

‘la voix publique’--‘and treaties’:

Australian Responses to Treaty Developments in International Law

to the

First World War

Gregory James Pemberton

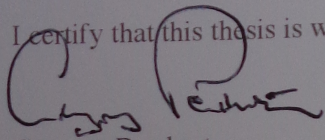
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I certify that this thesis is wholly my original work.

A handwritten signature in black ink, appearing to read 'Gregory Pemberton', written over the printed name.

Gregory Pemberton

1 June 2021

Acknowledgement

I wish to record my great thanks to my supervisor, Professor Don Rothwell, who patiently guided and assisted me in the completion of this thesis, especially with detailed comments.

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Abbreviations in Text

Army Council	AC
Attorney-Generals Department	AGs
Australian and New Zealand Society of International Law	ANZSIL
Board of Trade	BoT
British Association for Labour Legislation	BALL
British North America	BNA
Bryant and May	B&M
Bureau International Maritime de la Traite	BIMT
Bureau de la Repression de la Traite	BRT
Central Depot for the Suppression of Obscene Publications	CDSOP
Colonial Laws Validity Act	CLVA
Colonial Office	CO
Comité Maritime International	CMI
Comité permanent international des assurances sociales	CPIAS
Committee of Imperial Defence	CID
Criminal Law Amendment Act	CLAA
Crown colonies and protectorates	CC&P
Department of Defence	DoD
Department of External Affairs	DEA
Department of Trade and Customs	T&C
Diamond Match Company	DMC
Dominions Department	DD
Foreign Office	FO
Foreign & Commonwealth Office	FCO
General Department	GD
General Post Office	GPO
General Postal Union	GPU
Girls' Friendly Society	GFC
High Court of Australia	HCA
Home Office	HO

India Office	IO
International Abolitionist Federation	IAF
International Association for Labour Legislation	IALL
International Bureau for the Publication of Customs Tariffs	IBPCT
International Bureau for the Suppression of the White Slave Traffic	IBSWST
International Committee of the Red Cross	ICW
International Council of Women	ICW
Institut International de Statistique d'Agriculture	IISA
International Labour Organisation	ILO
International Office of the Union for the Protection of Industrial Property	IOUIP
International Radiotelegraphic Union	IRTU
International Telegraphic Union	ITU
International Union of American Republics	IUAR
International Union for the Protection of Literary and Artistic Works	IUPLAW
International Women's Suffrage Alliance	IWSA
Jewish Association for the Protection of Girls and Women	JAPGW
Judicial Committee of the Privy Council	JCPC
Ladies National Association for the Repeal of the Contagious Diseases Acts	LNA
Law Officers	LO
League of Nations	LoN
Legislative Council	LC
London Peace Society	LPS
London School of Economics	LSE
Melbourne Peace Society	MPS
National Council of Women	NCW
National Union of Women Workers of Great Britain and Ireland	NUWW
National Vigilance Association	NVA
New South Wales	NSW
New Zealand	NZ
Non-governmental organisation	NGO
Northern Territory	NT
Office d'Hygiène Public International	OHPI

Office Internationale du Travail	OIT
Orange Free State	OFS
Orange River Colony	ORC
Order-in-Council	OiC
Permanent Court of Arbitration	PCA
Permanent international governmental organisation	PGIO
Permanent Sugar Commission	PSC
Post-Master General's Department	PMG
Society for the Suppression of the Opium Trade	SSOT
South Australia	SA
Supreme Prize Court	SPC
Trade Union Congress	TUC
Union for the Protection of Industrial Property	UIIP
United Nations	UN
United Nations General Assembly	UN-GA
United Nations Security Council	UN-SC
United States of America	USA
Universal Postal Union	UPU
War Office	WO
Western Australia	WA
Women's Christian Temperance Union	WCTU
World Health Organization	WHO
Women's Guild	WG
Women's Political Association	WPA
Women's Suffrage League	WSL
Young Men's Christian Association	YMCA
Young Women's Christian Association	YWCA

Abbreviations for Publications

Adelaide Law Review	AdelLR
Advocate of Peace	AP
Agricultural History	AH
Alternative Law Journal	AltLJ
American Historical Review	AHR
American Industrial Hygiene Association Journal	AIHAJ
The American Journal of Comparative Law	AJCL
The American Journal of International Law	AJIL
American Journal of Sociology	AJS
American Labor Legislation Review	ALLR
American National Biography	ANB
Amsterdam University Press	AUP
Annals of the American Academy of Political and Social Science	AAAPSS
Archives des Völkerrecht	AV
Australian Bar Review	ABR
Australian Dictionary of Biography	ADB
Australian Drug and Alcohol Review	ADAR
Australian Feminist Studies	AFS
Australian Institute of Political and Social Science	AIPS
Australian Journal of Labour Law	AJLL
Australian Law Journal	ALJ
Australian National University	ANU
Australian National University Press	ANUP
The Australian Quarterly	AQ
Australian Yearbook of International Law	AYIL
BC Studies	BCS
Boston College International & Comparative Law Review	BCI&CLR
British Journal of Addiction	BJA
British Medical Journal	BMJ
British Parliamentary Papers	BPP
British Yearbook of International Law	BYIL

Bulletin of the History of Medicine	BHM
California Law Review	CalLR
California State University	CSU
California Western International Law Journal	CAILJ
Cambridge University Press	CUP
Canberra Law Review	CaLR
Case Western Reserve Journal of International Law	CWRJIL
Canadian Bar Review	CBR
Center for the Study of Armaments and Disarmament	CSAD
China Law Review	CLR
Columbia University Press	ColUP
Commonwealth Law Reports	CLR
Commonwealth Parliamentary Debates (House of Representatives)	CPD (HR)
Commonwealth Parliamentary Debates (Senate)	CPD (S)
Commonwealth Record Series	CRS
Congressional Records-House	CR-H
Cornell University Press	CLUP
The Criminal Law Quarterly	CLQ
Current Affairs Bulletin	CAB
Current Legal Problems	CLP
Daily Telegraph	DT
Department of Commerce and Labor: Bureau of Labor	DCLBL
Dictionary of National Biography	DNB
Diplomacy and Statecraft	DS
Duke University Press	DUP
Economic History Review	EHR
The Economic Journal	EJ
Economic Record	ER
English Historical Review	EHistR
Federal Law Review	FLR
Fordham International Law Journal	FILJ

Gender Issues	GI
George Allen & Unwin	GA&U
Harvard Law Review	HLR
High Court of Australia	HCA
Hispanic American Historical Review	HAHR
Historical Journal	HJ
House of Commons	HoC
House of Commons Debates	HCD
House of Representatives	HoR
Indian Journal of Chemical Technology	IJCT
International Affairs	IA
International Conciliation	IC
The International and Comparative Law Quarterly	ICLQ
The International Lawyer	IL
International Labour Review	ILR
International Organization	IO
Iowa Law Review	IoLR
International Review of Social History	IRSH
Irish Studies in International Affairs	ISIA
The Johns Hopkins University Press	JHUP
Journal of the American Society of Naval Engineers	JASNE
Journal of Chemical Education	JCE
Journal of Comparative Legislation and International Law	JCL&IL
Journal of Contemporary History	JCH
Journal of Economic History	JEH
Journal of Drug Issues	JDI
Journal of the History of International Law	JHIL
Journal of the House of Commons	JHC
Journal of Imperial and Commonwealth History	JICH
Journal of Modern History	JMH
Journal of Occupational Medicine	JOM
Journal of Peace Research	JPR

Journal of the Royal Statistical Society	JRSS
Journal of South African Studies	JSAS
Journal of Social History	JSH
Journal of the Society of Arts	JSA
Journal of the Society of Comparative Legislation	JSCL
Journal of Trafficking and Human Exploitation	JTHE
Journal of World History	JWH
Kluwer Law International	KLI
Law Quarterly Review	LQR
Law Reports, Appeal Cases	LRAC
McGill-Queen's University Press	MQUP
Manchester University Press	ManUP
Melbourne Journal of International Law	MJIL
Michigan Law Review	MichLR
The Modern Law Review	MLR
Melbourne University Law Review	MULR
Melbourne University Press	MUP
Modern Asian Studies	MAS
National Archives of Australia	NAA
National Centre of Biography	NCB
New Series	NS
New South Wales (Legislative Council)	NSW LC
Nordic Journal of International Law	NJIL
Ohio University Press	OhUP
Ohio State University Press	OSUP
Oxford Dictionary of National Biography	ODNB
Oxford University Press	OUP
Paedagogica Historica	PH
Political Science Quarterly	PSQ
Presses Universitaires de Rennes	PUR
Princeton University Press	PUP

Proceedings of the Australian & New Zealand Society of International Law	PANZSIL
Revue de droit international privé	RDIP
Revue de droit international et de législation comparée	RDI&LC
Revue Economique Internationale	REI
Revue d'Economie Politique	REP
Revue Générale de Droit International Public	RGDIP
Revue d'histoire	RH
Revue International de la Croix-Rouge	RICR
Revue Internationale de Droit Pénal	RIDP
La Revue de Paris	RP
The Royal United Services Institute Journal	RUSIJ
Rutgers University Press	RUP
Social History of Alcohol and Drugs	SHAD
Sociology of Health and Illness	SHI
Sri Lanka Journal of International Law	SLJIL
Stanford Journal of International Law	StJIL
Stanford University Press	STUP
State University of New York Press	SUNYP
Sydney Law Review	SLR
Sydney Morning Herald	SMH
The Historical Journal	THJ
The Indian Year Book of International Law	TIYBIL
The Johns Hopkins Press	TJHP
The Law Book Company Limited	TLBCL
The National Archives (United Kingdom)	TNA
The University Press	TUP
Tijdschrift voor Rechtsgeschiedenis	TVR
Transactions of the American Fisheries Society	TAFS
Transactions of the Epidemiological Society of London	TESL
Transactions of the Grotius Society	TGS
University of Alabama Press	UAP
University of British Columbia Press	UBCP

University of Chicago Press	UCP
University of Colorado Press	UCoP
University of Illinois Press	UIP
University of Kentucky Press	UKP
University of London Press	ULP
University of Michigan Press	UMP
University of North Carolina Press	UNCP
University of Pennsylvania Press	UPP
University of Queensland Papers	UQP
University of South Carolina Press	USCP
University of Queensland Law Journal	UQLJ
University of Tasmania Library Special and Rare Materials Collection	UTLS&RC
University of Toronto Faculty of Law Review	UTFLR
U.S. Bureau of Labor Statistics Bulletin	USBLSB
U.S. Government Printing Office	USGPO
The Victorian Historical Magazine	VHM
Victorian Studies	VS
Women's History Review	WHR
World Health Organization	WHO
Yale Law Journal	YLJ
Yale University Press	YUP
Zeitschrift für die gesamte Staatswissenschaft	ZGS

Table of Treaties

General

This table contains those major multi-party treaties from 1851 through 1914, which had a more general, as opposed to a more regional, application. Britain was party to nearly all, although those few instances, noted in each case, where Britain did not accede to what was a significant treaty internationally, have been included.

