

## TREATY-MAKING WITHIN THE BRITISH COMMONWEALTH

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*The subject of this essay is treaty-making within the British Commonwealth.<sup>1</sup> It can be seen as an outward projection onto the international scene of the subtle complexities of the constitutional relationships within the Commonwealth. It turns out on examination, moreover, to be so interestingly varied that this essay cannot do more than illuminate some of its more intriguing aspects.*

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<sup>1</sup> The phrase 'British Commonwealth' is out of date but has been chosen *faute de mieux* to avoid confusion with the Commonwealth of Australia.

## I THE INTER SE DOCTRINE

Some 50 years ago, and even more so 75 years ago, at the outbreak of the Second World War, the instantaneous response to a mention of this topic would have been a reference to the 'inter se doctrine'.<sup>2</sup> What, however, of today? The authoritative *Max Planck Encyclopedia of International Law*, in its recent edition, contains some paragraphs on the inter se doctrine which, while averring that the doctrine is nowadays largely of historic interest, correctly describes it as entailing, in its strict form, that relations between Commonwealth member states were not regulated by international law, with the consequences, amongst others, that intra-Commonwealth agreements were not treaties, in the international law sense, and that intra-Commonwealth disputes could not properly be submitted to an international tribunal.<sup>3</sup> Or to put it another way, that, insofar as relations between Commonwealth members are regulated by law, it is not international law but some tertium quid between that and municipal law.

It was not a subject to which Zelman Cowen devoted much attention in his writing. He did, however, touch on it in his Rosenthal Lectures given in 1964 at Northwestern University in Chicago,<sup>4</sup> offering a lightning tour of the development of the treaty-making power in Australia from the flat statement in a leading commentary in 1910 that the *Constitution* contained no treaty-making power, through the discovery by judicial interpretation of authority to do just that as changing circumstances called for it, and on to the seminal transition during and after the Second World War, marked by events such as the strong individual Australian and Canadian voice at the San Francisco Conference, the separate signature of the *Charter of the United Nations* by the Dominions, as founder members of the United Nations, and later Australian

<sup>2</sup> The well-known case of *A-G (Canada) v A-G (Ontario)* [1937] AC 326, like many of the early Australian cases, was concerned not with the inter se doctrine but only with the internal distribution of constitutional powers in relation to treaties, a subject on which Cowen did comment with some acerbity: see Zelman Cowen, *Australia and the United States: Some Legal Comparisons* (University of Buffalo School of Law, 1954) (the published version of a series of lectures given by Cowen at the University of Buffalo in 1954). It does not, however, fall within the subject area of this essay and will not be further considered.

<sup>3</sup> Charlotte Steinworth, 'Commonwealth' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol II, 462, 464–5 [9]–[10].

<sup>4</sup> Zelman Cowen, *The British Commonwealth of Nations in a Changing World: Law, Politics, & Prospects* (Northwestern University Press, 1965).

and New Zealand participation in the Southeast Asia Treaty Organization ('SEATO')<sup>5</sup> in their own right alongside the United Kingdom.<sup>6</sup>

To go back, however, to the two elements identified in the *Max Planck Encyclopedia of International Law*, it is convenient to begin with intra-Commonwealth treaties, before moving on to the second aspect, dispute settlement. In each case, the focus will be as much on the actual practice as on the underlying theory, not least because the practice would often seem to have left the theory panting to keep pace.

## II IMPERIAL TREATIES: TERRITORIAL EXTENT

To begin, then, with the question of treaties and treaty-making, the historical background — if one goes back to the 19<sup>th</sup> century — was that the overseas territories that were to become the Dominions had no separate international personality of their own. Treaty-making, like all other aspects of foreign relations, was an affair for the Crown acting solely on the advice of the British government. Treaties thus concluded could be more accurately called not British treaties but Imperial treaties, since their application extended *ipso jure*, under normal principles, to all territory under the sovereignty of the Crown.<sup>7</sup> And so it remained, even though, from the middle of the century on, we see the first arrangements emerging for regular consultation with overseas territories, if only with certain territories and on certain subjects. The first real pressure came, not surprisingly, in the area of tariffs and trade, and sharpened with the push from the overseas Dominions for Imperial preference for their produce. But that set up a double bind. It was not just a question whether there was room for a degree of autonomy in treaty relations, it was also a question what the effect of differential autonomy would be on Imperial treaties with foreign countries. There were, for example, British treaties with Belgium and the German *Zollverein*, each of which contained a non-discrimination clause. That would not necessarily stand in the way of the overseas Dominions granting preferences to British goods, but if the same concession were to be applied reciprocally in the reverse direction, for the benefit of Dominion products, the effect would be to trigger the

<sup>5</sup> The Southeast Asia Treaty Organization, established by a collective defence treaty of 1954 and dissolved in 1977: see *Southeast Asia Collective Defense Treaty*, signed 8 March 1954, 232 UNTS 169 (entered into force 1 May 1954).

<sup>6</sup> See Cowen, *The British Commonwealth of Nations in a Changing World*, above n 4, 77–90.

<sup>7</sup> Cf the rule now incorporated in art 29 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

non-discrimination clauses.<sup>8</sup> And if that happened the effect would instantaneously become worldwide, through the operation of most-favoured-nation clauses in a series of other British treaties.<sup>9</sup> The proposition was therefore self-defeating, and the position was clearly not a tenable one in the longer run.

The pressure which this generated led in due course to the denunciation of some of the British trade treaties and their replacement by a model that made a clear distinction between 'British' and 'foreign'.<sup>10</sup> But it led also, at around the turn of the 19<sup>th</sup> century and the early years of the 20<sup>th</sup>, to various concessions within the Imperial relationship, which are interesting for the light they project forwards: for example, the British government declined to countenance any suggestion that the colonies might be authorised to make treaties for themselves, but offered in return to negotiate separate treaties for them, with the assistance of representatives of the territory in question, and even that the colonial representatives might become the principal negotiators, so long as the final signature (and hence ratification) was reserved to Britain. It was also agreed that ratification could only happen after both governments, the British and the colonial, had given their approval, but conversely it would be the responsibility of the colonial government to secure whatever local legislation was necessary for the treaty to be implemented. It was accepted as well that the terms of these treaties, even if applicable to one territory alone, had to respect the interests of other parts of the Empire, and that necessarily implied that there would have to be consultation.<sup>11</sup>

A striking example was a negotiation with the United States of America over the Pacific halibut fishery which led to an agreement of some considerable local importance. Its specific interest for present purposes is that it was the first occasion on which a treaty was signed on the Empire side by a Dominion plenipotentiary alone, in this case Canada.<sup>12</sup> This was in March 1923.

<sup>8</sup> See A Berriedale Keith, 'Introduction: The Constitutional Development of the British Empire in Regard to the Dominions and India from 1887 to 1933' in Gerald E H Palmer, *Consultation and Co-operation in the British Commonwealth: A Handbook on the Methods and Practice of Communication between the Members of the British Commonwealth of Nations* (Oxford University Press, 1934) xv, xxxv–xxxvi.

<sup>9</sup> J E S Fawcett, *The Inter Se Doctrine of Commonwealth Relations* (Athlone Press, 1958) 22–3; Arthur Berriedale Keith, *The Sovereignty of the British Dominions* (Macmillan and Co, 1929) 286.

<sup>10</sup> Fawcett, above n 9, 23–6.

<sup>11</sup> See K C Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, 5<sup>th</sup> ed, 1953) 37; Keith, *The Sovereignty of the British Dominions*, above n 9, 279–82, 286–9.

