

# The Inaugural Sir William Dale Memorial Lecture

Colonial law and the clarity of drafting: the International Court and William Dale's two abiding interests

by Judge Rosalyn Higgins, DBE, QC

The following public lecture in memory of Sir William Dale was delivered at the Chancellor's Hall, Senate House, University of London on 2 July 2001.

When invited to give this Memorial Lecture I was honoured, but also daunted. How might I have any competence to speak on anything that would have interested William Dale as a topic (something that seemed to me a *sine qua non*)? But then I realised that the legal problems of the colonies and of the Commonwealth, that were so much at the heart of his professional life, have found their place in the court's docket too. There was, in fact, a theme that suggested itself.

The passing of imperial authority to the authority of independent rulers has entailed a prodigious amount of meticulous legal work for the Colonial Office and the Commonwealth Relations Office. They have had to ensure not only a smooth transition from ruler to ruled, but also certainty of borders between newly independent States, either or even both of which may have been under British rule. It is a tribute to their tremendous skills that generally this was accomplished with little difficulty. But not every eventuality can be foreseen and a significant percentage of the Court's cases on territorial title and boundary disputes have a British colonial background. I have only to mention the Northern Cameroons case (*Northern Cameroons*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p.15), the *Cameroon v. Nigeria* case (*Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275), the Botswana/Namibia case (*Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045) to make my point. And sometimes, although the point at issue may not have been territorial title, the mysteries of British colonialism or of the Commonwealth have been an essential element of the case: the *Mavrommatis Claims (Mavrommatis Jerusalem Concessions)*, Judgment No. 5, P.C.I.J. Series B, No. 11) and the *India v. Pakistan cases (Appeal Relating to the Jurisdiction of the ICAO Council)*, Judgment, I.C.J. Reports 1972, p. 46; Trial of Pakistani Prisoners of War, Interim Protection Order of 13 July 1973, I.C.J. Reports 1973, p. 328; Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973, p. 347) afford examples.

Of course, all of this could be added to by reference to those cases in the Court that are set against different colonial backdrops – the *Tunis and Morocco* case (*Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923, P.C.I.J. Series B, No. 4), the great *South West Africa* cases (*South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p. 6.) the *Western Sahara* (*Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12) case, the *Burkina Faso/Mali* case (*Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 554) and fl dare I say it – the *East Timor* case (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90). But this evening I confine myself to the sphere that so preoccupied Bill Dale – the problems of British colonial and Commonwealth law.

## I. THE PANOPLY OF BRITISH IMPERIALISM BEFORE THE COURT

Looking back at the docket of the Permanent Court of International Justice, which began its work in 1922, and its successor the International Court of Justice, I am struck with how much of the panoply of British Imperialism has been before the bemused gaze of the Judges of those Courts. Judges from Russia, China, Japan, Venezuela and Hungary have proclaimed themselves engrossed by explanations of the British Empire and the Dominions, by tales of Colonies, Crown Colonies, Protectorates, Mandates, Trust Territories, Non-Self-Governing Territories.

Papers said to illuminate legal title may turn out to be documents of the Colonial Office, or the India Office, or the Commonwealth Relations Office, or the Foreign Office. These mysteries of provenance, too, my colleagues have learned to accept. They know about the departure of the Irish Free State, the comings and goings of South Africa and Pakistan many years later, the creation of the Unified Diplomatic Service in 1965, the amalgamation of the Commonwealth Relations Office with the Colonial Office, and the later merger of the Commonwealth

Relations Office (of which Bill Dale was its last Legal Adviser) with the Foreign Office to become the Foreign and Commonwealth Office in 1968. In short, they understand more than does 95 per cent of the British public.

There is an understanding at the Court that each British colonial relationship found its place on a wide spectrum of possibilities. From the utmost degree of control to the loosest type of link, that spectrum ranges from colonies to territories under the League of Nations Mandate system or under the UN's trusteeship system, to States which had entered into agreements of varying form guaranteeing their protection. And even within these categories, the different degree of autonomy depended not only on the precise status concerned, but on the realities on the ground. India was not the Middle East, the Middle East was not the Gulf, and the story of Africa is distinct again.

So far as British imperialism is concerned, the International Court has not had occasion to address international law issues under full colonialism: by that I mean that the full exercise of the authority of the Crown over geographically dispersed places, whether directly or with a significant degree of delegation, as in the case of the Dominions, has not been the subject of litigation. But other colonial relationships have indeed concerned the Court.

In the early mandates, later to be brought within the UN Trusteeship system, sovereignty did not lie with the Administering Power. The authority of Britain, as of any other Administering Power, derived from international agreements, ultimately supervised by the League of Nations in the case of a Mandate, or the UN in case of a trust territory.