Sources

The source of each treaty text is indicated by an abbreviated source reference followed, where relevant, by the respective volume/page numbers, or a single number for the ATS and a single number with annual suffix for the UKTS.

Australian Treaty Series

British Foreign & State Papers

United Kingdom Treaty Series

League of Nations Treaty Series Index, vol. 1, 1927

C. Parry (ed.), *The Consolidated Treaty Series*, Oceana, Dobbs Ferry, NY, 243 vols., 1969-80

Christian L. Wiktor, *Multilateral Treaty Calendar, vol. 1*, Martinus Nijhoff Publishers, The Hague, 1998

Abbreviations used in this table

ATS Australian Treaty Series

AABP Applied to all British possessions

BDNA Britain did not adhere

BFSP British Foreign and State Papers

CTS Consolidated Treaty Series

DNEIF Did not enter into force

EIF Entered into force

LNTS League of Nations Treaty Series

UKTS United Kingdom Treaty Series

* * *

- 1856 *Declaration respecting Maritime Law*, Paris, signed & EIF 16 April 1856; AABP; BFSP 46/26; CTS 115/1; ATS 124/1901
- 1864 *Convention for the Amelioration for the Condition of the Wounded in Armies in the Field*, Geneva, 22 August 1864 (Britain, 18 February 1865), EIF 22 June 1865; AABP; BFSP 55/43; CTS 129/361; CTS 1942/6
- 1865 *International Telegraph Convention, with annexes & regulations*, Paris, 17 May 1865, EIF 1 January 1866; BDNA; BFSP 56/295; CTS 130/198
- *Convention relative to the establishment and maintenance of a lighthouse on Cape Spartel*, Paris, 31 May 1865, EIF 14 February 1866; BFSP 55/16; CTS 131/303
- 1868 *International Telegraph Convention, with annexes*, Vienna, 21 July 1868, EIF 1 January 1869; BDNA; BFSP 136/292; CTS 136/292
- *Declaration renouncing the use, in time of War, of Explosive projectiles, under 400 Grammes Weight*, St. Petersburg, signed & EIF 11 December 1868; AABP; BFSP 58/16; CTS 138/189; ATS 125/1901
- 1874 *Final Protocol of the Brussels Conference on the rules of military warfare & Project of an international declaration concerning the laws and customs of war adopted at Brussels*, Brussels, 27 August 1874; AABP; BFSP 65/1110; CTS 148/133
- *Treaty concerning the formation of a General Postal Union with detailed regulations and final protocol*, Berne, 9 October 1874, EIF 1 July 1875; BDNA; BFSP 65/13
- 1875 *Convention for the International Uniformity and Perfection of the Metric System*, Paris, 20 May 1875, EIF 20 December 1875; BFSP 66/562; CTS 139/237¹
- *International Telegraphic Convention, with annexed regulations & schedule of rates*, St. Petersburg, 22 July 1875, EIF 1 January 1876; BFSP 66/19; CTS 148/416; LNTS 57/213; ATS 6/1903²
- 1877-8 British colonies allowed choice of adhesion to non-political treaties-----**
- 1878 *Convention for the formation of the Universal Postal Union, with final protocol, regulations with annexes*, Paris, 1 June 1878, EIF 1 April 1879; BFSP 69/210; CTS 152/235³
- *Arrangement for the exchange of letters of declared value, with regulations & annexes*, Paris, 1 June 1878, EIF 1 April 1879; BFSP 69/245; CTS 152/270
- *Arrangement for the exchange of money orders, with regulations & annexes*, Paris, 4 June 1878, EIF 1 April 1879; BFSP 69/261; CTS 152/286
- *International convention respecting the measures to be taken against phylloxera vastatrix*, Berne, 17 September 1878; BFSP 69/619; CTS 153/247

¹ Britain adhered in 1884 and, apparently, did not invite their adherence by its possessions, of which, by 1907, only Canada had acceded. The Commonwealth only acceded in 1947 to the modifying convention of 1921; ATS 22/47.

² Australian adherences were SA, 3 June 1878; Victoria, 8 June 1879; NSW, 25 February 1884; Tasmania, 8 July 1885; WA, 1 January 1894 and Queensland, 9 April 1896. The Commonwealth acceded on 1 January 1903.

³ No Australian colony acceded.

- 1880 *Convention for the exchange of postal parcels without declaration of value, with final protocol & regulations with forms*, Paris, 3 November 1880, EIF 1 October 1881; BFSP 71/356; CTS 156/130
- 1881 *International convention respecting the measures to be taken against phylloxera, with final protocol*, Berne, 3 November 1881; BFSP 73/323; CTS 159/203
- 1883 *Convention for the Protection of Industrial Property & Final Protocol*, 20 March 1883, EIF 6 July 1884; UKTS 34/2006; BFSP 74/44; CTS 161/409; ATS 6/1907⁴
- 1884 *Convention for the Protection of Submarine Telegraph Cables & Additional Article*, Paris, 14 March 1884, EIF 1 May 1888; BFSP 75/356; CTS 163/391; ATS 1/1901⁵
- 1885 *General Act of the Conference of Berlin respecting the Congo*, Berlin, 26 February 1885, EIF 19 Apr 1886; BFSP 76/4; CTS 165/485
- *Additional Act to the Convention establishing a Universal Postal Union of June 1, 1878, with Final Protocol & Additional Article modifying the detailed regulations*, Lisbon, 21 March 1885; EIF 1 April 1886; BFSP 76/21; CTS 165/110⁶
- *Additional Act to the convention respecting the exchange of postal parcels of November 3, 1880, with final protocol & additional act to the detailed regulations*, Lisbon, 21 March, EIF 1 April 1886; BFSP 76/1315; CTS 165/147
- *Additional Act to the arrangement for the exchange of letters of declared value of June 1, 1878, with additional Act to the detailed regulations*, Lisbon, 21 March 1885, EIF 1 April 1886; BFSP 76/1333; CTS 165/159
- *Arrangement concerning cash on delivery, with detailed regulations*, Lisbon, 21 March 1885, EIF 1 April 1886; BFSP 76/1336; CTS 165/162
- *Additional act to the arrangement respecting the exchange of money orders of June 4, 1878, with additional act to detailed regulations*, Lisbon, 21 March 1885, EIF 1 April 1886; BDNA; BFSP 76/1326; CTS 165/172
- *Arrangement respecting the introduction of identity cards for postal purposes*, Lisbon, 21 March 1885; BFSP 76/1345; CTS 165/179
- *Regulations in execution of the International Telegraphic Convention of July 22, 1875*, Berlin, 17 September 1885, EIF 1 July 1886; BFSP 76/597; CTS 165/212⁷
- 1886 *Protocol of Conference relative to the Protection of Industrial Property*, Rome, 11 May 1886; BFSP 77/1037; CTS 167/477
- *Convention for the Creation of an International Union for the Protection of Literary & Artistic Works, Additional Article & Final Protocol*, Berne, 9 September 1886, EIF 5 December 1887; BFSP 77/22; CTS 168/185; ATS 126/1901⁸

⁴ Britain signed on 17 March 1884. Queensland and New Zealand were the only adhering Australasian colonies (7 September 1891). The Commonwealth adhered in 1907.

⁵ Australian accessions were SA, 30 May 1885; Victoria, 17 October 1885; Queensland, 29 July 1886 and NSW, Tasmania and WA, 23 September 1888. There does not appear to have been any formal act of adherence by the Commonwealth, although it accepted that the treaty did apply.

⁶ The only British possessions to adhere separately were Canada and India.

⁷ NSW, SA and Tasmania adhered.

- 1886 *Declaration explanatory of Articles II and IV of the Convention for the Protection of Submarine Telegraph Cables of March 14, 1884, with Closing Protocol*, Paris, 1 December 1886; EIF 1 April 1888; BFSP 77/1140; CTS 168/337; ATS 1/1901
- 1887 *Final Protocol to the Convention for the Protection of Submarine Telegraph Cables of March 14, 1884*, Paris, 7 July 1887; BFSP 178/13; CTS 169/375; ATS 1/1901
- 1888 *Convention respecting the Free Navigation of the Suez Maritime Canal*, Constantinople, 29 October 1888, EIF 22 December 1888; AABP; BFSP 79/18; CTS 171/241; ATS 127/1901
- 1889 *Declaration completing article III of the international phylloxera convention of November 3, 1881*, Berne, 15 April 1889; EIF 1 January 1890; BDNA; BFSP 81/1311; CTS 172/85
- *Protocol & final act of the International Maritime Conference*, Washington, 31 December 1889; BFSP 81/705
- 1890 *Revised regulations annexed to the International Telegraphic Convention of July 22, 1875*, Paris, 21 June 1890, EIF 1 July 1891; BFSP 82/869; CTS 172/378⁹
- *General Act of the Brussels conference relating to the African Slave Trade, with annex & declaration*, Brussels, 2 July 1890, EIF 31 August 1891; AABP; BFSP 82/55; CTS 173/293
- *International Convention for the Publication of Customs Tariffs, with regulations*, Brussels, 5 July 1890, EIF 1 April 1891; BFSP 82/340; CTS 173/329; ATS 128/1901¹⁰
- *Final Protocol to the General Act for the suppression of the African Slave Trade, of July 2, 1890, guaranteeing to the commerce of the United States in the Congo basin the same treatment as the signatory powers to the General Act of Berlin of 1884-85*, Brussels, 22 December 1890; AABP; UKTS 7/1892
- 1891 *Arrangement for the Prevention of False Indications of Origin of Goods*, Madrid, 14 April 1891, EIF 15 July 1892; BFSP 96/837; UKTS 13/1892; CTS 175/53¹¹
- *Arrangement concerning the International Registration of Trade Marks*, Madrid, 14 April 1891, EIF 15 July 1892; BDNA; BFSP 96/839; UKTS 2007/27; CTS 175/57¹²
- *Protocol respecting the Expenses of the International Office (Industrial Property)*, Madrid, 15 April 1891, EIF 15 April 1891; BFSP 83/676; UKTS 14/1892; CTS 175/63

⁸ This was applied to the Australian colonies by imperial legislation.