<sup>12</sup> Gerald E H Palmer, *Consultation and Co-operation in the British Commonwealth: A Handbook on the Methods and Practice of Communication between the Members of the British*

### III WORLD WAR I: THE TREATY OF VERSAILLES AND THE LEAGUE OF NATIONS

The decisive change had already come, however, on the general international level at the Peace Conferences after World War I, when the Dominions and India were eventually given separate places in recognition of their wartime contribution; and that led in turn to their separate signatures of the *Treaty of Peace between the Allied and Associated Powers and Germany* ('*Treaty of Versailles*'), accompanying those of the British representatives who signed on behalf of 'the British Empire', but with the Dominion and Indian signatures awkwardly indented immediately below the British.<sup>13</sup> The oddity was that the only entity not explicitly listed was Great Britain itself; the Empire was there, and the Dominions were there in their own names as well, as was India, but not Britain. Following these separate signatures, the *Treaty of Versailles* was not ratified until it had been approved both by Great Britain and by all of the signatory Dominions.

These arrangements at the Peace Conferences led also to the Dominions<sup>14</sup> becoming founder members of the League of Nations. Their separate signatures on the Peace Treaties might be thought compatible with older doctrine, in that the rights and obligations under the Peace Treaties flowed, so to speak, vertically, between Germany and her allies, on the one side, and the Allied and Associated Powers on the other, but did not flow horizontally between the latter. However that may be, the same could hardly be said of the *Covenant of the League of Nations* ('*Covenant*') or of membership of the League of Nations. Provisions such as arts 9–15 of the *Covenant*<sup>15</sup> are not open to any reasonable interpretation other than that they applied to, and therefore they applied as between, all 'Members of the League',<sup>16</sup> however unlikely it may have been in

*Commonwealth of Nations* (Oxford University Press, 1934) 131, 137; Robert B Stewart, *Treaty Relations of the British Commonwealth of Nations* (Macmillan Co, 1939) 71–2. See *Treaty between Canada and the United States of America for Securing the Preservation of the Halibut Fishery of the North Pacific Ocean*, signed 2 March 1923, [1925] UKTS 18 (entered into force 21 October 1924). Note that the treaty is published as a 'Treaty between Canada and the United States of America' although the contracting parties are 'His Majesty the King of the United Kingdom ...' and 'The United States of America': at 2.

<sup>13</sup> Signed 28 June 1919, [1919] UKTS 4 (entered into force 10 January 1920). The *Treaty of Versailles* also appears as the first entry in the 1920 Australian Treaty Series.

<sup>14</sup> Except Newfoundland.

<sup>15</sup> Containing the guarantees of territorial integrity and political independence, the preservation of the peace, the settlement of disputes, and similar items.

<sup>16</sup> Strangely enough, though, the converse was precisely the view propounded by the British government, though in a more limited context described below. Keith, *The Sovereignty of the*

practice that these provisions would fall to be invoked between members maintaining close and friendly mutual relations.

It might be noted also that, quite apart from the founder members, art 1 of the *Covenant* expressly opened membership of the League to any other 'fully self-governing State, Dominion or Colony'. The pointer to the future was unmistakable. But the phrase led to some confusion even among eminent authorities, one of whom described it and the Dominion signatures on the *Covenant* as purely 'ornamental',<sup>17</sup> whereas another was arguing as late as the 1930s that the rights granted to the Dominions under the *Covenant* were not rights under general international law, and did so on the basis that the wording of the *Covenant* recognised 'very explicitly that a Dominion or Colony is not identical with a State'.<sup>18</sup> Was that really genuine, or was it a sort of rearguard wilful misunderstanding?

The Peace Treaties and the *Covenant* were both signed in 1919. It was, in other words, hard on the heels of these developments that the treaty-making issue became the subject of specific consideration at the Imperial Conference of 1923, and then for a second round in 1926, and to a limited extent a third round in 1930. What had to be confronted was not just the demonstrative implications of the postwar arrangements just described, but also a number of purely practical parameters for treaty-making within the framework of intra-Imperial relations.

#### IV THE 1923 AND 1926 IMPERIAL CONFERENCES

A resolution of the 1923 Imperial Conference confronted those implications under the headings of 'Negotiation', 'Signature', and 'Ratification'.<sup>19</sup> The section on 'Ratification' contained nothing either new or substantive. Likewise, the section on 'Signature' dealt largely with the issue and format of Full Powers. And even the section on 'Negotiation' was fairly sparse, its main interest being the recognition implicitly conveyed that 'any of the governments of the Empire' might be engaged in treaty negotiation and that, if so,

*British Dominions*, above n 9, 386, points out that one of the objections leading to the rejection of the *Covenant* by the United States Senate was that it gave six votes to the British Empire but only one to the United States of America.

<sup>17</sup> T Baty, 'Sovereign Colonies' (1921) 41 *Canadian Law Times* 677, 682.

<sup>18</sup> Arthur Berriedale Keith, *The Dominions as Sovereign States: Their Constitutions and Governments* (Macmillan and Co, 1938) 40.

<sup>19</sup> United Kingdom, *Imperial Conference, 1923, Summary of Proceedings*, Cmd 1987, 13–15. In addition, the full texts of the 1923 and 1926 resolutions can be found in Stewart, above n 12, apps VI and VII respectively.

there should be proper information and consultation with the others before, during, and possibly after.<sup>20</sup> The Conference made plain, though, that what it had in mind by 'treaty' was an agreement which 'in accordance with the normal practice of diplomacy' (as the 1923 Conference Resolution put it) was between Heads of State and signed by plenipotentiaries provided with Full Powers issued by the Head of State and authorising the conclusion of a treaty.

The accuracy of that as a description of normal diplomatic practice is open to question, as will be seen,<sup>21</sup> and the Conference half admitted as much by adding a section on agreements other than treaties, which were 'not unusual' and were made between governments, and moreover were 'usually of a technical or administrative character'.<sup>22</sup> The purpose of the additional section was, however, simply to apply, to these 'agreements' as well, the principle of information and consultation where necessary.

That these modest procedures did not suffice is evidenced by the fact that they were revisited in greater detail only three years later. In the Resolution of the 1926 Imperial Conference, the principle of information and consultation was elaborated very slightly, as were the procedures for signature and the issue of Full Powers, but the substantive new material it contained dealt with treaty form and with entry into force; and, for the first time, the Resolution confronts expressly the case of multilateral treaties.<sup>23</sup> Much of what it says was plainly fuelled by current experience within the League of Nations.

It begins, for example, by deprecating as 'generally unsatisfactory' the practice that had been followed for signature of the *Covenant*, that is, the use of 'British Empire' followed by the indented listing of Dominions (and India), but without mention of Great Britain or of the Colonies and Protectorates: unsatisfactory both for its implication of a subordinate status for the Dominions and because it 'tended to obscurity and misunderstanding'<sup>24</sup> — which must be code for saying that its inwardness was baffling to other states. What the 1926 Imperial Conference proposed instead, to solve the difficulty, was that all treaties — both those made under the auspices of the League and

<sup>20</sup> United Kingdom, *Imperial Conference, 1923, Summary of Proceedings*, Cmd 1987, 13–14. See also Stewart, above n 12, 421–2.

<sup>21</sup> See Part V below.

<sup>22</sup> United Kingdom, *Imperial Conference, 1923, Summary of Proceedings*, Cmd 1987, 15. See also Stewart, above n 12, 423. And, according to the Resolution, were neither signed under Full Powers nor subject to ratification.

<sup>23</sup> See United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768. See also Stewart, above n 12, app VII.

