including New Zealand, had quietly discarded the label by then: Quentin-Baxter and McLean, above n 145, at 30.
[309] H Lauterpacht "The Subjects of the Law of Nations" (1947) 63 LQR 438 at 445—446. See also Tyler, Crawford and Scott, above n 158, at 8.
[310] See above fns 79—82 and accompanying text.
[311] See Noel-Baker, above n 140, at 190—191.
[312] Moore, above n 220, at 34.

The Balfour Declaration was formulated against the backdrop of the increasing acceptance of the compatibility between independent international personality and extensive international cooperation. By framing the Dominions as members of equal standing, freely associated in the Empire by common consent, their position within an imperial hierarchy was recommunicated in a manner compatible with new interwar approaches to international personality. To proponents of Empire, this Dominion idea offered the prospect of the Empire's preservation in a 20th century political context, one rooted in consensual political relations and cultural linkages.[313]

Imperial internationalism represented an ideological through-line of successive New Zealand governments in the 1920s, and deeply informed its acquisition of an independent international personality. It must be remembered that imperial internationalism is not the same as a lockstep adherence to the foreign policies formulated in Whitehall and Westminster: it is an ideological rubric through which New Zealand governments perceived their self-interest in the 1920s.[314] On select issues, such as compulsory PCIJ jurisdiction, New Zealand's conservative administration saw itself as the defender of imperial interests against a liberal internationalist-minded Labour Government in London. The extent to which New Zealand sought to safeguard its exclusionary immigration policy cannot be divorced from its imperial identity. As Belich notes, the "Dominions cherished their racialist immigration barriers because they believed it kept them British, not just white."[315] Lastly, New Zealand's sub-imperialist aspirations, in the form of the Samoa mandate, represented a key factor incentivising international engagement among political leaders with little extraneous interest in international affairs, who nevertheless looked to the League to confirm and legitimate what was an often-brutal form of colonial administration.[316]

New Zealand's participation in the League, before the election of the First Labour Government and the introduction of liberal internationalism to New Zealand's foreign policy vocabulary,[317] was inherently bound up with imperial internationalism and its sub-imperial aspirations.

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[313] John Darwin "A Third British Empire? The Dominion Idea in Imperial Politics" in Judith Brown and Wm Roger Lewis (eds) *The Oxford History of the British Empire, Volume IV: The Twentieth Century* (Oxford University Press, Oxford, 1999) 64 at 85—87.
[314] See William A Stoltz "Pax Australis: The History of Australia's Imperial Internationalism" (PhD thesis, Australian National University, 2020) at 10—11.
[315] James Belich *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783—1939* (Oxford University Press, Oxford, 2011) at 466.
[316] See generally Michael Field *Samoa mo Samoa: Black Saturday 1929* (Bridget Williams Books, Wellington, 2014).
[317] David McCraw "The Advent of Liberal Internationalism in New Zealand's Foreign Policy" (2003) 55(2) Pol Sci 46.

Indeed, had the Samoa mandate not arisen, it is entirely possible that New Zealand, like Newfoundland, would not have seen the need to separately participate at the Paris Peace Conference or join the League of Nations, and attain a form of international status in so doing. Although discussions New Zealand's development of an independent foreign policy often begin with the election of a liberal internationalist government in 1935,[318] the role of New Zealand's conservative and imperial political culture throughout the period in which its independent international legal personality was acquired cannot be overlooked.

[318] See generally McKinnon, above n 299.

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