⁹ NSW, SA, Tasmania and Victoria adhered.

¹⁰ NSW, Queensland, Tasmania and Victoria (and NZ) adhered in 1890, with the first four withdrawing in 1898. The Commonwealth agreed in 1901 to a Belgium request to 'subscribe', so as to contribute statistics and receive the bureau's bulletin. Both parties took this as an act of accession but Britain had been by-passed and did not learn of this until 1915, so there was no legal instrument of accession. The Commonwealth denounced its 'accession' on 31 March 1926 and 're-acceded' on 1 June 1935.

¹¹ NZ but no Australian colony adhered.

¹² Britain attended the conference but did not sign.

- 1891 *Universal Postal Convention, Final Protocol and Detailed Regulations*, Vienna, 4 July 1891, EIF 1 July 1892; BFSP 83/513 & 83/540; CTS 174/212¹³
- *Arrangement concerning declared-value letters, with detailed regulations and annexes*, Vienna, 4 July 1891; EIF 1 July 1892; BFSP 83/947; CTS 174/255
- *Postal order convention, with detailed regulations*, Vienna, 4 July 1891; EIF 1 July 1892; BFSP 83/963; CTS 174/305
- *Parcel post convention, with final protocol, and detailed regulations with annexes*, Vienna, 4 July 1891; EIF 1 July 1892; BFSP 83/976; CTS 174/276
- *Cash on delivery convention, with detailed regulations*, Vienna, 4 July 1891; EIF 1 July 1892; BFSP 83/998; CTS 174/317
- *Postal identity card convention*, Vienna, 4 July 1891; EIF 1 July 1892; BFSP 83/1007; CTS 174/326
- *Postal subscription convention*, Vienna, 4 July 1891; EIF 1 July 1892; BFSP 83/1013; CTS 174/332
- 1892 *Protocol recording the deposit of ratification of the General Act for the repression of the African Slave Trade, etc. of July 2, 1890*, Brussels, 2 January 1892, AABP; BFSP 84/53
- *International Sanitary Convention*, Vienna, 30 January 1892, EIF 14 February 1893; BFSP 84/12; UKTS 8/1893; CTS 176/395¹⁴
- 1893 *International Sanitary Convention, with annexes*, Dresden, 15 April 1893, EIF 1 February 1894; BFSP 85/7; UKTS 4/1894; CTS 178/369¹⁵
- 1894 *International Sanitary Convention for the protection of the pilgrimage to Mecca from disease, and for establishing sanitary inspection in the Persian Gulf, with annexes (with Britain's Declaration)*, Paris, 1 February 1894, BFSP 87/78; UKTS 8/1899; CTS 180/101¹⁶
- 1895 *Protocol respecting proposed International Convention for Protection of Wild Birds useful to Agriculture*, Paris, 29 June 1895¹⁷
- *International geodetic convention*, Berlin, 11 October 1895; BDNA; CTS 182/82
- 1896 *Additional Act [with Interpretative Declaration] modifying the International Convention for the Creation of an International Union for the Protection of Literary & Artistic Works, & Final Protocol, of 9 September 1886*, Paris, 4 May 1896, EIF 9 December 1897; BFSP 88/36 & 88/41; UKTS 14/1897; CTS 182/441 & 448; ATS 129/1901¹⁸
- *Revision of the international service regulations annexed to the International*

¹³ All Australian colonies adhered.

¹⁴ No Australian colony adhered.

¹⁵ No Australian colony adhered.

¹⁶ No Australian colony adhered.

¹⁷ Britain did not offer the colonies accession.

¹⁸ This was applied to the Australian colonies by imperial legislation.

- Telegraphic Convention of July 22, 1875, with annexes*, Budapest, 22 July 1896, EIF 1 July 1897; BFSP 88/1120; CTS 183/159
- 1896 *Convention relative to civil procedure, with additional protocol of May 22, 1897*, The Hague, 14 November 1896, BFSP 88/555; CTS 183/470
- 1897 *International Sanitary Convention, with general sanitary regulations to prevent the invasion & propagation of the plague*, Venice, 19 March 1897, EIF 31 October 1899; BFSP 89/159; UKTS 6/1900; CTS 184/264; ATS 5/1902¹⁹
- *Universal Postal Convention, Final Protocol & Detailed Regulations*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 89/65; CTS 185/59; ATS 7/1904²⁰
- *Agreement relative to postal subscriptions to newspapers, and detailed regulations*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 90/1079; CTS 185/219
- *Arrangement relative to the exchange of letters & packets with value declared & Final Protocol*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 90/1087; CTS 185/153
- *Parcel post convention, with final protocol, and detailed regulations*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 90/1104; CTS 185/186
- *Postal order agreement, and detailed regulations*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 90/1127; CTS 185/170
- *Agreement relative to cash on delivery, and detailed regulations*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 90/1141; CTS 185/209
- *Arrangement relative to the use of identity cards in postal business*, Washington, 15 June 1897, EIF 1 January 1899; BFSP 90/1151; CTS 185/227
- 1899 *International Convention respecting the Liquor Traffic in Africa*, Brussels, 8 June 1899, EIF 8 July 1900; AABP; BFSP 91/6; UKTS 13/1900; CTS 187/346
- *International Convention for the Pacific Settlement of International Disputes*, The Hague, 29 July 1899; EIF 4 September 1900; AABP; BFSP 91/970; UKTS 9/1901; CTS 187/410; ATS 130/1901
- *International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864*, The Hague, 29 July 1899; EIF 4 September 1900; BFSP 91/1002; UKTS 10/1901; CTS 187/443; ATS 132/1901
- *International Convention with Respect to the Laws & Customs of War on Land*, The Hague, 29 July 1899, EIF 4 September 1900; AABP; BFSP 91/988; UKTS 11/1901; CTS 187/429; ATS 131/1901
- *Declaration Prohibiting the use of Expanding Bullets*, The Hague, 29 July 1899, EIF 4 September 1900; AABP in 1907; BFSP 91/1017; UKTS 32/1907; CTS 187/459; ATS 7/1907

¹⁹ Western Australia was the only Australian colony to adhere before the Commonwealth did on 11 October 1902.

²⁰ Canada but no Australian colony adhered before the Commonwealth did in 1904.

- 1899 *Declaration respecting the prohibition of the use of projectiles diffusing asphyxiating gases*, The Hague, 29 July 1899; AABP in 1907; BFSP 91/1014; UKTS 32/1907; CTS 187/453; ATS 8/1907
- *Declaration respecting the prohibition of discharge of projectiles from balloons or similar methods*, The Hague, 29 July 1899, EIF 4 September 1900; BDNA; BFSP 91/1011; CTS 187/456
- *Final Act of the International Peace Conference*, The Hague, 29 July 1899; AABP; BFSP 91/963
- 1900 *Declaration modifying Article 35 of the Special Regulations of the Venice International Sanitary Convention of the 19th March, 1897*, Venice, 19 March 1897, EIF 20 August 1900; BPS 89/209; UKTS 6/1900; CTS 188/259
- *Convention for the preservation of wild animals, birds and fish in Africa, with annex*, London, 19 May 1900, BFSP 94/715; CTS 188/418
- *Additional Act modifying the Paris Convention for the Protection of Industrial Property, 20 March 1883*, 14 December 1900, EIF 14 September 1902; BFSP 92/807; UKTS 15/1902; LNTS 39/221; CTS 189/134; ATS 6/1907²¹
- *Additional Act modifying the arrangement of April 14, 1891, relative to the international registration of trademarks, & Final Protocol, 20 March 1883*, 14 December 1900; BDNA; BFSP 96/848; CTS 189/142

-----1 January 1901 Australian Federation-----

- 1902 *International Convention relative to Bounties on Sugar & Final Protocol*, Brussels, 5 March 1902, EIF 1 September 1903; BFSP 95/6; UKTS 7/1903; CTS 191/56²²
- *Convention for the protection of birds useful to agriculture, with annexes*, Paris, 19 March 1902, EIF 6 December 1906; BDNA; BFSP 102/969; CTS 191/91
- 1903 *Declaration*, 24 January 1903 [relative to the convention of 1897] & *International Sanitary Convention*, Paris, 12 March 1903; EIF 6 April 1907; BFSP 97/1085; UKTS 27/1907 & 5/1910; CTS 194/294; ATS 13/1909²³
- *Regulations annexed to the revised international telegraph convention, with tariffs*, London, 10 July 1903, EIF 1 July 1904; BFSP 97/736; CTS 193/327²⁴
- *Convention for the establishment of an International Seismological Association*, Strasbourg, 28 July 1903, EIF 1 April 1904; BDNA; CTS 194/11
- *Final protocol of the preliminary conference respecting wireless telegraphy*, Berlin, 13 August 1903; BFSP 97/467; CTS 194/46²⁵

²¹ The Commonwealth acceded in 1907.

²² The Commonwealth did not accede.

²³ The Commonwealth acceded on 30 April 1909.

²⁴ This appears to be only an administrative agreement, which was not given separate legal status, beyond being made under the head convention. Only British India and the small number of British colonies, adherents to the head convention, including the Commonwealth, NZ, Natal and Ceylon were asked to assent, which they did.

²⁵ Britain did not invite colonial adhesion.