<sup>24</sup> United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 22. See also Stewart, above n 12, 426.

outside — should be in head of state form and be in the name of the King ‘as the symbol of the special relationship between different parts of the Empire’.<sup>25</sup> That was to apply irrespective of which, or how many, of the parts of the Empire were involved, even if it were only one of them. It prescribed a listing order,<sup>26</sup> the chief differences from the *Treaty of Versailles* formula being that Great Britain and Northern Ireland would be specified in place of the Empire, and that the Dominions and India would be listed with the same primary status as Great Britain; but it still required that all be listed together in the preamble and the signature block, and indeed had the Dominions listed not alphabetically, but in age order of seniority!

This device was seen in specific terms as a way around the problem that had presented itself in the meantime about inter se relationships within the Empire:

The making of the treaty in the name of the King ... will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King.<sup>27</sup>

That said, the 1926 Conference Resolution acknowledged once again the existence of agreements in government-to-government form, though in a somewhat half-hearted way, consisting on the one hand of urging Dominions entering into such agreements who ‘may be willing to apply between them some of the provisions *as an administrative measure*’<sup>28</sup> to state which provisions and to what extent, while on the other hand sternly warning against using the head of state form for such agreements.

The Resolution concludes by noting the need to take ‘some convenient opportunity ... of explaining to the other members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired’.<sup>29</sup> And it seems that Sir Austen Chamberlain did indeed make a formal statement to the Council of the League of Nations in March

<sup>25</sup> United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 23. See also Stewart, above n 12, 427.

<sup>26</sup> Illustrated in a specimen Appendix: United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 29–30. See also Stewart, above n 12, 432–3.

<sup>27</sup> United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 23. See also Stewart, above n 12, 427.

<sup>28</sup> United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 23 (emphasis added). See also Stewart, above n 12, 427 (emphasis added).

<sup>29</sup> United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 24. See also Stewart, above n 12, 428.



1927 urging a reversion to what he called the older common practice of making treaties in the head of state form, on the grounds that thereby ‘the acceptance by the Governments of the British Empire of treaties negotiated under the auspices of the League would be facilitated’.<sup>30</sup> Tellingly, though, he describes this as being ‘for constitutional reasons with which I need not trouble the Council’<sup>31</sup> — code again, one imagines, for an admission that others would be nonplussed by the origins of this peculiarly British problem, so that a straightforward political appeal was likely to be more productive than legal argument.

#### V INCONSISTENCY WITH ACTUAL INTERNATIONAL EXPERIENCE

There is room to ask oneself whether it was ever genuinely thought that these devices and arrangements, of a largely formal character, would serve to cope with the barrage of practical problems that were likely to arise, and several of which had already arisen. We may take three examples directly linked to the *Covenant* or to the Permanent Court of International Justice whose foundation had followed on in 1922.

The first arises out of art 18 of the *Covenant*, which provided that ‘[e]very treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it’. The fact that this formula encompassed on its face not only ‘treaties’ in a formal sense, such as the ones contemplated by the Imperial Conferences, but also (and on the same footing) the far more extensive category of ‘international engagements’, meant that it necessarily swept up as well the intergovernmental agreements which the Imperial Conferences liked to envisage as limited to technical or administrative matters. Perhaps an inter se purist would not have been unduly perturbed in intra-Imperial terms by the fact that the article then added: ‘No such treaty or international engagement shall be binding until so registered’, which turned out in any case to be more aspirational than real in actual state practice.<sup>32</sup> The truth was, however, that it had already led to a sharp spat as early as 1924, when the government of the Irish Free State insisted on submitting to the

<sup>30</sup> Sir Austen Chamberlain, ‘Form of Treaties to Be Negotiated in Future under the Auspices of the League of Nations’ (1927) 8 *League of Nations — Official Journal* 377, 377.

<sup>31</sup> *Ibid.*

<sup>32</sup> And was replaced in the *Charter of the United Nations* by the softer sanction of non-invocability before United Nations organs — but even that never caught root, and soon fell into disregard.

League for registration the 1921 agreement angularly entitled *Articles of Agreement for a Treaty between Great Britain and Ireland*.<sup>33</sup> There was a British note of protest to the Secretary-General of the League, which took the position that:

Since the *Covenant* ... came into force, His Majesty's Government have consistently taken the view that neither it, nor any conventions concluded under the auspices of the League are intended to govern the relations *inter se* of the various parts of the British Commonwealth.<sup>34</sup>

The note denied, accordingly, that art 18 was applicable. In other words, the British protest was based more on a claim to invoke an *inter se* exception than on any legal argument as to the non-treaty status of the agreement itself — for which, however, there would have been some justification given that the text, which calls itself an 'instrument', was not adorned with any formal preamble or *testimonium*, was set out in numbered paragraphs not articles, and was signed simply on behalf of British and Irish 'Delegations'.<sup>35</sup> The Irish riposte was to the effect that the obligations in art 18 were imposed in the most specific terms on every member of the League in clear and unequivocal language, so that the limitation which the British Government sought to read into the article could not be accepted. To all appearances, none of this had any effect on the registration as such,<sup>36</sup> though the British and Irish Notes were also published in the League's Treaty Series.<sup>37</sup> The minuet was danced again in

<sup>33</sup> Signed 6 December 1921, Cmd 1560. See Stewart, above n 12, 338–41.

<sup>34</sup> Communication from Alexander Cadogan to Sir Eric Drummond, Secretary-General of the League of Nations, 27 November 1924 in 27 LNTS 449, 449.

<sup>35</sup> And looked forward expressly to its introduction by legislation on each side:

This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and, if approved, shall be ratified by the necessary legislation.

*Articles of Agreement for a Treaty between Great Britain and Ireland*, signed 6 December 1921, Cmd 1560, art 18.

<sup>36</sup> The agreement was published in the League's Treaty Series: see *Treaty between Great Britain and Ireland*, signed 6 December 1921, 26 LNTS 10.

<sup>37</sup> Though in a separate volume of the League of Nations Treaty Series from the agreement itself: see Communication from Alexander Cadogan to Sir Eric Drummond, Secretary-General of the League of Nations, 27 November 1924 in 27 LNTS 449; Communication from J P Walshe to Sir Eric Drummond, Secretary-General of the League of Nations, 18 December 1924 in 27 LNTS 450.

the same way after the conclusion of the supplementary agreement of December 1925.<sup>38</sup>

A second problem of the same severely practical kind arose out of the growing practice, with general multilateral treaties, of making their entry into force dependent on the deposit of a certain number of ratifications; should the Dominions be counted separately or should the ratification by the British Empire count as one only? That this had become a real issue is attested by the Resolution of the 1926 Imperial Conference, which addresses it directly, and proposes as the solution to it that future entry into force clauses be framed in terms of ratifications by so many 'Members of the League' (rather than, for example, 'High Contracting Parties'). In other words, a verbal solution to a substantive problem.

The third example is drawn from the *Statute of the Permanent Court of International Justice*, which contained two provisions bearing on limitations on membership of the Court by reason of nationality. Article 10, as originally drafted, might have had the effect of excluding the election of Dominion judges alongside a British one (or vice versa) but the day was saved by the success of the Canadian representative in incorporating a similar verbal solution to the one just mentioned, that is, to substitute for the simple reference to 'nationality' a more elaborated reference to 'national[s] of the same Member of the League'.<sup>39</sup> But when Sir Cecil Hurst tried to secure, at the time the *Statute of the Permanent Court of International Justice* came up for revision in 1929, an express recognition in the drafting committee's report of a Commonwealth exclusion clause for the nomination of Judges ad hoc, his proposal was rebuffed and he dropped it.<sup>40</sup>

## VI TREATY-MAKING PRACTICE IN THE 1920S AND 1930S

Nor were these the only problems. To judge from the 1926 and 1930 Imperial Conference reports, one might conclude that, after the initial uncertainties, multilateral treaty-making settled down into a regular pattern. But the facts do not bear this out. Practice into the 1930s seems to have been quite varied, and not trouble-free.