Since 1921 Britain had been the Mandatory Power for Palestine. *Mavrommatis*, a Greek national, had already secured from the Ottoman authorities certain concessions for public works to be constructed in Palestine. Some of the characteristics of Britain as a mandatory Power were already to be seen in 1922, when it gave one Rutenberg a right to call for amendment of the *Mavrommatis* concession and informed *Mavrommatis* that his concessions would be recognised by the new Mandatory Power but that he should reach an understanding with his adversary. And eventually, his Jaffa concessions, but not his Jerusalem concessions, were recognised. The matter was brought by Greece to the International Court, which in a complicated series of Judgments, confirmed the validity of the original concession for Jerusalem and found the option to demand annulment granted by Britain to another concessionaire to be contrary to the international obligations accepted by the Mandatory for Palestine.

In 1961 the Republic of Cameroon, a UN trust territory, filed an application against the United Kingdom.

The points of law were quite different and relating to the questions put to the vote at the moment of decolonisation. Part was administered by France. The Northern sector granted to Britain (and this was to hold good also under the later UN Trusteeship system) was composed of two parts, divided by a narrow strip of territory of what was then the British Protectorate of Nigeria. Britain administered certain parts of Cameroon along with certain parts of Nigeria. In a complicated decolonisation process, the peoples of Northern Cameroons voted to achieve independence by joining with independent Nigeria; while the people of Southern Cameroons voted to join the independent (French) Republic of Cameroon. The UN endorsed these divergent results and terminated the Trusteeship Agreement. The Republic of Cameroon filed suit at the International Court, which found the case without object and would not pronounce upon the complaints.

The *Mavrommatis* case and the *Northern Cameroons* case thus dealt with quite diverse points of law. But each bore witness to the fact that in this type of colonial arrangement Britain did not have title to the territory and its administration was to be on behalf of the people of that territory, and not in its own interests.

There is currently pending in the Court a case that the Republic of Cameroon has brought against Nigeria. As in the case of *Botswana/Namibia*, it seems that not all matters of title and frontiers were as clearly resolved upon decolonisation as the colonial Powers had thought and hoped them to be. I shall say a little more about each of them in a later section of my talk.

If mandates and trust territories were rather familiar to the Court, the concept of a 'British protected State' was rather novel. But that has been the status of Qatar and Bahrain, in respect of which the Court has recently brought to conclusion a long and difficult litigation.

Formally speaking, the *Qatar/Bahrain* case was neither a colonial nor a Commonwealth case. At no time were Qatar or Bahrain (or indeed, any of the other Trucial Sheikdoms) British colonies. They were legal entities, with their own local Rules, before they entered into relationships with Britain. Their gradual development to full international personality depended on a variety of factors, of which the relationship with Britain was but one.

Their status *vis-à-vis* Britain was that of 'protected States'. This is a status that is rare, but not unknown, within the Commonwealth: Brunei, the Maldives Islands and Tonga forming the class. But, to make matters really complicated, Qatar and Bahrain, though protected States, were never within the Commonwealth. They were not colonies, and not within the Commonwealth. And, the judges of the Court who sought to grasp the precise nature of the relationship had to wrestle with the reality that

while it may be possible to offer some generalisations as to legal relationships in British constitutional law and in international law so far as colonies and self-governing territories are concerned, the same cannot be said of protectorates or protected States.

As to Protectorates, there were of course common features in that their very status was based on the understanding that the Protecting Power would have all powers in the field of foreign relations and defence. But as the Permanent Court has observed:

'In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.' [QUOTE] (Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., Series B, No. 4, p. 27.)

That observation is a fortiori true as regards the status of Protected States in international law. It cannot even be assumed that it is powers in the defence and foreign relations fields that a Protected State will temporarily give up. The protection it seeks may be in diverse fields - and the Bahrain and Qatar treaties with Britain well illustrated this point. And there was no British power to legislate for Bahrain or Qatar.

From a constitutional law perspective, the same holds true. The Crown in right of the United Kingdom had jurisdiction, but not sovereignty over, territories under its protection (Fawcett, p.118). These distributions of powers were a question of fact, to be ascertained in each case.

The *Foreign Jurisdiction Act* 1890 mentioned two principal modes of acquisition of such jurisdiction: treaties and usage resting on acquiescence, both being of equal efficiency (*ibid.*, p.118). The Law Officers advised in 1867 that formal treaties or agreements were not essential to the acquisition of jurisdiction, it being 'sufficient if the consent of the ruling powers were obtained and this might be evidenced by acquiescence, usage and sufferage' (Forsyth, *Cases and Opinions on Constitutional Law*, p. 232). That 'consent of the ruling powers' was to be a critical, and deeply contested issue in the *Qatar-Bahrain* case.

### **But first, the treaty relationships**

In the case of both Bahrain and Qatar there were relevant treaties.