- 1904 *Protocol respecting measures to be taken against the anarchist movement*, St. Petersburg, 14 March 1904; BDNA; CTS 195/118
- *International Agreement for the Suppression of the White Slave Traffic*, Paris, 18 May 1904; BFSP 97/95; UKTS 24/1905; LNTS 83; CTS 195/326; ATS 19/1949²⁶
- *Convention for the exemption of hospital ships from harbour dues & taxes, with Final Act*, The Hague, 21 December 1904, EIF 26 March 1907; BDNA; BFSP 98/624; CTS 197/331
- 1905 *Convention for the Creation of an International Institute of Agriculture*, Rome, 7 June 1905; EIF 14 March 1910; BFSP 100/595; UKTS 17/1910; ATS 5/1910²⁷
- *Convention relating to civil procedure*, The Hague, 17 July 1905, EIF 24 April 1909; BDNA; BFSP 99/990; CTS 199/1
- 1906 *Universal Postal Convention, with Final Protocol & detailed regulations*, Rome, 26 May 1906, EIF 1 October 1907; BPS 99/254; CTS 201/246²⁸
- *Agreement concerning the exchange of insured letters & boxes of declared value, with final protocol and detailed regulations*, Rome, 26 May 1906, EIF 1 October 1907; BPS 100/1034; CTS 201/234
- *Agreement respecting money orders, with final protocol and detailed regulations*, Rome, 26 May 1906, EIF 1 October 1907; BPS 100/959; CTS 201/313
- *Parcel post convention, with final protocol, and detailed regulations*, Rome, 26 May 1906, EIF 1 October 1907; BPS 100/999; CTS 201/332
- *Agreement relative to postal subscriptions to journals etc., and detailed regulations*, Rome, 26 May 1906, EIF 1 October 1907; BPS 100/977; CTS 201/363
- *Agreement respecting cash on delivery, and detailed regulations*, Rome, 26 May 1906, EIF 1 October 1907; BPS 100/987; CTS 201/373
- *Agreement relative to postal identity cards*, Rome, 26 May 1906, EIF 1 October 1907; CTS 201/386
- *International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field [& Final Protocol]*, Geneva, 6 July 1906; EIF 9 August 1907; AABP; BFSP 99/968; UKTS 15/1907; LNTS 23; CTS 202/144; ATS 9/1907²⁹
- *International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches*, Berne, 26 September 1906, EIF 1 January 1912; BFSP 99/986; UKTS 4/1909; LNTS 24; CTS 203/12; ATS 9/1919³⁰
- *International Convention respecting the Prohibition of Night Work for Women in*

²⁶ Britain did not invite colonial adhesion.

²⁷ The Commonwealth acceded in 1910.

²⁸ The Commonwealth acceded in 1908.

²⁹ This was applied to all Britain's colonies by imperial legislation in 1911.

³⁰ The Commonwealth acceded in 1907.

- Industrial Employment*, Berne, 26 September 1906; EIF 14 January 1912; BFSP 100/794; UKTS 21/1910; CTS 203/4³¹
- 1906 *International Radiotelegraphic Convention, Final Protocol, Service Regulations & Additional Agreement*, Berlin, 3 November 1906; EIF 1 July 1908; BFSP 99/321; UKTS 8/1909; CTS 203/101; ATS 5/1913³²
- *Convention respecting the Liquor Traffic in Africa*, Brussels, 3 November 1906, EIF 2 December 1907; AABP; BFSP 99/490; CTS 203/130
- *Agreement for the Unification of Pharmacopoeial Formulas for Drugs*, Brussels, signed & EIF 29 November 1906; BFSP 99/179; UKTS 10/1907; CTS 203/156³³
- 1907 *Final protocol for the third International conferences for the technical unification of railways, relative to the sealing of trucks before passing customs*, Rome, 18 May 1907; BDNA; CTS 204/199
- *Protocol for the Accession of Non-Signatory Powers to the Convention of July 29, 1899, for the Pacific Settlement of International Disputes*, The Hague, 14 June 1907. EIF 29 December 1906; AABP; BFSP 100/276; UKTS 26/1907
- *Additional Act to the International Sugar Convention of March 5, 1902 [with Protocol of Signature & Declaration]*, Brussels, 28 August 1907; BFSP 100/482; UKTS 12/1908; CTS 204/360³⁴
- *Accession of the United Kingdom to the Declaration signed at The Hague July 29, 1899, Respecting (1) Expanding Bullets (2) Asphyxiating Gases*, The Hague, 30 August 1907; AABP; UKTS 32/1907
- *Modifications of the règlement of May 20, 1875, respecting the International office of Weights & Measures*, Paris, 17 October 1907; CTS 205/212³⁵
- *Convention for the Pacific Settlement of International Disputes*, The Hague, 18 October 1907; EIF 26 January 1910; BDNA, until 1970; BFSP 100/298; UKTS 6/1910 & 6/1971; LNTS 54/435; CTS 14/1994; CTS 205/233; ATS 6/1997³⁶
- *International Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/314; UKTS 7/1910 & 6/1971; CTS 205/250; ATS 6/1910
- *International Convention relative to the Opening of Hostilities*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/326; UKTS 8/1910; CTS 205/263; ATS 7/1910
- *International Convention concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/338; UKTS 9/1910; CTS 205/277; ATS 8/1910

³¹ The Commonwealth acceded on 30 December 1919.

³² The Commonwealth acceded on 1 June 1913.

³³ The Commonwealth did not accede.

³⁴ The Commonwealth was not a party.

³⁵ Canada adhered at this time to the 1875 head convention, the only British possession which did.

³⁶ The Commonwealth acceded separately on 23 December 1996.

- 1907 *Convention relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/359; UKTS 19/2009; CTS 205/299³⁷
- *International Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/365; UKTS 9/1910; CTS 205/305; ATS 9/1910
- *International Convention relative to the Conversion of Merchant Ships into Warships*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/377; UKTS 11/1910; CTS 205/319; ATS 10/1910
- *International Convention relative to the Laying of Automatic Submarine Contact Mines*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/389; UKTS 12/1910; CTS 205/319; ATS 11/1910
- *International Convention respecting Bombardments by Naval Forces in Time of War*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/401; UKTS 13/1910; CTS 205/345; ATS 12/1910
- *Convention for the Adaption of the Principles of the Geneva Convention to Maritime War*, The Hague, 18 October 1907; BDNA; EIF 26 January 1910; BFSP 100/415; LNTS 15/340; CTS 205/359³⁸
- *International Convention relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/422; UKTS 14/1910; CTS 205/367; ATS 13/1910
- *Convention relative to the Establishment of an International Prize Court [& Additional protocol]*, The Hague, 18 October 1907; DNEIF; BFSP 100/435; CTS 205/381³⁹
- *Convention concerning the Rights and Duties of Neutral Powers in Maritime War*, The Hague, 18 October 1907; EIF 26 January 1910; BDNA; BFSP 100/448; CTS 205/395⁴⁰
- *International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons*, The Hague, 18 October 1907; EIF 26 January 1910; AABP on 27 November 1909; BFSP 100/455; UKTS 15/1910; CTS 205/403; ATS 14/1909
- *Final Act of the Second International Peace Conference held at The Hague in 1907*, The Hague, 18 October 1907; AABP; BFSP 100/281; CTS 205/212
- *International Agreement respecting the Creation of an International Office of Public Health*, Rome, 9 December 1907; EIF 15 November 1908; BFSP 100/466; UKTS 6/1909; CTS 206/32; ATS 15/1909⁴¹

³⁷ This is not listed in the ATS.

³⁸ Britain signed but did not ratify this convention.

³⁹ Only Nicaragua signed and ratified.

⁴⁰ Britain signed but did not ratify this convention.

⁴¹ The Commonwealth acceded on 29 September 1909.

- 1907 *Protocol recording accession of Russia to the International Sugar Convention of March 5, 1902 and Additional Act of August, 28 1907*, Brussels, 19 December 1907, EIF 31 March 1908; BFSP 100/487; UKTS 12/1908; CTS 206/56⁴²
- 1908 *Convention telegraphique internationale, reglement et tarifs y annexes, evision de Lisbonne*, Lisbon, 11 June 1908, EIF 1 July 1909⁴³
- *International Convention relative to the Protection of Literary and Artistic Works, revising that signed at Berne, 9 September 1886 etc.*, Berlin, 13 November 1908; EIF 9 September 1910; BFSP 102/619; UKTS 19/1912; CTS 208/28; LNTS 1/217; ATS 9/1912⁴⁴
- 1909 *Final Protocol of the International Naval Conference, with annexed declaration relative to the law of maritime warfare*, London, 26 February 1909; DNEIF; BFSP 104/239 & 242; CTS 208/338
- *Convention with respect to the International Circulation of Motor Vehicles*, Paris, 11 October 1909; EIF 1 May 1910; BFSP 102/64; UKTS 19/1910; CTS 209/361⁴⁵
- 1910 *International Agreement for the Suppression of the Circulation of Obscene Publications*, Paris, 4 May 1910; EIF 15 September 1911; BFSP 103/251; UKTS 11/1911; LNTS 22; CTS 211/54; ATS 10/1912⁴⁶
- *International Convention for the Suppression of the White Slave Traffic, & Final Protocol*, 4 May 1910; EIF 8 February 1913; BFSP 103/244; UKTS 20/1912 & 7/1914; LNTS 8; CTS 211/45; ATS 19/1949⁴⁷
- *Declaration modifying paragraph 5 of the declaration annexed to the general act relative to the African Slave Trade of July 2, 1890*, Brussels, 15 June 1910, EIF 30 January 1912; AABP; BFSP 103/255; CTS 211/234
- *Additional Protocol to the convention of October 18, 1907, relative to the establishment of an International Prize Court*, The Hague, 19 September 1910; BDNA; BFSP 104/258; CTS 212/173
- *Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels*, Brussels, 23 September 1910; EIF 1 March 1913; BFSP 103/434; UKTS 4/1913; CTS 212/178; ATS 14/1930⁴⁸
- *Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea*, Brussels, 23 September 1910; EIF 1 March 1913; BFSP 103/441; UKTS 4/1913; CTS 212/187; ATS 15/1930⁴⁹

⁴² The Commonwealth was not a party to the head convention.

⁴³ This appears to be only an administrative agreement, which was not given separate legal status, beyond being made under the head convention of 1875. Apart from Britain and British India, British colonial adherents to the head 1875 convention were asked to give their assent: Australia, NZ, Cape Colony, Natal, ORC, Transvaal and Ceylon, whose representatives signed separately.

⁴⁴ Applied to the Commonwealth under imperial legislation on 13 November 1913, retrospectively from 1 July 1912.

⁴⁵ The Commonwealth did not accede.

⁴⁶ The Commonwealth acceded on 12 April 1912.

⁴⁷ The Commonwealth acceded on 18 August 1914.

⁴⁸ The Commonwealth acceded on 24 October 1930.

⁴⁹ The Commonwealth acceded on 20 August 1930.