<sup>38</sup> *Agreement Amending and Supplementing the Treaty of December 6, 1921, between Great Britain and the Irish Free State*, signed 3 December 1925, 44 LNTS 263.

<sup>39</sup> Fawcett, above n 9, 11, quoting *Statute of the Permanent Court of International Justice* art 10(2). See also Fawcett, above n 9, 11–13; Keith, *The Sovereignty of the British Dominions*, above n 9, 352–4.

<sup>40</sup> Fawcett, above n 9, 14.

One can begin (not entirely chronologically) with the League Conference for the Supervision of the International Trade in Arms, Ammunition and Implements of War in 1925, where the Japanese delegate pointedly asked whether an exception clause for the consignment of arms by a High Contracting Party 'for the use of the armed forces ... wherever situated' would cover supplies by Britain to India; and, on his being told that it would, and would also cover Australian or Canadian arms purchases in the United Kingdom because their armies were in the service of the Crown, there was immediate strong opposition from within Europe and from the United States of America.<sup>41</sup> The form of words finally adopted was open to more than one interpretation, and the resolution of the question of interpretation was not made any the easier when the *Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*<sup>42</sup> was signed by the British delegate 'for the British Empire', but subject to a declaration that his signature did not 'bind India or any British Dominion which is a separate member of the League and does not separately sign or adhere to the Convention'.<sup>43</sup> It is therefore a touch surprising to see the 1926 Imperial Conference roundly stating, in the context of the non-application inter se of treaties signed in the name of the Crown, that the question had been discussed at the 1925 Arms Traffic Conference and that its legal committee had 'laid it down that the [inter se principle] underlies all international conventions'.<sup>44</sup> Fawcett says that the Conference records show only that the inter se doctrine was not rejected, but not that it was explicitly accepted.<sup>45</sup>

Other examples from the inter-war period, which was a great period of multilateral treaty-making, are equally indecisive:

- the 1923 *Treaty of Peace* ('*Treaty of Lausanne*')<sup>46</sup> followed the *Treaty of Versailles* precedent (except that Canada chose not to be a signatory), as had the Washington Disarmament Conference two years earlier,<sup>47</sup> both using the indented listing which created the impression that the

<sup>41</sup> Stewart, above n 12, 346.

<sup>42</sup> Signed 17 June 1925, 6 LNOJ 1117 (not yet in force).

<sup>43</sup> Stewart, above n 12, 181.

<sup>44</sup> Ibid 341, quoting United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 23.

<sup>45</sup> Fawcett, above n 9, 46.

<sup>46</sup> Signed 24 July 1923, 28 LNTS 12 (entered into force 6 August 1924).

<sup>47</sup> See, eg, *Treaty between the United States of America, the British Empire, France, Italy and Japan, for the Limitation of Naval Armament*, signed 6 February 1922, 25 LNTS 202 (entered into force 17 August 1923).

Dominions were bound twice over, once by the Empire signature and again by their own;

- the 1924 London Reparation Conference ultimately adopted a complicated formula for participation in which the British Empire delegation included one Dominion representative by rotation, with the others sitting in the Conference hall in turn as Observers; it ended with a treaty in the inter-governmental form that specified ‘the Government of His Britannic Majesty (with the Government of the Dominion[s] ... and India)<sup>48</sup> — an awkward usage that was seldom followed thereafter;
- the 1925 *Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy* (*Locarno Treaty*)<sup>49</sup> was signed by Great Britain alone but included as an express provision that ‘[t]he present Treaty shall impose no obligation upon any of the British dominions, or upon India, unless the Government of such dominion, or of India, signifies its acceptance thereof’,<sup>50</sup> an arrangement that drew on the Anglo-French Treaty of 1919, but in the event no Dominion Government did signify its acceptance, nor did India;
- something similar had been done in 1921 for the *Convention and Statute on the Regime of Navigable Waterways of International Concern*,<sup>51</sup> and the *Convention and Statute on Freedom of Transit*,<sup>52</sup> except that both were signed on behalf of ‘the British Empire (with New Zealand and India)’ and accompanied by a British declaration both that its signature was not binding on other Dominions and reserving to the Dominions the right to accede;
- the 1926 *Slavery Convention*<sup>53</sup> followed the *Treaty of Versailles* signature precedent but this time subject to a declaration, as for the 1925 *Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*,<sup>54</sup> that British signature did not bind India or any British Dominion ‘which is a separate member of the League of Nations and does not separately sign or accede to the *Convention*’; and

<sup>48</sup> *Agreement between the Allied Governments and the German Government to Carry Out the Experts’ Plan of April 9, 1924*, 30 LNTS 76 (signed and entered into force 30 August 1924).

<sup>49</sup> Signed 16 October 1925, 54 LNTS 289 (entered into force 14 September 1926)

<sup>50</sup> *Ibid* art 9.

<sup>51</sup> Signed 20 April 1921, 7 LNTS 36 (entered into force 31 October 1922).

<sup>52</sup> Signed 20 April 1921, 7 LNTS 12 (entered into force 31 October 1922).

<sup>53</sup> Signed 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927).

<sup>54</sup> Signed 17 June 1925, 6 LNOJ 1117 (not yet in force).

- the 1928 *General Treaty for Renunciation of War as an Instrument of National Policy*<sup>55</sup> did manage to revert to the head of state form that had been advocated by the 1926 Imperial Conference but was followed by *separate* instruments of ratification by Great Britain and the Dominions, without anything appearing in the treaty or extraneously about its application inter se, and the same was done for the 1937 *Convention regarding the Abolition of the Capitulations in Egypt*,<sup>56</sup> and for the London naval treaties of 1930<sup>57</sup> and 1936,<sup>58</sup> except that in the latter two cases there emerged once again, in a way reminiscent of the 1925 Arms Traffic Conference, substantive problems of how to count naval strength.<sup>59</sup>

In the face of this confusing *mêlée*, it may be just as well that the Second World War ushered in a new era.

## VII THE PERIOD AFTER WORLD WAR II

If we now jump to the period after the War, the treaty-making issue simply fades away. The Dominions participated vigorously in their own right in the negotiating process towards the *Charter of the United Nations*, and at the San Francisco Conference itself, and were often at odds with the United Kingdom; Indian independence confirmed what was already the position internationally (except only for the separation of Pakistan); the independence constitutions for British colonies emerging into statehood routinely contained a normal treaty-making power; and the subject did not appear again on the agendas of Commonwealth Prime Ministers' Meetings.

A significant indicator is provided by the extended consideration of the law of treaties by the International Law Commission of the United Nations ('ILC'), which started at the very beginning of that body's work in 1950 and culminated in the adoption of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')<sup>60</sup> in 1969. A large part of the significance in the present context lies in the fact that throughout this long period the work was in the hands of a succession of Special Rapporteurs, all of them British, and repre-

<sup>55</sup> Signed 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929).

<sup>56</sup> Signed 8 May 1937, 182 LNTS 37 (entered into force 15 October 1937).

<sup>57</sup> *International Treaty for the Limitation and Reduction of Naval Armament*, signed 22 April 1930, 112 LNTS 65 (entered into force 27 October 1930).

<sup>58</sup> *Treaty for the Limitation of Naval Armament*, 184 LNTS 115 (signed and entered into force 25 March 1936).

<sup>59</sup> For a more detailed account, see Stewart, above n 12, 159–201; Palmer, above n 12, 151–60.