Roberts-Wray, with whom Bill Dale shared an office when he first went to the Colonial Office, and who later became Legal Adviser of the Commonwealth Relations Office, wrote in his classic work *Commonwealth and Colonial Law*, of Britain being responsible for the foreign relations and defence of Qatar and Bahrain. (So did Fawcett, *The International Status of the Commonwealth and its Members*, p. 116.) But such powers are --not in fact set out in terms in these treaties. They are to be deduced from a reading

of the treaties as a whole, rather than stipulated in clearly and explicitly stated provisions. The relations established were not static, but evolved through treaties agreed over time, in response to particular historic events. Their original *raison d'être* clearly lay in Great Britain's desire to prevent piracy in the Gulf and the desire of the various Sheikhs of the region to be secure from hostile action from other competing actors in the region. But it did not take long for Britain to see that there was much advantage to be had if British consent was also to be required for Bahraini trade and commerce.

The treaties with the Sheikhs of Bahrain thus gradually passed from agreements to deliver up slaves and to embargo the use of ships for slaving purposes; to a more general promise to abstain from piracy, slavery and 'maritime aggression'; to most favoured nation trade advantages for 'British subjects of every denomination residing in Bahrain'. What Bahrain got in return was a commitment by Britain to obtain reparation for any injuries inflicted by others in the Gulf upon Bahrain. Gradually British power spread. Several treaties later (1880) the Sheikh and his successors agreed not to enter into negotiations or treaties with any other government without British consent, nor to allow foreign diplomatic or consular agencies to be established in Bahrain without British consent. By 1892 it was agreed that there would be 'no ceding, mortgaging or selling of any part of Bahrain save to the British Government'. And some 25 years later Sheikh Khalifa had signed an undertaking that:

*'if there is any prospect of obtaining kerosene oil in my territory in Bahrain, I will not embark on the exploitation of that myself, and will not entertain overtures from any quarter regarding that, without consulting the Political Agent in Bahrain and without approval of the British Government.'*

The treaty relations with Qatar started later, but followed a somewhat similar pattern – the slave trade, piracy, no relations with third States without British consent, no sale or cession of territory, and no granting of concessions (it was pearl concessions that were envisaged in Qatar waters). Importantly, all disputes were to be referred to the British Resident. Once again, all that Britain offered for this and more was 'good offices' if Qatar was attacked.

This brief summary shows two things. The first is that over time there were greater and greater erosions – albeit in the form of 'agreed to' treaties – upon the powers of Bahrain and Qatar respectively. The ability to exercise power in a variety of areas kept moving inexorably in Britain's direction. The second is that the exercise of power reserved for Britain now went far beyond that of foreign affairs. Indeed, the loss of control by Bahrain and by Qatar over the exploitation of natural resources, and of alienation of territory, go to the heart of the concept of ownership and title to property.

This was the back-cloth to certain questions about which the Court had to satisfy itself in resolving whether the Hawar Islands, lying off the western coast of the Qatar peninsula, belonged to Qatar or to Bahrain.

The British authorities had in 1939 decided that title lay with Bahrain. What was the basis of its competence to decide? Was the consent by Bahrain and Qatar to determine the controversy necessary? Had that consent really been given? Or was consent not the key and should the substance of the decision be judicially reviewed by the Court, and if so by reference to what criteria – the international law criteria of title, or the test of ‘reasonableness’?

The starting point for the Court was that it was dealing with relations between States, in which it was agreed that one State would ‘protect’ the other. Accordingly, Britain could only decide by consent the issue of title to the Hawars. And it found, relying on correspondence between each of the two Sheikhs and the British Political Resident, that consent *had* been given. The International Court was content to hold Qatar to the consequences of that consent and declined to review in any way whatever the substance of the British decision.

All of this is, to an extent at least, clearly visible from the text of the Court’s Judgment. But there was another element, also dependent upon the precise status of British/Gulf-State relations, that was not nearly so visible and which I think is of some considerable interest.

Bahrain had offered the Court a variety of arguments to support its claim to title in the Hawars. It contended that the Bahrain authorities, and they alone, had performed acts of sovereignty in the islands; and that this had been recognised by the British Government in its 1939 award of the islands to Bahrain. At the oral phase of argument a new strand was introduced. It was proposed to the Court that the doctrine of *uti possidetis* also meant title lay with Bahrain. Indeed, counsel for Bahrain contended that if this argument was accepted, there was no need to go further on anything it disposed of the entire issue.

For the non-international lawyers in the audience, let me quickly explain that the doctrine of *uti possidetis juris* provides that States obtaining independence do so within the administrative frontiers set by the prior colonial government. The idea has its origins in Roman law and became of importance in international law as the Latin American States achieved their independence in the early 1900s, usually from a single colonial ruler (Spain). In 1964 it was voluntarily adopted as a principle by the Organisation of African Unity, which was concerned that independence should not be accompanied by intra-African fighting over colonial frontiers. In 1986, in the *Burkina Faso/Mali* case the International Court of Justice in turn confirmed that the principle:

‘...is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs’ (*I.C.J. Reports* 1986, p. 565, para. 20).