- 1911 *International Convention for the Protection of Industrial Property, & Final Protocol*, Washington, 2 June 1911; EIF 1 May 1913; BFSP 104/116; UKTS 8/1913; LNTS 39/221; CTS 213/405; ATS 17/1925⁵⁰
- *Convention for the International Registration of Trade Marks, with implementing regulations*, Washington, 2 June 1911; EIF 1 May 1913; BDNA; BFSP 108/404; CTS 213/420
- *International Agreement for the Prevention of False Indications of Origin on Goods*, Washington, 2 June 1911; EIF 1 May 1913; BFSP 104/137; UKTS 7/1913; CTS 214/1⁵¹
- *Convention respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean*, Washington, 7 July 1911; EIF 15 December 1911; BFSP 104/175; UKTS 2/1912; CTS 214/280; ATS 6/1913⁵²
- 1912 *International Sanitary Convention, with appendices & procès-verbal of signature*, Paris, 17 January 1912; EIF 7 October 1920; BFSP113/786; UKTS 2/1921, 28/1921 & 14/1922; LNTS 4/281 & 4/411; CTS 215/223; ATS 5/1923⁵³
- *International Opium Convention, with Final Protocol*, The Hague, 23 January 1912; EIF 11 February 1915; BFSP 105/490; UKTS 17/1921; LNTS 8/187 & 222; CTS 215/297; ATS 20/1920⁵⁴
- *International Radiotelegraph Convention, Final Protocol & Detailed Service Regulations*, London, 5 July 1912; EIF 1 July 1913; BFSP 105/219; UKTS 10/1913; LNTS 1/136; ATS 7/1913⁵⁵
- *Convention concerning International Exhibitions [& Protocol]*, Berlin, 26 October 1912; DNEIF
- *Final protocol relative to the adoption of general rules respecting the dimensions of goods trucks*, with annexes, Berne, 14 December 1912; BDNA; CTS 217/332
- 1913 *Final Protocol of the Second International Opium Conference, 1913*, The Hague, 9 July 1913
- *Convention regarding Creation of an International Association 'de l'Heure'*, Paris, 25 October 1913; DNEIF
- *Convention respecting the Compilation of International Commercial Statistics, & Protocol*, Brussels, 31 December 1913; EIF 1 July 1914; BFSP 116/583; UKTS 15/1924; LNTS 47; ATS 6/1915⁵⁶

⁵⁰ The Commonwealth acceded on 20 August 1925.

⁵¹ The Commonwealth did not accede.

⁵² Britain applied this to colonies, including the Commonwealth, by 1 October 1913.

⁵³ The Commonwealth acceded on 27 April 1923 with a reservation as to Article 9.

⁵⁴ Britain ratified in 1914 but did not sign the protocol of that year putting the head convention into force. Australia acceded with Britain's accession on 10 January 1920.

⁵⁵ The Commonwealth acceded on 2 June 1913.

⁵⁶ The Commonwealth acceded on 30 November 1914.

- 1914 *Convention for the Safety of Life at Sea*, London, 20 January 1914; BFSP 108/283; DNEIF
- *Final Act of the International Conference of Phytopathology*, Rome, 4 March 1914; DNEIF
- *Additional Protocol to the International Convention for the Protection of Literary & Artistic Works of 13 November 1908, & Protocol of Signature*, Berne, 20 March 1914, EIF 5 November 1914; BFSP 107/341; UKTS 11/1914; LNTS 1/244; ATS 12/1914⁵⁷
- *Protocol respecting the Putting into Force of the International Opium Convention of 23 January 1912*, The Hague, 25 June 1914; BDNA; ATS 7/1915
- *International Convention regarding the establishment of uniform regulations for the reciprocal recognition of official proof marks on firearms, with annexes I & II*, Brussels, 15 July 1914; EIF 27 January 1956; BDNA; BFSP 121/1030; LNTS 79/133; CTS 220/194

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⁵⁷ Applied to the Commonwealth by imperial legislation.

Abstract

This thesis examines, firstly, how international law developed in the period up to the First World War and, secondly, how Australia (both governments and public), through the imperial government (and public), responded to these developments. Within those broad, twin topics, the thesis has focussed on, firstly, the development of international law in terms of treaties, especially multilateral ones, and, secondly, three of arguably eight main subject areas of those treaties—rules for the conduct of war, transnational crime and international labour protection. The remaining five main subject areas of modern treaties—commerce, communications, transport, health (including drug trafficking) and protection of nature--were examined generally, not in detail, due to considerations of scale of research and word length.

The thesis begins by examining broadly, from the mid-19th century, the development of international law through treaties, which were growing in number, content and form, with many being associated with domestic legislation and taking a multilateral form. Generally, the initiative for this came from the Continent, with Britain often diffident though, ultimately, accommodating, in most cases. Britain's decision in 1877-8 to allow its colonies to exercise a choice of adhesion to 'commercial' or non-political treaties greatly expanded the scope for those colonies to take a more active role in international affairs. Having said that, Britain was adamant that even the self-governing colonies did not assume an independent status. This was particularly evident in British concern to remove from the Australian Commonwealth's draft constitution bill, any treaty references, which would allow or imply this. In practice, no Australian government at this time sought to challenge imperial paramountcy and, generally, were much less active and assertive than Canada's.

Britain deemed treaties on the conduct of war, as with those on extradition and arbitration, to be political, so no colonial choice of adhesion was offered and, generally, Britain did not consult colonies prior to concluding them. This was certainly the case with the treaties negotiated at the Hague peace conference of 1899. The *Geneva Convention* of 1906 and some of the Hague conventions of 1907, however, for the first time for such subjects, required domestic application. Britain decided this would be done through imperial legislation, with which the Commonwealth but not Canada was entirely content. The ultimately unratified *Declaration of London* of 1909 led to the Commonwealth's first challenge, due to its commercial implications, by demanding prior consultation on any treaty, which affected colonial interests, and for colonial not imperial authorities to be responsible for local application of such treaties.

Britain invited colonial adhesion to the conventions against white slave (1910) and obscene publications (1910) traffic. The Commonwealth followed Britain's lead and already had some

measures in place, which were in accord with these treaties, through its immigration and customs legislation, to which it added new legislation on emigration from Australia. As powers over crime, manufacturing and sales resided with the states, the other role for the Commonwealth was to encourage them to legislate appropriately. This proved complex and difficult. The states had varying legislation, having followed Britain's earlier leads on, respectively, prostitution and pornography. On obscene publications, the Commonwealth acceded in 1912, though it was not certain adequate state legislation was yet in place. The white slave traffic convention proved similarly complicated and the Commonwealth's accession was not finalised until August 1914, just after Britain declared war on Germany, again without all states having legislated for the treaty's requirements.

The conventions on prohibiting women's night work and white phosphorus matches (both 1906) proved even more difficult, as power over industrial conditions rested firmly with the states. The Commonwealth did show some initiative, proclaiming a ban of the import of such matches in late 1908, just before Britain did likewise. Once again the issue of the states' power over sales and manufacturing frustrated early action. Victoria was the keenest state because a British match factory, being established there, wanted such legislation. The Commonwealth wished to adhere to that convention but the slowness of the states in responding meant that Britain first decided that state legislation was inadequate and, then, in 1915, decided to defer acceding, which the war further delayed. Australia's accession was not finalised until late 1919. Acceding to the night work convention was even more difficult, as the Commonwealth, although keen, was unable to convince all the states to act, resulting in eventual non-adherence.

In the period here examined, the Commonwealth generally followed Britain's lead on multilateral treaties, with one exception; that on eliminating subsidies on the production of sugar, due to the 'White Australia' policy. The instances where the Commonwealth did not accede or was delayed in so doing, was solely because it either lacked the legislative power to meet such a treaty's requirements or, while having the power, had not then legislated and/or established the administrative machinery to meet the treaty's obligations.

PART 1
INTRODUCTION & BACKGROUND

Introduction:
‘solid foundations’

1. Aim: Australian responses to the development, through treaties, of international law,

This thesis examines how Australia--both its governments and people--responded to developments in international law, specifically with respect to selected multilateral treaties and chiefly in the period to the First World War. Although a single aim is probably desirable for any study, this thesis thereby has a dual focus; first, the development of international law and, second, Australian responses to that. Necessarily, for such detailed study, certain specific issues of international law--selected multilateral treaties--were chosen for closest examination. The second aim can be seen as resulting in a specific case study or studies of this—in this case, of Australia--and a similar study could be made of how any other foreign or colonial governments and peoples in this period, responded to these specific treaties. Equally, examining other selected treaties or time periods could make for different case studies.

The thesis is written within the sub-discipline or, better, a dual sub-discipline of the disciplines of law and history, known as legal history. Much traditional (non-historical) international law scholarship opens with what is termed an historical or background introduction to the law, as it exists today. This type of supposed ‘history’ is essentially general, covers large time periods briefly and is based almost entirely on secondary sources. The international legal history, which emerged or revived, after the Second World War, employed a similar methodology, until recently. The conventional practice in the discipline of history, however, is to limit scholarly studies to certain, specified boundaries, both in subject matter and time, because of the amount of detailed evidence, which is required for a solid foundation for both the specific and general observations made. Here, in heeding the counsel of famed Prussian historian, Leopold von Ranke, when examining and then presenting ‘what actually happened’ (*wie es eigentlich gewesen*), with respect to the twin developments, cited above, I have taken ‘pleasure in the particular’, while keeping an ‘eye for the universal’.¹

The traditional historians, who lacked legal expertise, have largely neglected law, especially its international history. Some have examined constitutions, in their focus on nation building. Their detailed method also made them cautious about studying truly international subjects, with their vast sources. Only recently, have a relatively small number of detailed studies of international legal history emerged. This detailed study concludes with some very significant, hitherto, largely unexpressed, generalisations about both the development of international law and Australian responses to that, at least for the period, which was examined closely.

¹ Leopold Von Ranke, ‘A Fragment from the 1830s’, in Fritz Stern, *The Varieties of History: From Voltaire to the Present*, Vintage Books, New York, 1973, p. 59.

2. Summary literature review: ‘unsolid foundations’

There is a vast amount of scholarship from the distinct disciplines of law (constitutional and international), social science (international relations and political science) and history, which touch upon, albeit briefly and mainly without detail, the subjects examined in this thesis. These subjects are, respectively, international law generally and specifically—here, mainly, law on the conduct of war, transnational crime and labour protection--and Australia’s general relationship to international law. Each of these disciplines has its own body of literature, often with its own methodology, and often do not interact with the others. The type of scholarly literature, which does touch, if only briefly, on these subjects, is mainly general works, especially those in law and international relations, of which there are a great many. So, longer and more detailed literature reviews are included in five detailed appendices. This was done because the whole body of scholarship touching, if only marginally, on each of the five subjects above, had to be shown to have been reviewed closely, for this thesis to support one originally unexpected conclusion, that there is very little detailed scholarship in any of these areas, using governmental and/or non-governmental archival sources.