<sup>60</sup> Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

senting a longitudinal cross-section of the finest and most experienced international lawyers of the period.<sup>61</sup> And the significance is that the dog did not bark; there is not one trace in any of the reports of these authoritative experts of special considerations relating to the Commonwealth or Commonwealth treaties. During the period in question, the ILC also had members from Canada, Nigeria, Cameroon, and India, but there is once again no trace of any mention by any of them in the ILC's debates of special issues over Commonwealth treaties; nor, more significantly still, is any such mention to be found in any of the comments by Commonwealth member states in the discussion of the ILC's work at successive Sessions of the United Nations General Assembly. Moreover, the *Vienna Convention* as it emerged consistently uses as its rubric treaties 'between States' and nowhere in the ILC's detailed commentary is there any discussion of the head of state, state-to-state, or government-to-government forms of treaty-making.

Writing in 1961, midway through this process, Lord McNair is able to say:

When my *Law of Treaties*, 1938, was published the relations between the different Commonwealth countries, including the United Kingdom, were governed for the most part by what was called 'the *inter se* doctrine'. ... Very little of that doctrine now remains ... It is not at the moment easy to give a simple answer to the question whether agreements between the Commonwealth countries are governed by international law or by some domestic system of law. In each case the answer must depend upon the intention of the parties. There is no reason why they should not enter into agreements which they regard as not being within the field of international law, and there is no doubt that they are free to contract, and capable of contracting, obligations with one another based on, and governed by, international law.<sup>62</sup>

James Fawcett, writing three years earlier, sounds harder and more dismissive, though in fact his conclusions are roughly similar:

The *inter se* doctrine has never been a rule of customary international law, and such international efficacy as it has had rested largely upon express treaty provisions. ...

It was in essence a constitutional convention, relied on principally by the United Kingdom, adapted to the transition from a unitary empire, in which there was some devolution of power, to an association of independent countries with full international status. It is doubtful whether the doctrine had, apart

<sup>61</sup> Brierly, followed by Lauterpacht, followed by Fitzmaurice, followed by Waldock.

<sup>62</sup> Lord McNair, *The Law of Treaties* (Clarendon Press, 1961) 115.

from its embodiment in commercial treaties, any significant use or function after 1930.<sup>63</sup>

What then of the actual practice of mutual treaty-making within the Commonwealth? Although it continued to be the case that certain matters that would customarily be arranged by bilateral treaty were handled within the Commonwealth relationship by agreed schemes, backed by legislation in each separate jurisdiction, this rapidly began to look like the exception, not the norm. The best examples are the schemes for mutual legal assistance and for the surrender of fugitive offenders; both still exist and have regularly been updated — including, in the latter case, to adapt the Commonwealth usage to the normal international term ‘extradition’. Though even there bilateral agreements are concluded within those fields, such as the 2010 *Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia on Mutual Assistance in Criminal Matters*.<sup>64</sup>

But those areas have to be set alongside a whole series of topics on which Commonwealth countries — even the United Kingdom — simply contract with one another by treaty in the same way as they would with foreign countries, in, for example, air services, double taxation, trade, and the peaceful uses of nuclear energy, many of these going back as far as the 1940s and 1950s. As regards form, the pattern used has been, it goes without saying, the government-to-government (occasionally state-to-state) form that had become standard practice internationally, or the simpler exchange of notes form. This applied even to situations as fundamental as the cession of territory, an example being a December 1950 agreement between the United Kingdom and Australia over sub-Antarctic territories, although the form employed contains an ingenious twist: *Exchange of Notes Constituting an Agreement regarding the Transfer of Heard and MacDonalld Islands from His Majesty’s Government in the United Kingdom to His Majesty’s Government in the Commonwealth of Australia*.<sup>65</sup>

<sup>63</sup> Fawcett, above n 9, 48.

<sup>64</sup> Signed 21 July 2010, [2012] UKTS 6 (not yet in force).

<sup>65</sup> 93 UNTS 81 (signed and entered into force 19 December 1950). There was a similar agreement with South Africa relating to Marion and Prince Edward Islands: see *Exchange of Notes Constituting an Agreement regarding the Transfer of the Marion and Prince Edward Islands from His Majesty’s Government in the United Kingdom to His Majesty’s Government in the Union of South Africa*, 93 UNTS 75 (signed and entered into force 22 February 1949). Though an older form based on backing ‘request and consent’ legislation in Australia and the United Kingdom was used in 1955 for the Cocos (Keeling) Islands.



It seems that, if there ever were any difference in the language or in the formulae used, that too has now disappeared, as witness recent United Kingdom bilateral treaties with Nigeria,<sup>66</sup> Australia,<sup>67</sup> and Brunei,<sup>68</sup> on the topics, respectively, of transfer of sentenced persons, defence, and double taxation. In the last of these, which is in ordinary government-to-government form, the Party on the Bruneian side is not ‘the Government of Brunei’ but — and without any apparent awkwardness or embarrassment — ‘the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam’.

### VIII TREATY-MAKING: CONCLUSION

The simple conclusion is, therefore, that treaty-making by, and between, members of the Commonwealth has long since aligned itself with standard international practice, and that there is barely a trace to be found of old inter se doctrines and their procedural consequences.

### IX THE SETTLEMENT OF DISPUTES: THE WORLD COURT

One may move on, then, to the question of the settlement of disputes as between members of the Commonwealth. Many years ago, the late Sir Robert Jennings shrewdly observed that on a strict inter se analysis not one obstacle but two stood in the way of the compulsory jurisdiction of the International Court of Justice in disputes between two Commonwealth Dominions: the one being their supposed disability to contract treaties with one another, and the other the concept that the law governing their mutual relations was something other than international law.<sup>69</sup>

<sup>66</sup> *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria on the Transfer of Sentenced Persons*, signed 9 January 2014, Cm 8791 (not yet in force).

<sup>67</sup> *Treaty between the Government of the United Kingdom of Great Britain and the Government of Australia for Defence and Security Cooperation*, signed 18 January 2013, Cm 8603 (not yet in force).

<sup>68</sup> *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam to Amend the Arrangement between the Government of Brunei and His Majesty's Government for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Made in 1950, as Amended by an Arrangement in 1968 and a Supplementary Arrangement in 1973 with Protocol*, signed 11 December 2012, [2014] UKTS 4 (entered into force 11 December 2013).

<sup>69</sup> R Y Jennings, ‘The Commonwealth and International Law’ (1953) 30 *British Yearbook of International Law* 320.

The first of the two obstacles listed by Jennings comes into play inasmuch as the so-called ‘compulsory jurisdiction’ of the International Court is in fact a facultative jurisdiction although one provided for under the *Statute of the International Court of Justice* (‘*ICJ Statute*’), itself being a treaty instrument which ranks as an integral part of the *Charter of the United Nations*. Under the relevant provision (which was carried over unchanged from the *Statute of the Permanent Court of International Justice* concluded in 1920), member states of the United Nations and certain others may make optional declarations and, to the extent that any two such declarations coincide, they establish in binding form the jurisdiction of the Court in respect of any dispute falling within their terms. The Court has long since held that the resulting rights and obligations have a treaty-like character.<sup>70</sup>

The second obstacle comes into play by virtue of the fact that the text regulating the optional declarations has running through it like a thread the motif of treaty, of international law, and of international obligation. Moreover the *ICJ Statute* directs the Court to apply to disputes coming before it law deriving from a list of specified sources, and that list is now universally regarded as the foundational text describing the sources of what we know as ‘international law’.<sup>71</sup> This therefore determines the substantive content of what a common lawyer might refer to as defining the Court’s ‘jurisdiction’. Whatever we call it, however, it is plain that the International Court is the tribunal par excellence set up to settle disputes by the application to them of international law. And it can just as easily be seen that, if, on strict inter se principles, Commonwealth countries cannot (or at least do not) contract treaties with one another, they cannot set up between themselves the binding legal link founding the Court’s judicial power; and, if the law governing their relations is indeed a *tertium quid* neither international nor municipal, then the Court would in any case not be enabled to deal with disputes arising out of those relations.