The reach of the doctrine has been extended by the Badinter Commission in the Balkans, which has declared it applicable to disintegrating States. In the view of that body, the doctrine of *uti possidetis* operates to require new States forming within the older, larger State to respect, as their new independent frontiers, the former internal administrative frontiers within the federation to which they had belonged.

It will readily be seen that the underlying policy drive behind the doctrine is the stability of frontiers. Naturally, there is no suggestion that they cannot be altered through mutually agreed revisions: but the less they are tampered with unilaterally in a changing world, the better.

Could the doctrine apply to the frontiers that were necessarily implied by the British decision of 1939 over the frontiers? Because at the end of the day it based its judgment on the consent of the Parties, the Court did not have to answer the question. Judge Kooijmans, in his separate opinion, offered the view that the conditions for the doctrine did not exist, because, there was no transfer of sovereignty from a colonial power to a new State. Qatar and Bahrain had never been British colonies.

But there is an alternative way of looking at it, which also merits consideration.

It is true that the doctrine, thus far, has been associated precisely with such situations. Thus the Chamber in *Burkina Faso/Mali* was concerned with ‘frontiers inherited from colonization’ (*I.C.J. Reports* 1986, p. 633, para. 149) and it determined that ‘by becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power’ (*ibid.*, p. 568, para. 30).

But the fact that thus far the doctrine has been applied by the Court in circumstances relating to classic decolonisation and State succession does not of *itself* answer the question as to whether it could and does apply upon independence from constraints that could reasonably be described as ‘a more muted form of colonialism’. That question remains an open one, requiring careful analysis. It seems to me that we should be looking at substance, not form. If the formal question is ‘was there State succession?’ the substantive question is ‘was there a transfer of effective exercise of authority?’

The reality is that colonialism came in many forms. The forms of colonialism were often a matter of ‘historical accident’. One has only to read the terms of the various British Treaties with Qatar or with Bahrain, or indeed various other documents, to see that while ‘existing State

form' may have been preserved, the reality was still – I hope I am not offensive in saying this – a form of colonialism. We have seen that all the early treaties were a series of ever increasing obligations imposed on Qatar or Bahrain. There are many other illuminating indications of the realities too detailed for recitation here. Quite simply, the category of 'protected State' was merely a rather more courteous form of colonialism than characterised certain other categories. Even in internal judicial matters, as in legislative drafting, the role of the United Kingdom had assumed primacy.

Finally, and equally telling, Bahrain and Qatar *were only able to resume full independence in 1971* with the consent of the United Kingdom. Is this not in reality a form of colonialism?

Who could doubt that Britain was effectively 'the administering power' in Bahrain and Qatar prior to 1971? It seems artificial to draw the line, so far as the *uti possidetis* doctrine is concerned, between this type of 'polite' colonialism and other types. In all these situations the underlying policy considerations of stability and the avoidance of fratricidal struggle (emphasised in the *El Salvador/Honduras* case, *I.C.J. Reports 1992*, p. 386; the *Burkina Faso/Mali* case, *I.C.J. Reports 1986*, p. 567 and the *Libya/Chad* case, *I.C.J. Reports 1994*, p. 37) have equal importance.

The Court was right to avoid entering into these difficult waters unnecessarily. But there is no reason of legal principle why the principle of *uti possidetis* should not apply upon the independence of these protected States; and there are strong policy reasons why it should.

I have one small footnote to add on the *Qatar/Bahrain* case. By the end of this great case the Court knew all about Sheikhs, Emirs, the ins and outs of the British role in the Gulf from 1860-1971. But, in drafting its long Judgment, one insuperable problem remained. In recounting different events throughout this one hundred and ten years of turbulent history, it was asked of the British Judge when was it right to say 'Great Britain' and when 'United Kingdom'? The British Judge wished she could have lifted the phone to Bill Dale to have her approximate sense of things confirmed or amended. The Legal Adviser of the Foreign Office and the Research Department came to the rescue, and I trust that 'Great Britain', 'United Kingdom of Great Britain and Ireland', and 'United Kingdom of Great Britain and Northern Island' all appear at their correct points in the Judgment.

### India/Pakistan

In the recent litigation between Pakistan and India over an aerial incident in Kashmir, the Court has become deeply familiar with the details of the end of British rule in that sub-continent. In deciding whether it could indeed proceed to the merits, the Court found itself enveloped in a very singular slice of Commonwealth relations.