Intellectual humility is one keystone of sound scholarship. Every scholar, especially when new to a subject area, must expect and respect earlier works in that field. So, in drawing the startling conclusion above, this writer is only endorsing similar claims of two very qualified scholars. In 1947, the New York based, German-Jewish *émigré*, Arthur Nussbaum, revived the study of international legal history in the English-speaking world and concluded. 'The history of the law of nations is little explored and almost uncharted.'² Since then, the first English-language journals on legal history (1957) and international legal history (1999) were established. A number of books on the latter were published, almost all by Continental, especially Germanic-speaking scholars. All were highly general and did not use the archival sources mentioned above. In 2014, about the time when this thesis was started, American, Stephen Neff, in the latest, major work on international legal history, drew a similar conclusion to Nussbaum. 'It is unfortunate that there has not (so far) been any major tradition of writing detailed histories of international law in particular periods.'³ In fact, the first such works, albeit in very small numbers, had only begun to appear a few years before, with only a few of marginal relevance to this study and none of direct relevance.

The poverty of international legal history has two methodological sources: one, traditional, dating from the early modern period, and, second, (post-) modern, arising especially in the last forty or so years. The first is discussed here; the second, under Methodology & Sources.

² Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd ed., Macmillan & Coy., New York, 1954 (1947), pp. 196-7.

³ Stephen Neff, *Justice among Nations: A History of International Law*, HUP, Cambridge, Mass., 2014, p. 201.

The first English-language works on the law of nations emerged in the period when custom was the overwhelming form, if not only source. As governments did not codify this supposed law, scholars relied almost entirely on earlier such scholars, as their authorities, if not the exactly the source, of this so-called customary international law. In 1602, the first English language account, as claimed by its ‘compiler’, lawyer William Fulbeck, of ‘the law of Nations’, cited well-known historical texts, such as on Greece and Rome (Thucydides and Herodotus) or medieval theology (Thomas Aquinas), plus then more recent legal scholars (Vitoria and Gentili) to establish those ‘matters of Law, wherein the Nations of the world doe consent and accord.’⁴ Thus, from the start, ‘history’, at least as that discipline was understood then, was enlisted to determine and explain international law, with the main source material being famed writers. The English publication of the major works of Hugo Grotius (from 1654) Samuel Pufendorf (from 1703) and Emer de Vattel (from 1760) fed this approach.⁵

Almost in parallel with these later developments, were early English-language studies of the history of English domestic (municipal and constitutional) law and jurisprudence. Lawyer Roger Acherley’s historical *The Britannic Constitution* (1727) makes occasional reference to political treaties, citing the emerging view that they should have parliamentary sanction.⁶ William Blackstone’s totemic *Commentaries on the laws of England* (1765-9), the first such English-language texts, embalmed the understanding of the ‘law of nations’, as almost completely separate from domestic law, at least for Britain. His scarce words described, citing only Pufendorf, a ‘third kind of law’, as opposed to the laws of God and Reason, ‘which regulates the Conduct and mutual intercourse of Independent States with each other, by Reason and Natural Justice’ but which, unlike ‘municipal’ law, lacks a ‘supreme power’ to enforce. He conceded that there were ‘crimes’ against this ‘law of nations’--infringement of ‘safe-conducts’ and ambassadors’ rights, plus piracy—but which were only ‘animadverted on’ (noticed or observed by) the laws of England. He did not mention treaties.⁷

⁴ William Fulbeck, *The Pandectes of the law of Nations: containing several discourses of the questions, points, and matters of law, wherein the Nations of the World doe consent and accord etc.*, Thomas Wright, London, 1602.

⁵ The first English translation of *De Jure Belli ac Pacis Libri Tres*, first published in French in Paris in 1625, was an abridgement of 1654, prepared by Clement Barksdale of London. In 1682, a fuller edition, *The Most Excellent Hugo Grotius: His Three Books Treating the Rights of War & Peace. etc.*, was prepared by Thomas Basset & Ralph Smith of London. Pufendorf’s *De Jure Naturae et Gentium Libri Octo* was first published in Latin in Lund, Sweden, in 1672 and as an English translation as, *Of the Law of Nature and Nations*, printed by L. Lichfield, Oxford, in 1703. Emer de Vattel’s *Le Droit des Gens ou Principes de la Loi Naturelle, appliqué à la conduite et aux affaires des Nations et des Souverains* was first published in French in 1757 at Neuchâtel, in 1758 in Leiden and London, and as *The Law of Nations or Principles of the Law of Nature applied to the conduct of Nations and Sovereigns: A Work tending to Display the True Interest of Powers*, printed for J. Newbery etc., London, 1760.

⁶ Roger Acherley, *The Britannic Constitution: or, the Fundamental Freedom of Government in Britain etc.*, printed for A. Bettesworth etc., London, 1727; see, especially, p. 389.

⁷ William Blackstone, *An analysis of the laws of England*, Clarendon Press, Oxford, 1756, pp. 2 & 109; *Commentaries on the laws of England*, 4 vols., Clarendon Press, Oxford, 1765-69, vol. 1, pp. 43-4. Gilbert Stuart,

Blackstone weighed heavily on Jeremy Bentham (1780/89), with Thomas Hobbes (1651) always lurking behind British jurisprudence. Bentham confined his few comments, on what he re-titled (from an unnamed other's words) 'international law', to his last few pages.

*With what degree of propriety rules for the conduct of persons of this description [i.e., 'mutual transactions between sovereigns'] can come under the appellation of laws, is a question that must rest til the nature of the thing called a law shall have been more particularly unfolded.*⁸

Such omissions and conclusions are understandable, then, as neither were writing about the Continent, where treaties had started to increase and change, while Britain largely still clung to the isolated security of the domestic statutes of the *Navigation Code*—its *mare clausum*.⁹

The first English-language work claiming to be a history of, not just a guide to, 'the Law of Nations' did little to 'unfold' further, Bentham's 'thing called a law'. Lawyer Robert Ward's *Enquiry* (1795) begins with ancient Greece and ends with 'the age of Grotius', did not use official sources and, so, again focuses on custom. Soon after, the lectures of lawyer Sir James Mackintosh at the Inns of Court, 'on the Law of Nature and Nations' (c. 1799), which contained some 'historical' background, inspired barrister, Frederick Eden's '*An historical sketch*', including of '*the principles of the law of nature and of nations*' (1823). Although necessarily general, given its short length, this actually captures more accurately, than did Ward in his preface, the major changes that international law was then undergoing.¹⁰ In the *United States of America (USA)*, independence understandably stimulated interest in international law. The inaugural *Columbia College* lectures of retired New York judge, James Kent (1826), and the textbook of lawyer and diplomat, Henry Wheaton (1839), both began with a brief 'sketch' (respectively, 20 and 32 pages) of general international legal history.¹¹

Wheaton's more detailed *History of the Law of Nations* (1842), written in Berlin, highlights the limitations of early international legal history. Although providing a wealth of detail on

An Historical Dissertation on the Antiquity of the English Constitution, T. Cadell, London, 1768 & *Observations concerning the public law, and the constitutional history of Scotland*, W. Creech, Edinburgh, 1774.

⁸ Thomas Hobbes, *Leviathan; or, The Matter, Forme, and Power of a Commonwealth, Ecclesiasticall and Civill*, A. Cooke, London, 1651. Jeremy Bentham, *Introduction to Principles of Morals and Legislation*, Clarendon Press, London, 1907, pp. viii, 326-7. Supposedly, this work was written in 1780 but not published until 1789.

⁹ John Selden, *Mare Clausum seu de Dominio Maris etc.*, Richardo Meigben, London, 1635. Still the best works on the *Navigation Code* are Ephraim Lipson, *The Economic History of England: Vol. II: The Age of Mercantilism*, A & C. Black, London, 1929; Elizabeth Hoon, *The Organization of the English Customs System, 1696-1786*, D. Appleton-Century Co., NY, 1937; Lawrence A. Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering*, Columbia University Press, NY, 1939.

¹⁰ Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius*, vol. 1, J. Butterworth, London, 1795; Sir James Mackintosh, *A Discourse on the Study of the Law of Nature and Nations*, London, c. 1799; Frederick Eden, *An historical sketch of the international policy of modern Europe: as connected with the principles of the law of nature and of nations, concluding with some remarks on the Holy Alliance*, J. Murray, London, 1823.

¹¹ James Kent, *Commentaries on American Law*, vol. 1, O. Halsted, NY, 1826; Henry Wheaton, *Elements of International Law: with a Sketch of the History of the Science*, Carey, Lea & Blanchard, Philadelphia, 1836 and *History of the Law of Nations from the earliest times to the Treaty of Washington, 1842*. Gould, Banks, NY, 1845.

some issues up to 1842 and utilizing some public official records, it focuses more on the international relations of selected foreign powers, especially Britain and the USA, rather than the making of law itself. He detailed the anti-slave trafficking campaign without seeing this, along with new commercial treaties, as representing a fundamental shift in the nature of treaties and, hence, international law generally. This weakness is amplified by his failure to note the contemporaneous emergence of treaties on extradition, postage and copyright. No English-language histories of international law followed for nearly a half-century.

This relative inattention to the rise in treaties, in such works, is a surprising omission and, even more surprisingly, has been since shared by later writers.¹² Why? Collections of British treaties had been published by Thomas Rymer (1705-17),¹³ Stephen Whatley (1710 & 1732)¹⁴ and an unknown compiler (1772-5).¹⁵ These complemented treaty compilations emerging earlier from Continental authorities, which, to the time of Wheaton's work, were by France's royal printer Frédéric Leonard (1683 & 1693),¹⁶ three French refugees in Holland—Jacques Bernard (1700),¹⁷ Jean Dumont (1707, 1710 & 1726-31),¹⁸ Jean Rousset (1728-55)¹⁹—and north German, Johan Christian Lünig (1710-22).²⁰ In a supplement to Dumont, Jean Barbeyrac, French-born law professor at Groningen, covered treaties from the pre-

¹² An excellent exception is Mario Toscano, *Storia del Trattati: e Politica Internazionale: 1 Parte Generale: Introduzione allo Studio della etc.*, *Le Fonti Documentarie e Memorialistiche*; 1958; in English JHUP, Baltimore, 1966, pp. 48-74. See also for the earliest and more minor collections of 1643, 1648, 1650, 1653, 1664 & 1685.

¹³ Thomas Rymer [with Rbert Sanderson], *Foedera, conventiones, literae, et cujuscunque generis, acta publica, inter Regis Angliae, et alios quosvis imperatores, reges, pontifices, principes, vel communitates, ab ineunte saeculo duodecimo, viz anno 1101, ad nostra usque tempora, habita aut tractata; ex autographis, infra **secretiores archivorum regiorum** [emphasis add] thesaurarias, per multa saecula reconditis fideliter exscripta. In lucem missa de mandato reginae*, 17 vols. London, 1704-17.