These conclusions are ones that strike a contemporary eye very oddly. So it is worthwhile here, too, to take a closer look at what the practice had been in earlier days, and how the practice looks now.

<sup>70</sup> Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press, 2013) vol I, 260–1, citing Sir Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure’ (1958) 34 *British Yearbook of International Law* 1, 76.

<sup>71</sup> Literally so: ‘the Court ... shall apply’: see *ICJ Statute* art 38(1). This is in identical terms to its predecessor, signed in 1920.

## X ACCEPTANCE OF THE WORLD COURT'S JURISDICTION

We can take as our starting point a collective Empire decision taken in 1929 to accept the jurisdiction of the Permanent Court of International Justice. It would seem that all of the then Dominions<sup>72</sup> deposited with the League of Nations individual declarations of acceptance and that each of them was accompanied by a reservation, in standard terms, excluding from the submission to the Court's jurisdiction any '[d]isputes with the Government of any other Member of the League which is a Member of the British Commonwealth of Nations ...'. There then followed a final phrase: '... all of which disputes shall be settled in such manner as the parties have agreed or shall agree'.<sup>73</sup> The same pattern was followed for accession in 1931 to the *General Act (Pacific Settlement of International Disputes)*.<sup>74</sup> This is intriguing. The phrasing leaves it entirely unclear whether the addition of the final phrase is merely explanatory in nature (in which case, what is it doing in a terse, and carefully formulated legal undertaking?); or whether it has some legal value, connoted by the use of 'shall', and in that case whether the effect is conditional, in other words, whether the exclusion of the World Court is effective only when some other agreed method of settlement has been established. There was an explanation by the British Government at the time, but it was only after a fashion, namely that intra-Commonwealth disputes were excluded 'because the members of the Commonwealth, though international units individually in the fullest sense of the term, are united by their common allegiance to the Crown'. It then added that disputes between them 'should, therefore, be dealt with by some other mode of settlement, and for this provision is made in the exclusion clause'.<sup>75</sup>

This explanation is somewhat perplexing. And the perplexity is not diminished by the fact that two of the Dominions, Canada and the Union of South Africa, included further explanatory material of a similar kind within the text of their formal declarations themselves.

The sources of this perplexity are, first and foremost, that this is the 1920s, yet none of the explanations, not even the British one, rests on a *legal* concept

<sup>72</sup> Except the Irish Free State: see further below n 79 and accompanying text.

<sup>73</sup> H Lauterpacht, 'The British Reservations to the Optional Clause' (1930) 29 *Economica* 137, 138.

<sup>74</sup> Signed 26 September 1928, 93 LNTS 343 (entered into force 16 August 1929).

<sup>75</sup> 'Memorandum on the Signature by His Majesty's Government in the United Kingdom of the Optional Clause of the *Statute of the Permanent Court of International Justice, 1929*' in Arthur Berriedale Keith (ed), *Speeches and Documents on the British Dominions 1918-1931: From Self-Government to National Sovereignty* (Oxford University Press, 1932) 410, 416.

of inter se relations; indeed, the Canadian and South African statements expressly deny it. Even more perplexing is that the reservations, as formulated, seem to invite jurisdictional dissension, not shut it out. Had the reservations simply taken the form of 'no disputes with other members of the Commonwealth', that would have been that, and there is no doubt whatsoever that the Permanent Court, and the International Court of Justice in its turn, would have given effect to it as a valid choice of partners option, a restriction *ratione personae*. It is the addition of the final phrase that gives rise to the difficulty, insofar as it opens the way to an argument that this is not a restriction *ratione personae* but *ratione modus*. It is not too difficult to imagine a determined claimant state, completely at odds with a Commonwealth partner over an issue in dispute, marching off to the International Court and insisting that the absence of an alternative settlement mechanism rendered the Commonwealth exclusion inoperative. And the point is that the matter would then be for the *World Court* to decide, under the principle of the *compétence de la compétence*. It would be outside the hands of the Commonwealth club, which would seem to be the antithesis of inter se, both procedurally and substantively.<sup>76</sup>

The answer may well be — or may have been — that the assumption was that that simply would not happen; that Commonwealth countries had agreed that they would not take their disputes to the World Court, and therefore they would not do so. But that leads to the final perplexity, and the most baffling one of all. If that were the assumption, and it were valid, why was it necessary to have a Commonwealth reservation at all? Commonwealth partners had agreed that they would not sue one another before the World Court, and that was an end to the matter.<sup>77</sup>

To think of the reservation, finally, as perhaps a disguised form of protection for the United Kingdom against the Irish Free State, the only country that had not incorporated a Commonwealth reservation in its acceptance of the World Court's jurisdiction, seems not only far-fetched, but also counter-factual, as we shall see in a moment.

<sup>76</sup> Fawcett, above n 9, 14.

<sup>77</sup> Though, in truth, as Fawcett pointed out the reservation would not in any case have had the effect of overriding a dispute settlement clause in a multilateral treaty to which Commonwealth states were parties: see *ibid.*

XI A SPECIAL DISPUTE SETTLEMENT  
PROCESS FOR THE COMMONWEALTH?

Having arrived at that state of puzzlement, it is instructive to take a look at the actual practice since 1929 and the current situation, and in the first instance at that notional alternative of a special dispute settlement process within and for the Commonwealth.

Interestingly enough, the question does seem to have been a live one in the 1920s, at more or less the time that the Dominions were considering their acceptance of the World Court's jurisdiction. A committee on imperial legislation, meeting in 1925, had drawn attention to the possible need for a system of dispute settlement, and the matter was referred for further study, the outcome of which is recorded in the decisions of the 1926 Imperial Conference. The recommendation was not for an institution but for a process; the process is not described in any great detail, but is readily recognisable as following a standard pattern of bilateral arbitration — not in fact all that different from what one would see today — the sole special feature being that all of the panel of arbitrators should come from within the Empire.<sup>78</sup>

What happened after that is less clear. The only record of the mechanism's being actuated is in connection with a dispute in 1932 between Britain and the Irish Free State over the payment of land annuities; we can infer that the Irish hankered after putting it to the World Court or some other international tribunal, but in the end accepted the British position (no doubt having in their mind the 1925 scheme) that it had to go to arbitration. However that may be, even the arbitration route came to immediate grief up against the Irish insistence that some at least of the arbitrators must come from without the Empire. There is a letter to the *Manchester Guardian* from the eminent Hersch Lauterpacht in July 1932 proposing to get round the obstacle via a tribunal composed of equal numbers of British and Irish nominees, and allowing the tribunal so constituted a measure of discretion to decide *ex aequo et bono*,<sup>79</sup> but there is no sign of official interest having been shown in it. And that, so it would seem, is the last that was ever heard of the Commonwealth scheme.

<sup>78</sup> Full text, as revised in 1930, reprinted as 'Scheme for Ad Hoc Tribunal to Deal with Justiciable Disputes between Governments of the Commonwealth' in Gerald E H Palmer, *Consultation and Co-operation in the British Commonwealth: A Handbook on the Methods and Practice of Communication between the Members of the British Commonwealth of Nations* (Oxford University Press, 1934) 120.

<sup>79</sup> See Sir Elihu Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht — Disputes, War and Neutrality* (Cambridge University Press, 2004) vol 5, 3–6.