For a while it looked as if the International Court would find itself issuing an authoritative interpretation of the schedule to the Indian Independence (International Arrangements) Order issued by the Governor-General of India on 14 August 1947. This Order was claimed by Pakistan to have the status of an agreement between India and Pakistan – itself a not uninteresting proposition. The matter arose in the following circumstances. One of Pakistan's claims was that the Court had jurisdiction over the aerial incident by virtue of the so-called General Act of 1928, a treaty which provided that the parties thereto would submit their disputes 'for decision to the Permanent Court of International Justice'. I shall leave aside the question as to whether the *General Act* survived the demise of the League, with which it was closely associated, and if so, whether the reference clause to the Permanent Court would be read as meaning today a reference of disputes to the International Court of Justice. These were clearly important questions for all parties to the *General Act* of 1928. But there were some questions that had a very specific colonial (or more correctly, dominion) resonance that would, I think, have intrigued Sir William Dale.

In 1931 British India had acceded to the *General Act* of 1928. In the 1947 Indian Independence (International Arrangements) Order, it was provided that:

*'rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve upon the Dominion India and upon the Dominion of Pakistan ...'*

Accordingly, in Pakistan's view, India and Pakistan both succeeded to the *General Act* 1928. But India pointed to another clause in the independence Order by virtue of which 'membership in all international organisations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India'. And in India's view, it was through being a League member that India had become a party to the General Act. Pakistan was not, in today's parlance, a 'continuation State'.

India also drew the Court's attention to an Expert Committee, which in 1947 had been instructed, in connection with the preparation of the Indian Independence (International Arrangements) Order, to study the effect of partition on the treaty commitments of India (British India). That Committee had drawn up a list of such treaties – but the *General Act* did not appear. Pakistan in turn said that that omission was manifestly an error – and pointed to other omissions from the list of treaties generally acknowledged to bind India.

In any event, India had in 1974 notified the Secretary-General of the United Nations that:

*'the Government of India never regarded themselves as bound by the General Act of 1928 since her Independence in 1947, whether by succession or otherwise'*.

And Pakistan had in 1974 notified the Secretary-General that it was bound by the General Act, and had been ever since independence, by virtue of the Order of 1947. Moreover, in Pakistan's view that also described the position of India.

Before very long my colleagues from Venezuela, China, Algeria and Hungary had become experts on the legal history of the partition of India and the implications for international treaties. But, at the end of the day, the Court avoided an interpretation of the 1947 Order and its schedules, and also avoided pronouncing upon whether the *General Act* had in fact survived. Instead, it focused on that communication of India to the Secretary-General of 1974 as the determinative factor.

Now I will at this juncture confess that I think there are strong policy reasons, when procedures exist in a treaty for its denunciation, against allowing States to extricate themselves other than by recourse to denunciation. But I also recognise that that statement in itself begs certain questions in the particular case.

In any event, in a carefully worded passage (which I am surprised has not received more attention from the experts in treaty law) the Court said India could not have been expected formally to denounce a treaty to which it did not consider itself a party since independence. Its communication of 1974 to the Secretary-General thus 'served the same legal ends as the notification of denunciation' provided for in the Act.

In sum, the *General Act* could not found the Court's jurisdiction in the case Pakistan wanted to bring concerning the shooting down of its plane.

Before leaving this deployment of the panoply of British imperialism before the Court, let me just add that in the pending case between Indonesia and Malaysia, the history of another British protectorate will be under our scrutiny. And this last week, we learned, during the hearings on Philippine's request to intervene, that there was made with the Sultan of Sulu an agreement of protection by which the independent State of North Borneo would be administered not by the Colonial Office but by the British North Borneo Company. The history of the great chartered trading companies of Asia and North America remind us that the performance of public functions by private parties is not so much a new 'Third Way', as rather history coming round again.

## II. IMPERIAL DECISION MAKING

It is possible to learn, through careful study of the pleadings and annexes of these great cases, much about internal decision-making in the heyday of British Empire.

The element most striking to Judges coming from the four corners of the world was the way in which British colonial governance was carried out on the ground by no more than a handful of Crown servants, without day to day

reliance on military force. These few people knew 'their' territories and the leading figures in them intimately. Further, one cannot read either the *Botswana/Namibia* case or the *Qatar/Bahrain* case without a strong sense of the commitment of the British Political Agent in the area to 'his' local rulers and people. This undeniable truth was in fact a point of controversy in the *Qatar/Bahrain* case. There was for long years a British Political Agent located in Bahrain, but no separate British Agent in Qatar (with whom British treaty relations started later). Undeniably close links were established between British civil servants and the Sheikh of Bahrain. A dispassionate reading of the documents do suggest a 'fighting of the Bahraini corner' by Belgrave, the Political Agent, and to an extent Weightman, which fact might have had greater weight in the Court's final decision had it not been for two factors. The first was that ultimately it is governments, and not civil servants, who take internationally contested decisions. And the second was the emphasis that the Court gave to the consent given by Qatar, as well as Bahrain, to His Majesty's Government determining the question of title to the Hawar Islands.