¹⁴ Samuel Whatley, *A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, relating to Peace and War among the potentates of Europe, from 1648 to the present time etc.*, 4 vols., London, 1710 & 2nd edition, printed for J. J. and P. Knapton *et al*, London, 1732.

¹⁵ [anon.], *A Collection of All the Treaties of Peace, Alliance, and Commerce, between Great-Britain and other Powers from the Revolution in 1688 to the present time*, 2 vols., printed for J. Almon, London, 1772-5.

¹⁶ Frédéric Leonard, *Recueil de tous les traité modernes conclus entre les potentats de l'Europe: etc.*, Paris 1683 & *Recueil des traitez de paix, de trêve, de neutralité, de confederation, d'alliance, et de commerce, faits par les rois de France, avec tous les princes, et potentats de l'Europe, et autres, depuis pres de trois siecles, etc.* 6 vols., Paris, 1693

¹⁷ Jacques Bernard, *Recueil des traitez de paix, de trêve, de neutralité, de suspension d'armes, de confédération, d'alliance, de commerce, de garantie, et d'autres actes publics: comme contracts de mariage, testaments, manifestes, declarations de guerre, &c. faits entre les empereurs, rois, républiques, princes, & autres puissance's de l'Europe, & des autres parties du monde, depuis la naissance de Jesus-Christ jusqu'à présent: servant à établir les droits des princes, et de fondement a l'histoire, etc.*, 4 vols., The Hague, 1700. The same publisher, Adrian Moetjens, edited, possibly assisted by Jean Dumont, *Recueil de divers traitez de paix, de confederation, d'alliance, de commerce, &c: faits depuis soixante ans, entre les etats souverains de l'Europe: et qui sont les plus importants, les mieux choisis, & les plus convenables, au temps present*, 2. vols, Amsterdam, 1707.

¹⁸ Jean Dumont, *Nouveau recueil de traitez, d'alliance, de trêve, de paix, de garantie et de commerce faits & conclus entre les rois, princes, et etats souverains de l'Europe, depuis la paix de Munster jusques à l'annnée M.DCC.IX, lesquels pour le plupart n'ont point encore été imprimés et sont très utiles pour les negotiations de la paix prochaine*, Amsterdam, 1710 & *Corps universel diplomatique du droit des gens etc.*, 8 vols., Amsterdam, 1726-31. Dumont died in 1727, with four volumes published, and Rousset assisted with the other four.

¹⁹ Jean Rousset, *Recueil Historique d'Actes, Negociations, Memoires et Traitez depuis la Paix d'Utrecht jusqu'an second Congrès de Cambray inclusivement*, 23 vols., The Hague, 1728-55 & *Supplément au Corps universel diplomatique du droit des gens etc.*, 2 vols., Amsterdam, 1739.

²⁰ Johan Christian Lünig, *Das Teutsche Reichs-Archiv*, 24 vols, Leipzig, 1710-22.

Charlesmagne period back to ancient Greece and Rome (1739).²¹ As well as some country-specific volumes, this general approach was continued by French writer and diplomat Gabriel Bonnot ‘de Mably’ (1746)²² and Hamburg-born, Georg Friederich Martens (1791-1795, 1800-20 and 1817-24),²³ a project continued by his compatriots, Frédéric Saalfeld (1828-33)²⁴ and Frédéric Murhard (1836-42).²⁵ No one, at least in Britain, thought to catalogue the growing number of statutes, related to treaties, with one arguable Continental exception.²⁶

There was no sign yet, that British legal scholars recognised this change, as witnessed by the publication of John Austin’s *London University* inaugural jurisprudential lectures, dating from 1828, which have remained inexplicably influential: ‘why is Austin still inevitable?’, law journal editor, Frederick Walton, asked rhetorically both about a century later and before today.²⁷ Austin’s few words on international law were that it was, essentially, ‘law improperly so called’, as it lacked an enforcing power.²⁸ Since Blackstone, however, whose *dictum* he upheld, the loss of American colonies had changed British international policy, with the first repeal of the *Navigation Code*’s statutes from the early 1820s and, thus, Britain’s greater engagement with treaties, on reciprocal commerce and navigation, plus anti-slave trafficking.

These developments had been recognized by 1820, by one closer to policy than Austin. Foreign Office (FO) archivist and librarian, of Swiss parentage, Lewis Hertslet, now catalogued the new treaties on commerce, navigation and slave trafficking, which were sent to colonies for guidance of local legislation and, from 1832, publicly sold in fifteen volumes.²⁹ He then began the *British and Foreign State Papers* series. Parliamentary legislation associated with many of these treaties reflected both the shrinkage of crown prerogatives and

²¹ Jean Barbeyrac, *Histoire des ancien traitez ou Recueil historique et chronologique des traité répandus dans les auteurs Grecs et Latins, etc.*, Amsterdam, 1739.

²² Abbé de Mably, *Le Droit Public du l’Europe, Fondé sur la traitez conclus jusqu’en l’année 1740*, 3 vols., The Hague, 1746.

²³ Georg Freiderich de Martens, *Recueil des principaux traités d’alliance, de paix, de trêve, de neutralité, de commerce, de limites, d’échange etc. conclus par les puissances de l’Europe tant autres elles qu’avec les puissances et etat dans autres parties du monde depuis 1761 jusqu’à présent*, 5 vols., Göttingen, 1791-1795; *Supplément etc.*, 3 vols., Göttingen, 1800; *Supplément etc.*, 8 vols., Göttingen, 1802-20; *Nouveau Recueil etc.*, 5 vols. (Vols. 1-5, with Karl Martens in vol. 5), Göttingen, 1817-24.

²⁴ Frédéric Saalfeld, *Nouveau Recueil etc.*, 4 vols. (vols. 6-9) & *Supplément etc.* to vol. 5, Göttingen, 1828-33.

²⁵ Frédéric Murhard, *Nouveau Recueil etc.*, 7 vols. (vols. 10-16), Göttingen, 1836-42 & *Nouveau Supplément etc.*, 3 vols, Göttingen, 1839-42.

²⁶ Gottfried Wilhelm Freiherr von Leibniz, *Codex juris gentium diplomaticus, in quo tabulae authenticæ actorum publicorum, tractatum, aliarumque rerum majoris momenti per Europam, pleraque ineditae vel selectae, ipso verborum tenore expressa ac temporum serie digestae, continentur; a fine saeculi undecimi ad nostra usque tempora comprehensus*, Hanover, 1693 & [addendum] *Mantissa etc.*, Hanover, 1700.

²⁷ F. P. W[alton]., ‘Review’, *JC&IL*, 10(1), 1928, pp. 148-51, especially, p. 149. Walton was a Canadian.

²⁸ John Austin, *The Province of Jurisprudence Determined*, John Murray, London, 1832, pp. 126-30, 140, 146-8.

²⁹ Lewis Hertslet, *A Complete Collection of the Treaties and Conventions at present subsisting between Great Britain & Foreign Powers so far as they relate to Commerce and Navigation; to the Repression and Abolition of the Slave Trade*, 2 vols., T. Egerton, London, 1820; Toscano, *op. cit.*, pp. 74-5, 78-9. *Times*, 17 March 1870; *FCO Records: policy, practice and posterity, 1782-1992*, FCO Historical Branch, London, 1992.

increasing parliamentary supremacy over treaties, plus their domestic significance. In 1827, colonial secretary, Lord Bathurst advised.

*His Majesty has not the power of making any regulation at variance with the several treaties of Commerce and Navigation, into which he has entered with various Foreign States.*³⁰

Neither statute nor court judgement, nonetheless, this was an official statement, which reflected a growing change in Britain's constitution, implicitly acknowledging both the rise of treaties and parliamentary supremacy, and, less obviously, the link between those two.

Of the successive British constitutional studies, which followed in this century, lawyer and historian, Henry Hallam (1827), ended his account in 1820 and, so, his omission of this development may be understandable but that is less the case, for the works of parliamentary clerk, Thomas Erskine May (1861-71), Greek classicist William Hearn (1867), historian William Stubbs (1874-8) and celebrated law professor, A. V. Dicey (1885).³¹ Legal studies, in conjunction with that of modern history, had begun in British universities from 1853, but the disciplines were separated from 1872.³² Australian universities followed both developments.

In 1843, the year after Wheaton's history and the *Treaty of Washington*, and three years before the *Navigation Code* was ended, colonial secretary, Edward Smith-Stanley, advised that it was 'indispensable' that colonies have an 'intimate acquaintance' with treaties and, so, sent them Hertslet's latest volumes.³³ International law scholars, however, did not reflect these changes in their textbooks, now appearing with increasing frequency. Some began with a few pages of the usual brief general background histories: Manning (1839), Gardiner (1844), Phillimore (1854), Twiss (1861), Halleck (1861), Amos (1874), Levi (1887), Lawrence (1895) and Smith (1900).³⁴ (Reviewing Nussbaum in 1948, Chinese law professor

³⁰ Despatches, Lord Bathurst to Darling *et al*, 10 April 1827 & Huskisson to Darling *et al*, 8 September 1827, CO324/105/17-20, 29-38, TNA.

³¹ Henry Hallam, *The constitutional history of England, from the accession of Henry VII to the death of George II*, 4 vols., L. Baudry, Paris, 1827; Thomas Erskine May, *The constitutional history of England since the accession of George the Third, 1760-1860*, Longmans, Green, London, 1861-71; William Hearn, *The Government of England: Its Structure and Its development*, George Robertson, Melbourne, 1867; William Stubbs, *The constitutional history of England*, Oxford, 1874-78; A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, Macmillan, London, 1885.

³² C. H. Firth, 'Modern History at Oxford, 1724-1841', *EHistR*, 32(125), January 1917, pp. 1-21; Reba Soffer, 'Nation, Duty, Character and Confidence: History at Oxford, 1850-1914', *HJ*, 30(1), 1987, pp. 77-104.

³³ Circular despatch, Stanley to governors, 28 June 1843, CO854/3/162, TNA; letter, Hertslet to James Stephen (CO), 15 January 1841, CO323/227/282-4, TNA. For the first time the volumes were then sent to Australia.