## XII THE POST-WORLD WAR II PRACTICE

To turn now from that to the situation as it developed after the Second World War, with the advent of the United Nations and the present International Court. The Court's jurisdictional regime, as previously noted, is in all essential respects unchanged from that of its predecessor, and declarations made earlier were simply carried over. The current listing shows that, out of the 70 United Nations member states who have accepted the Court's compulsory jurisdiction, a full 20 are within the Commonwealth; moreover the United Kingdom is the only one among the Permanent Members to have maintained its acceptance of the Court's jurisdiction unbroken throughout. Put together, those are highly creditable figures which can be the source of some pride. Out of the 20, though, only 8 include a Commonwealth reservation; 5 of those are 'new' members which could not have been party to the 1929 agreement, and there is a fair amount of variation in the phrasing of the reservations themselves. South Africa abstracted itself from the compulsory jurisdiction years ago, in the days of apartheid, so that the only three old Dominions to have held to the original position are Canada, India, and the United Kingdom. The striking change is Australia and New Zealand, which remain within the compulsory jurisdiction but without any Commonwealth exception at all; Australia dropped it in 1975, followed by New Zealand in 1977. There is no apparent reason for the change, other than a general feeling perhaps that the reservation had become outmoded. But, as so often, unanticipated consequences followed, which will be discussed below.

As to the practice, if one leaves aside cases that never went anywhere, and also one case that started before the claimant state<sup>80</sup> had joined the Commonwealth, there are only five cases in the history of the International Court of Justice between a claimant and a respondent both of whom are Commonwealth members. Of these five, one case was brought under the jurisdictional provisions of another multilateral treaty,<sup>81</sup> two by special agreement between the disputing States,<sup>82</sup> and only two therefore by unilateral application under

<sup>80</sup> Cameroon, which brought a territorial and boundary dispute against Nigeria to the Court in 1994, but joined the Commonwealth only in the following year: see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Application Instituting Proceedings)* [1994] ICJ General List No 94.

<sup>81</sup> By India against Pakistan, under the *Chicago Convention on International Civil Aviation*, signed 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947): see *Jurisdiction of the ICAO Council (India v Pakistan) (Judgment)* [1972] ICJ Rep 46.

<sup>82</sup> Both of them territorial-cum-boundary cases: one involving Botswana and Namibia (*Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045); and the

the Court's compulsory jurisdiction. The two brought to the Court by friendly agreement can be regarded as falling, in effect, within the spirit of the second part of the 1929 Imperial formula,<sup>83</sup> which leaves therefore only the remaining two as test cases for present purposes. The fact that there are only two of them over an 80-year period is in itself noteworthy, and the interest in the cases themselves is enhanced by the happy accident that one is between two States (Nauru and Australia) neither of whom had made a Commonwealth reservation,<sup>84</sup> and the other between two States (Pakistan and India) one of whom still maintains a Commonwealth reservation (India) whereas the other never had one (Pakistan).

In the case between Pakistan and India,<sup>85</sup> India relied on its Commonwealth reservation to oust the jurisdiction of the Court. Pakistan attempted to strike out the reservation on a number of grounds, both particular and general, including that it conflicted with the principle of the sovereign equality of states. But Pakistan sought also to have the reservation disappplied on the grounds that it was obsolete, arguing in support that:

the original idea of the *inter se* doctrine has withered away, and ... the Commonwealth members, including India, have come to regard each other as ordinary States between whom the normal rules of international law apply and between whom litigation may take place upon an international level, in the ordinary way.<sup>86</sup>

The Court for its part (as already foreshadowed above) had no difficulty in reading the reservation as defining, *ratione personae*, the states towards whom India wished to be bound, and on that basis upheld it by a large majority. It saw no reason to go into Pakistan's argument of obsolescence, and with that the case came to an end.

In the case between Nauru and Australia,<sup>87</sup> on the other hand, there was no Commonwealth reservation to be invoked, nor did Australia, in advancing a lengthy list of preliminary objections, use any argument of an *inter se*

other Malaysia and Singapore (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 14).

<sup>83</sup> Which provides that 'disputes shall be settled in such a manner as the parties have agreed or shall agree'.

<sup>84</sup> Nauru's acceptance of the jurisdiction was later allowed to expire.

<sup>85</sup> Which arose out of the shooting down of a Pakistani military aircraft in 1999: see *Aerial Incident of 10 August 1999 (Pakistan v India) (Judgment)* [2000] ICJ Rep 12.

<sup>86</sup> *Ibid* 27 [30].

<sup>87</sup> Arising out of the exploitation of phosphates by the British Phosphate Commission.

character in their support. The inwardness of the case was that Nauru's complaints arose out of the activities of the British Phosphate Commissioners, and they constituted a joint body in which New Zealand and the United Kingdom each played an equal part. The International Court (which has no power to join additional defendants) had therefore to decide whether the case could proceed at all in the absence of the United Kingdom and New Zealand — one of which maintained in any case a Commonwealth reservation while the other did not! This last fact may explain why the claimant (Nauru) chose to go against Australia on its own, though it does not, at least on the surface, explain why New Zealand was let off; below the surface, however, one can suspect a possible tactical consideration that to go against two, while demonstratively leaving out the third (for want of jurisdiction), might have lent the case a doubtful aspect in the eyes of the Court when it came to considering the arguments as to whether all three States were necessary parties; similarly so if the case *had* been brought against all three, but one of them could readily have had itself struck off the record on the basis of the Commonwealth reservation. In the end, the Court found in favour of its jurisdiction, Australia read the writing on the wall and reached an out-of-court settlement, the case was withdrawn,<sup>88</sup> and the United Kingdom and New Zealand reimbursed Australia for part of the damages.<sup>89</sup>

To complete that picture by looking at inter-state arbitration, the record of the International Court of Justice's sister organisation in The Hague, the Permanent Court of Arbitration, suggests that there have been only five proceedings between Commonwealth countries, all under the particular dispute settlement provisions contained in substantive treaties.<sup>90</sup>

<sup>88</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia) (Order of 13 September 1993)* [1993] ICJ Rep 322.

<sup>89</sup> Australia agreed to provide A\$2.5 million annually to Nauru for 20 years, and, in recognition of their shared responsibility with Australia for the operations of the British Phosphate Commission, New Zealand and the United Kingdom agreed to contribute A\$8.5 million each: Ramon E Reyes Jr, 'Nauru v Australia: The International Fiduciary Duty and the Settlement of Nauru's Claims for Rehabilitation of Its Phosphate Lands' (1996) 16 *New York Law School Journal of International and Comparative Law* 1, 32–3.

<sup>90</sup> Four of them under the comprehensive dispute settlement regime of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), and the remaining one under the special regime of the *Indus Waters Treaty*, signed 19 September 1960, 419 UNTS 125 (entered into force 12 January 1961), between India and Pakistan. To judge from earlier press reports, one further disputed issue of a very limited character between Malaysia and Singapore may currently be pending before an ad hoc arbitral process established by mutual agreement.



That hasty survey of 80 years of experience between Commonwealth countries in the field of international litigation suggests the following conclusions.

### XIII CONCLUSION: DISPUTE SETTLEMENT

First, there never was a real constitutional inhibition to intra-Commonwealth dispute settlement by normal international processes. The special arbitration arrangement dreamt up in the 1920s was political window-dressing which never proved to have genuine appeal when it came to the issue. And the Commonwealth reservations to the compulsory jurisdiction of the World Court were likewise (and to a large extent explicitly) a matter of policy choice rather than legal need. As against that, we should remind ourselves that this was the 1920s, when a standing international tribunal and compulsory jurisdiction were both new ideas, still largely untried, so that a cautious approach was understandable.