But these representatives of the Crown who were posted to the territories concerned do stride impressively across the pages of a court docket seventy years or more later. We all finished with our own clear sense of the character of Weightman, of Belgrave, of Lock, Fowle and Walton, among a myriad of agents and representatives in the Gulf. We came to know equally well the impressive figures of Trollope, Redman and Eason as we dealt with the *Botswana/Namibia* case. Trollope and Redman, respectively Magistrate of the Eastern Caprivi Strip and District Commissioner in Bechuanaland, were in frequent correspondence about matters that bore upon the key issue before the Court – the main channel of the River Chobe, which marked the frontier. Indeed, in 1948, though neither lawyers nor hydrographers, they wrote a joint report in which they expressed their common opinion on where the main channel ran. And Captain Eason, a police officer in Bechuanaland and manifestly a man of considerable skill in diplomacy, had also made a report on the channel, which had reached similar conclusions. The Court – though it ultimately too found the northern channel to be the main one – was careful *not* to rely on these opinions as 'State practice'. They were internal documents fl important to a general understanding of things, but not themselves sources of international legal obligation.

The desire of a district commissioner to do well by 'his' people, and the mutual understanding of civil servants in the Colonial Office and Commonwealth Relations Office as to the reasonableness of such a position, was also illustrated in the Trollope/Redman exchanges. They exchanged correspondence on the intractable problem of the channel and its relationship with the traditional use of an island in the region by the Caprivi tribesmen. The law

and tribal practices seemed to pull in opposite directions. They saw a possible 'deal', which would retain the navigational rights of Bechuanaland on the one hand and the continued cultivation of law by the Caprivi tribesmen on the other. But their immediate political masters – the High Commissioner for Bechuanaland and the Secretary to the South-African Prime Minister, respectively – saw the larger picture including problems of international law relating to the South West Africa Mandate, that could result. And the proposed 'gentleman's' agreement was not allowed to come to fruition.

The case law of the Court reveals, also, the complex lines of authority in the different types of colonial rule.

The Permanent Court had shown in the *Mavrommatis* case that the freedom of the colonial ruler to legislate or otherwise act may be constrained by the type of status accorded under international law to the territory in question. But the structures put in place to carry out colonial rule, rule in protectorate States and rule in protected States were infinitely flexible, reflecting the complex practices through time of the Colonial Office, Commonwealth Relations Office and India Office. In the Palestine Mandate the protesting concessionaire dealt not with the 'Zionist authorities', as the Permanent Court termed the local government there, but rather with the Colonial Office in London. Even when Greece made representations to the Foreign office about the Mavrommatis' concessions, it was referred to the Colonial Office. It was the Crown Agent for the Colonies which had signed the agreement with Mavrommatis's opponent, Rutenberg. But the actual grant of the concession to Rutenberg was made by the High Commissioner of Palestine.

The local authorities in Bechuanaland and South West Africa dealt *directly* with each other – a singular form of external relations, albeit at a level lower than that at which foreign relations are usually conducted. But anything that amounted to alterations of rights and obligations in a protectorate had to be referred to London for authorization. At the same time, these views of the Commonwealth Relations Office were communicated to the other State through the local protectorate officials, and never directly (even though South Africa at the relevant moment of time was still a member of the Commonwealth). One could say that there was a bifurcation between the locus of ultimate decision-making power and the *locus* of external communication of those decisions.

It was to the British Political Agent in the Gulf that Qatar and Bahrain presented their arguments for title to the Hawars. And he had been authorized by the British Political Resident to impart to Qatar the Crown's offer to decide the matter. It was, however, the Secretary of State for India who insisted that Qatar was entitled to a right of reply. And it is interesting to see that the decision of the

British Government, when taken, was sent by the Foreign Office to the Government of India, thence to the British Political Resident in the Gulf and only then, through him, to the Rulers of Qatar and Bahrain.

### iii. the international court of justice and the COMMONWEALTH

Some nineteen Commonwealth countries have in force declarations accepting the jurisdiction of the court under Article 36 (2) of its Statute. It follows that some 35 members of the Commonwealth do not give themselves or the Court this possibility. (Up to date figures have been conveniently compiled by Sims, *Round Table* (2000) at pp. 212-3. He points out that this ratio *within* the Commonwealth is exactly the same as the ratio of UN members *outside* the Commonwealth who accept the Optional Clause to those who don't). Of course, there are other ways in which a case can be brought before the Court, notably, by agreement between the parties in respect of the particular dispute, and by having agreed to a treaty which contains a referral clause to the Court in case of a dispute arising under it.

There have in fact been rather few 'inter-Commonwealth' cases:

- *Appeal relating to the Jurisdiction of the Council of the International Civil Aviation Organization (India v. Pakistan)*
- *Trial of Pakistani Prisoners of War (Pakistan v. India)*
- *Certain Phosphate Lands in Nauru (Nauru v. Australia)*
- *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) [started just before Cameroon joined the Commonwealth]*
- *Kasikili/Sedudu Island (Botswana/Namibia)*
- *Aerial Incident of 10 August 1999 (Pakistan v. India)*

While all of them have entailed major points of procedural and substantive international law, the historical background of empire, decolonisation and Commonwealth has formed a necessary backdrop to an understanding of each. In some these issues have played an important part – as in the 1999 *Aerial Incident* case and in the *Kasikili/Sedudu Island* case. I have spoken already of the latter. In the former the Court had to consider arguments relating to succession of treaties as independent India and Pakistan were born.

Botswana and Namibia are, to date, the only Commonwealth countries that have voluntarily and jointly brought their dispute for settlement to the Court. The maintenance of neighbourly relations and the avoidance of bloodshed was a high priority. In another interesting 'first', they each declined the option to appoint an ad hoc judge, declaring themselves fully satisfied to leave matters to the permanent Bench of the Court.

#### IV. THE INTERNATIONAL COURT OF JUSTICE AND THE COMMONWEALTH RESERVATION

The case brought to the Court by Pakistan against India concerning the aerial incident of 10 August 1999 obliged the Court to scrutinise the succession arrangements as the imperial era in India came to a close; it also brought back before the Bench an issue long dormant: that of *inter se* doctrine in the Commonwealth. Pakistan appeared to face a major problem in bringing the case at all, in that India's current acceptance of the court's compulsory jurisdiction excluded from the Court's jurisdiction any State which 'is or has been a Member of the commonwealth of Nations'. Pakistan appeared to fall into both categories, having withdrawn in 1972 from the Commonwealth and rejoined in 1989, Pakistan necessarily had to persuade the Court of the invalidity of such a reservation. Its main line of argument was to suggest that all purpose to such a reservation had long since gone.

It is certainly not difficult to feel sympathy for the proposition that the original twin purposes underlying the so-called 'Commonwealth Reservation clause had now lost their relevance. This is not the moment for me to expound in any detail on the birth of the Commonwealth Reservation clause as a component element in acceptances of the International Court's jurisdiction by Commonwealth States. The works by Patrick Gordon Walker (*The Commonwealth* (1965)) and Lorna Lloyd (*Peace Through Law: Britain and the International Court in the 1920s* (1997)) are particularly illuminating on this history. But briefly put, from the outset relations between the Dominions, and between Great Britain and any one of the Dominions, were 'different from the relations between two foreign States and for this reason were not international'. For this reason 'disputes between two units' of the British Empire could not come to the Permanent Court of International Justice, which had jurisdiction only in disputes of an international character. There were the words used by Sir Cecil Hurst, the British Judge at the PCIJ (1929-1946) to explain the matter. The detailing of 'the Commonwealth Reservation through time' is admirably explained, with precision and clarity, by Nicholas Sims in his *Round Table* articles on the topic (see especially 'The Commonwealth and the ICJ', *Round Table* (2000), p. 354).

Thus the United Kingdom, Canada, Australia, New Zealand, South Africa and India all accepted the jurisdiction of the Permanent Court with a 'Commonwealth Reservation', in accordance with the *inter se* doctrine. This practice was continued by some (but not all) colonies and protectorates as they reached independence in the '60s and '70s and had to think about their acceptances of this Court's jurisdiction. Interestingly, to the extent that the *inter se* doctrine did

continue, it was unaffected by the post 1949 phenomenon of some Commonwealth members becoming republics. The Gambia, Kenya, Malta and Mauritius accepted the Court's jurisdiction with a Commonwealth Reservation clause.

But Uganda, Nigeria, Malawi, Swaziland and Botswana and New Zealand and Australia came to revise and eliminate their earlier Commonwealth Reservations. Cyprus and Nauru made no such reservation in accepting the Court's jurisdiction. And the United Kingdom in 1969 adopted a (perhaps characteristic) 'half-way' position, replacing its old declaration of acceptance, complete with Commonwealth Reservation clause, with one that excluded 'disputes with regard to situations or facts existing before January 1969'. For the future, then, the United Kingdom accepted that relations with Commonwealth States were exactly as those with other sovereign States, at least so far as the settlement of disputes was concerned.

There was another aspect, too: in the Imperial Conference of 1926 not only had it been assumed that inter-Dominion relations were not really international relations, but it had also been intended that there should be an inter-Commonwealth Tribunal, which would be the more appropriate way to settle disputes. This idea never came to fruition and was essentially dead in the water by the Second World War. I have learned from Patrick Gordon Walker's book that an attempt to revive the idea, in the form of a peripatetic Privy Council dealing with intergovernmental disputes, was made by Joseph Cooray of Ceylon at the 1960 meeting of the Commonwealth Prime Ministers. This particularly caught my attention as Senator Cooray later became my friend and colleague on the UN Human Rights Committee. He was to the core of his being a Commonwealth man: my inability to hold a sensible conversation with him on the great Inter-Commonwealth cricket matches of the day was a constant confirmation to him that the United Kingdom had not chosen its new member well. I was not a proper successor to Sir Vincent Evans.