On the other hand, the perpetuation of the reservation after the War (in some cases but not all) and its adoption by newly independent Commonwealth countries (once more, in some cases but not all), even if it looks somewhat anomalous, can at least clearly be seen as a conscious policy choice. More importantly, though, practice has shown it not to be in any way incompatible with the civilised submission of disputes to the International Court by free mutual agreement; nor does there seem to have been any disposition on the part of any of the States concerned to take the view — or to argue that view before the international court or tribunal — that, when it came to submitting a dispute for adjudication by agreement, there was anything substantively different from the norm, in the law regulating the relations between them as members of the Commonwealth, including in those disputes in which the applicable law was general customary international law (as opposed to the provisions of a particular treaty). On the contrary, the law regulating the fluvial boundary between Botswana and Namibia,<sup>91</sup> or the sovereignty over a lighthouse, islands and rocks adjacent to Malaysia and Singapore,<sup>92</sup> or the environmental obligations of India and Pakistan in respect of hydroelectric power generation in Kashmir,<sup>93</sup> was simply assumed, without

<sup>91</sup> *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045.

<sup>92</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 14.

<sup>93</sup> *Indus Waters Kishenganga Arbitration (Pakistan v India) (Final Award)* (Permanent Court of Arbitration, 20 December 2013).

question or argument, to be the same law that would have applied had either or both of the litigating States not been members of the Commonwealth.

#### XIV AN OVERALL ASSESSMENT

This leads to one overall conclusion that applies both to treaty-making and to dispute settlement: there is nothing in international law that stands in the way of the maintenance of special legal relations between Commonwealth members, but there is nothing in international law or intra-Commonwealth arrangements that compels it either. It is a matter of choice; the exercise of that choice has varied between countries and over time, but the variation has had no effect on Commonwealth relationships in general.

What, then, is one to make of the *inter se* doctrine — assuming, that is, that it ever had real existence?

One explanation would be that it was never more than a device contrived by the mother country to keep the colonial territories under control. There might perhaps be a little germ of truth in that, but it would be both unduly cynical and analytically inadequate. Unduly cynical because there have been other cases in which analogous attempts have been made to create or keep alive a semi-domestic, and therefore not wholly international, relationship between historically connected States: sometimes for entirely meritorious reasons (Germany), sometimes for suspect ones (Russia). And analytically inadequate because those dealing with the matter at the outset, say in the mid-19<sup>th</sup> century, did have to confront one essential *legal* fact: namely that treaties, which at the time were normally contracted between heads of state, were concluded, so far as the British Empire was concerned, by the Crown, and in virtue of that applied to all of the sovereign territory of the Crown. Their area of application included therefore all of the territorial units which were on their way to becoming the self-governing Dominions, though in some cases only after important coagulations of local territorial units. In short, and without prejudice to the growing pressure towards separate treaty-making capacities for the nascent Dominions, so far as concerned the application of treaty rights and duties in their respect, and even more so (if the case should arise) *as between* them, the inescapable fact was that the King could not conclude treaties with himself; that was an impossibility on the domestic plane in exactly the same way as on the international plane. In other words, there was a gap, and it had to be filled; there had to be some mortar or else the bricks would not hold together.

The idea that this mortar — the *tertium quid* between international law and domestic law referred to earlier — was some sort of Commonwealth

constitutional law, which was neither international law nor was it quite the same as ordinary English law, was not in itself a bad one, nor was it analytically flawed. The problem with it was that it was always anachronistic.<sup>94</sup> It was anachronistic in the early days because the legal relationships between Great Britain and the colonial territories were not advanced enough to lend it any substance, and it was anachronistic in the opposite sense by the 1930s because the actual autonomy of the Dominions, and the reality of their international presence, had outpaced it, had developed too far to allow any real space for a not-quite-international law of this kind. Perhaps at some point in between the lines did intersect and there was a state of equilibrium, but if they did, things were moving too fast for it to have been more than momentary. As the 1926 Imperial Conference itself put it:

nothing would be gained by attempting to lay down a Constitution for the British Empire ... considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever yet been tried.<sup>95</sup>

But it immediately went on to add: 'The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions'.<sup>96</sup>

And that is no doubt the reason for the second problem at the heart of the inter se doctrine, that circumstances never allowed adequate time or opportunity to work out what its actual content was; from the international point of view, what *was* this tertium quid, the law regulating the state-to-state relations between the Dominions and Great Britain and between themselves, not just in its essential nature from the theoretical point of view, but also in its actual incidents, its substantive content and rules?

The closest that one can get to uncovering any real substance boils down, it would seem, to little more than the following two threads. On the one hand we have the stratagem approved by the 1926 Conference, according to which

<sup>94</sup> And even to call it 'Commonwealth' constitutional law is itself anachronistic.

<sup>95</sup> United Kingdom, *Imperial Conference, 1926, Summary of Proceedings*, Cmd 2768, 14.

<sup>96</sup> *Ibid.* In full:

The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

all treaties should be concluded in the name of the King, not just symbolically but as a specific device to 'render superfluous' the inclusion of any provision that its terms should not be regarded as regulating inter se the rights and obligations of the various territories. That has the ring of whistling into the wind, and so it was. The difficulty was that this convenient arrangement applied only (as the 1926 Report expressly pointed out) to treaties in head of state form — which led the Conferences to utter what one is tempted to call the plaintive wish that all treaties should be concluded in that form. It lay, however, outside even the combined persuasive force of the British Empire to ensure that that did in fact happen, and we can now see in retrospect that the wish was being uttered at the very moment at which the tide was turning decisively against the use of the head of state form; or it was doing so at least for multilateral treaties, yet it was precisely the case of multilateral treaties that gave rise to the mischief that had been foreseen. When we come quite shortly afterwards to the watershed case of the *Charter of the United Nations*, we find it concluded (via the literary artistry of a *Commonwealth* statesman, General Smuts) in the altogether more subversive form of 'We, the peoples ...', and it is signed by 'the representatives of the Governments of the United Nations'. Not one of the foundational treaties for the postwar world system, from Bretton Woods onwards, was in head of state form, and not one of them includes anything even roughly corresponding to an inter se reservation, even had that been remotely conceivable. The tide had washed over, and left no trace behind. In the United Kingdom's own practice, the sole treaties which are now concluded between heads of state are the constitutional instruments of the European Union — hardly a matter of much moment in the field of intra-Commonwealth relations.

The other thread is represented by the practice of doing differently things which, between foreign states, would have been done by treaty, namely by the establishment of agreed Commonwealth schemes, which were then put into effect by parallel legislation in each jurisdiction. The classic examples are the scheme for the surrender of fugitive offenders (the substitute for extradition), the scheme for mutual legal assistance (the substitute for civil procedure conventions), and the Commonwealth preference schemes (in place of trade treaties). This is a practice that did habitually obtain for a time, but the habitual observance is long since past, and the examples given show that Commonwealth countries now deal with one another in these fields by treaty, in a way that is indistinguishable from how they deal with foreign partners.

The conclusion has to be that the inter se doctrine was an honest attempt to manage, with some ingenuity, a problem that forced itself on the attention as the Empire developed into the modern Commonwealth. But it was a

transitional problem only, and the circumstances it set out to deal with were always changing, and often changing fast, so that the measures adopted were always slightly behind the times. The result of that was that they never had adequate time to bed down, in a way that would have allowed us to define and describe what the *inter se* doctrine really amounted to in international practice. In other words, perhaps the most significant thing to say about the present topic is that, as a topic, it no longer exists. And the vigour and health of the Commonwealth are none the worse for that: both of those propositions being ones that one may feel sure Zelman Cowen would have endorsed.