We can, I think, indeed safely say that the original twin reasons for the Commonwealth Reservations clause have long since gone.

But that perception, which was fully understood by the Court, was not enough to get Pakistan home against India in the recent case. Two insuperable hurdles remained for Pakistan: the first was that a State is entitled to accept the Court's jurisdiction or not. It may freely qualify its acceptance of the Court's jurisdiction, and does not have to ground that refusal, or qualification, in objective necessity or good sense. That recourse to judicial settlement is so tramelled at the beginning of the 21st Century may be a matter of regret: but the legal position is clear.



Interestingly, it was the action of two Commonwealth States which has raised in the minds of some Judges of the Court what they see as an issue of 'international law compatible' reservations. The recently added reference in India's Commonwealth Reservation clause to those who 'had been' members of the Commonwealth was in reality directed at Pakistan. Pakistan was not slow to make this point to the Court, saying that it was in essence discriminatory. In the case that Spain brought against Canada in 1995 concerning action taken against a Spanish vessel outside Canadian territorial waters pursuant to recently adopted Canadian legislation, the issue arose again, in a somewhat sharper form. Canada had briefly withdrawn its acceptance of the Court's compulsory jurisdiction, and replaced it with one containing a reservation not as to other *parties*, but as to subject matter. And the newly reserved subject matter – coastal State measures regarding fisheries, without specification as to maritime territorial limits – was precisely that envisaged by the new legislation and which led to the dispute. In the eyes not only of Spain, but also of some of my colleagues, a reformulation of a State's acceptance of the jurisdictional clause in order to exclude potentially illegal activity from the jurisdiction of the Court, presented certain fundamental problems for the Court. The Court's majority judgment, with which I agreed, thought differently, stating the *jurisdiction* and *legality* are two different things. In any event, I hold the rather simple-minded view that a Judge cannot begin to 'know' what is legal or illegal until he or she has heard full argument on the point. One should *hold* no views on legality at the stage of jurisdiction: they will be at best mere 'hunch' and should be avoided, so as to approach a hearing on the merits with an open mind.

The echo of the original 1926 intention that there would be a special way for Commonwealth *inter se* disputes to be resolved is still sometimes heard in the phrase that sometimes is added to 'Commonwealth Reservations': I refer to the declarations of acceptance which nonetheless exclude disputes with other Commonwealth members 'all of which disputes shall be settled in such manner as the parties have agreed or shall agree'.

The Court has not readily read prior arrangements between the parties as excluding its own jurisdiction. In the *Land and Maritime Boundary* case between Cameroon and Nigeria (Judgment on Preliminary Objections, 1998) Nigeria contended that because the two States had over the years engaged in joint activities directed to resolving their border problems, this was an implied agreement to resort exclusively to existing bilateral machinery and not to invoke the jurisdiction of the Court. The Court did not agree. No more did the Court accept that the parties were under an obligation to settle boundary disputes within the Lake Chad region by reference alone to the Lake Chad Basin Commission, so that the Court's

jurisdiction was not to be invoked in matters falling within the competence of that Commission. The Court found the Lake Chad Basin Commission not to be an organ for judicial settlement and its contribution to dispute resolution in that part of Africa thus did not displace the jurisdiction of the International Court.

In the recent *Pakistan-India Aerial Incident* case (*Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction, Judgment, *I.C.J. Reports 2000*, p. 12), the issue arose in the entirely converse sense. Far from it being argued that another bilateral instrument precluded resort to the Court, Pakistan contended that the *Simla Accord* of 1972 required resort to the Court. This was because by that agreement both States had resolved to settle their differences by negotiation or 'other peaceful means mutually agreed by them'. And, said Pakistan, as they had before the aerial incident in question each already accepted the jurisdiction of the Court, the *Simla Accord* now required judicial settlement there of the dispute. The Court did not find that persuasive and, in particular, the *Simla Accord* did not preclude India from relying on the Commonwealth Reservation contained in its declaration of acceptance.

## CONCLUSION

As I bring this Memorial Lecture to a close it will be all too apparent that I have spoken on only one of Bill Dale's two abiding interests in international law. I have not, as your invitations promised, spoken also on good drafting and clear language. The reality is that there turned out to be so much more than I could have anticipated to share with you on colonial and Commonwealth matters at the Court. In offering an apology to those of you who are really much more interested in that other element in the Lecture's title, I can only say that I hope at least that I have spoken of the Court's role in the areas of law so loved by Bill Dale directly, clearly and grammatically. 🇦🇪

Judge Rosalyn Higgins, DBE, QC

*International Court of Justice, The Hague*