³⁴ William Oke Manning, *Commentaries on the Law of Nations*, S. Sweet, London, 1839; Daniel Gardner, *A Treatise on International Law: a short explanation of the jurisdiction and duty of the government of the republic of the United States*, Press of N. Tuttle, Troy, NY, 1844; Sir Robert Phillimore, *Commentaries upon International law, vol. 1*, Butterworths, London, 1854; Travers Twiss, *The law of nations considered as independent political communities vol. 1: On the rights and duties of nations in time of peace*, Clarendon Press, Oxford, 1861; H. W. Halleck, *International Law, or Rules regulating the Intercourse of states in peace and war*, D. Van Nostrand, NY, 1861; Sheldon Amos, *Lectures on International Law*, Stevens & Sons, London, 1874; Leone Levi, *International Law with materials for a Code*, K. Paul, Trench, London, 1887; T. J. Lawrence, *The Principles of International Law*, Macmillan, London, 1895, (see p. 53 in the second edition); F. E. Smith (Lord Birkenhead), *International Law*, Bedford, London, 1900.

and diplomat, Yuen-li Liang, wrote. ‘Most treatises on international law contain one or two chapters on the historical background, usually relatively short and too concentrated.’³⁵ Others, increasingly, contained no historical sections: Woolsey (1860), Field (1872), Creasy (1876), Hall (1880), Lorimer (1883), Snow (1890), Walker (1895), Oppenheim (1905) and Baty (1909).³⁶ Treaties were rarely mentioned in this first category and only to a relatively minor extent in the second, and, if so, in a separate section, often buried at the back of their tomes, as with Oppenheim, who, like Baty, at least recognised their growing significance. Continuation of the Martens and Hertslet series by other editors after 1843 passed others by.³⁷

Later, international law and relations scholars would characterise, arguably anachronistically, this and preceding periods, as a struggle between so-called ‘naturalists’ and ‘positivists’, based on the writings of a pantheon of famed scholars.³⁸ They have largely ignored what was actually happening then in the world of policy. International legal history was yet to offer much to help to explain the latter. Prussian, Karl von Kaltenborn-Stachau’s *Kritik des Völkerrechts* (1847) reflects the approach of much international legal history, focusing on the pantheon, rather than actual law itself, as did compatriot Franz von Holtzendorff’s multi-authored *Handbuch des Völkerrechts* (1885).³⁹ Belgian legal historian, François Laurent’s three volume *Histoire du droit et des relations internationales* (1850) begins in antiquity, ending before the surge in multilateral treaties, and is more political than legal history.⁴⁰ His Belgian colleague, Ernest Nys, also offered mainly detailed political history in *Les Origines du droit international* (1894), focusing on the late, Middle Ages and just reaching the early modern period.⁴¹ The only English-language contributions, since Wheaton in 1842, were by two British lawyers. The promising subtitle of John Hosack’s *On the Rise and Growth of the*

³⁵ Yuen-li Liang, *HLR*, 1948, April, 61(4), pp. 737-41.

³⁶ Theodore Dwight Woolsey, *Introduction to the study of International law: Designed as an Aid in Teaching and in Historical Studies*, J. Munroe & coy., Boston, 1860; David Dudley Field, *Draft Outlines of an International Code, Vol. 1: Relations of Nations and of their Members in Time of Peace*, Diossy & company, NY, 1872; Edward S. Creasy, *First Platform of International Law*, John van Voorst, London, 1876; W. E. Hall, *A Treatise on International Law*, Clarendon Press, Oxford, 1880; James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, 2 vols., William Blackwood & Sons, Edinburgh, 1883; Freeman Snow, *International law: A Manual based upon lectures delivered at the Naval War College*, Govt. Printing Office, Washington, 1895; Thomas Alfred Walker, *A Manual of Public International Law*, CUP, Cambridge, 1895; Lassa Oppenheim, *International Law: a Treatise: Vol 1: Peace*, Longmans, Green & Co., London, 1905, especially, pp. 517-583; Thomas Baty, *International Law*, Murray, London, 1909, especially, p. vii.

³⁷ *Nouveau recueil général de traités, conventions, et autres transactions remarquables, etc.*, 20 vols., Göttingen, 1843-75; *Nouveau recueil général de traités d’alliance et autres actes relatifs aux rapports de droit international, Deuxième série*, 35 vols., Göttingen, 1876-1908; Heinrich Triepel, *Nouveau recueil etc., Troisième série*, Leipzig, 1909-42. Edward, Lewis Hertslet’s son, succeeded his father. S. Hall, Sir Edward Hertslet and his work as librarian and keeper of the papers of the foreign office, 1857-1896, MA, University of London, 1958.

³⁸ A good example is David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, *NJIL*, 65(3-4), 1996, pp. 385-420.

³⁹ Karl von Kaltenborn-Stachau, *Kritik des Völkerrechts nach dem jetzigem Standpunkt der Wissenschaft*, G. Mayer, Leipzig, 1847. Franz von Holtzendorff, *Handbuch des Völkerrechts Auf Grundlage europäischer Staatspraxis*, Habel, Berlin, 1885.

⁴⁰ François Laurent, *Histoire du droit et des relations internationales*, Hebbelynck, Gand, 1850 (1862 & 1880).

⁴¹ Ernest Nys, *Les Origines du droit international*, Alfred Castaigne, Brussels, 1894.

Law of Nations (1882)⁴² cites treaties but the work is mainly diplomatic history from ancient times to Utrecht (1713), in 300 pages. Thomas Alfred Walker's *History of the Law of Nations* (1899) ends in 1648.⁴³ There were some more specific studies but lacked archival sources.⁴⁴

English-language scholarly journals increased greatly in the late nineteenth century, with many more on law in the USA, it having more universities, than did Britain. International law constituted a minority of articles in them, with most on domestic law and, as with the first specialist international law journal (1907), only rarely carried scholarly history. In only its second volume, Oppenheim adjudged that 'the history of international law is virgin land which awaits its cultivators.'⁴⁵ Historical (and political science) journals also now emerged but only very rarely tackled law, let alone international law. Examples of such were so rare, it is worth noting Edward Cheyney's fine 'International Law under Queen Elizabeth' (1905).⁴⁶

The First World War and the League of Nations ignited a burst of scholarly interest in international law, relations and history. Belligerents unprecedentedly released hitherto secret diplomatic records, even as the war began, to justify their actions. Governmental archives, at least in Britain, liberalised access. In Britain, major works of international history, some government sponsored, sought to explain the origins of the war and Versailles, by tracing back to Vienna in 1815 and, even, Westphalia in 1648.⁴⁷ British universities had recently been increasing in number and their graduate history theses soon followed these trends.⁴⁸ All ignored international legal developments in these periods. Of treaties, they mainly mentioned only those on alliance and peace. Their accounts were framed essentially as to how states used their power in pursuit of national interests, constrained only by the 'balance of power', a concept either initiated or embraced by the emerging international relations discipline.

International law studies also expanded. Britain's *Journal of Comparative Legislation* added 'International Law' to its title and the *Transactions of the Grotius Society* began (both 1918). Next year, the *British Yearbook of International Law* commenced, as did, in 1922, the Royal

⁴² John Hosack, *On the Rise and Growth of the Law of Nations: as established by general usage and by treaties*, John Murray, London, 1882. See also his more specific, *Rights of British and Neutral Commerce, as Affected by Recent Royal Declarations and Orders in Council*, S. Sweet, London, 1854.

⁴³ Thomas Alfred Walker, *History of the Law of Nations*, CUP, Cambridge, 1899.

⁴⁴ John Bassett Moore, *History and Digest of International Arbitration*, Govt. Printing Office, Washington, D. C., 1898; Stuart A. Moore and Hubert Stuart Moore, *The History and Law of Fisheries*, Stevens and Haynes, London, 1903; Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters; with special reference to the Rights of Fishing and the Naval Salute*, W. Blackwood, Edinburgh, 1911; Carl Jacob Kulsrud, *Maritime Neutrality to 1780: A History of the Main Principles Governing Neutrality and Belligerency to 1780*, Little, Brown, Boston, 1936.

⁴⁵ Lassa Oppenheim, 'The Science of International Law: Its Task and Method', *AJIL*, 2 (2), 1908, pp. 313-56.

⁴⁶ Edward P. Cheyney, 'International Law under Queen Elizabeth', *EHistR*, 20(80), October 1905, pp. 659-72.

⁴⁷ The works, some multi-volume, need not be cited but the main British authors were Sir Adolpus Ward, Charles Webster, Harold Temperley, G. P. Gooch, G. M. Trevelyan, R. B. Mowat and A. J. P. Taylor.

⁴⁸ P. M. Jacobs (ed.), *History Theses 1901-1970: Historical research for higher degrees in the universities of the United Kingdom*, Institute of Historical Research, London, 1976.

Institute for International Affairs' *International Affairs*. These journals focused on the present or recent past, not exploring legal history. On the Continent, Leiden's (Grotius's university) *Tijdschrift voor Rechtsgeschiedenis* (1918) carried that flag but with little detailed, international legal history. In Berlin, the *Kaiser Wilhelm Institute for Foreign and International Public Law* (1924) was established, though the leading scholar was Frankfurt's Karl Strupp who, with constitutional lawyer, Julius Hatschek, began in 1922-28 the three-volume *Wörterbuch* [Dictionary] *des Völkerrechts*, until Strupp, being Jewish, fled in 1933.⁴⁹

Britain's Paul Vinogradoff, born and educated in Russia (and Germany), was a fine domestic law historian but his lectures at Leiden on *Historical Types of International Law* (1923) are brief (about 70 pages since Westphalia, with only about ten on 'modern developments') and ignore major treaty developments.⁵⁰ His citation by recent scholars is unwarranted. Alsatian Robert Redslob's *Histoire des Grands Principes du Droit des Gens* (1923) focuses on political developments with the treaties often cited being traditional political ones. Then, in his last twenty or so, of 550 pages, he details briefly the other major treaty developments.⁵¹ *The Law of Nations* (1928) by British legal scholar, J. L. Brierly, who had worked for the League, has a few pages on the subject's background, without any detail.⁵² Lord McNair's *The Law of Treaties* (1938) was a general study and did not comprehensively detail Britain's treaties.⁵³ A significantly greater contribution was by Britain's Sir Geoffrey Butler and Simon Maccooby. Thoughtfully, they deliberately chose the word 'Development' instead of 'History' of *International Law* (1928) and, although thinly sourced, more than anyone before, detected and, albeit, briefly, acknowledged the great treaty developments of the last century.⁵⁴

This last work raises the notion that diplomatic historians were documenting one narrative of this period, generally accurate, while there was another equally true, parallel narrative. This contained much the same periods, places and persons but was marked by treaties not crises, while building to a different result, than just the Great War. Thus, Versailles was not just an end but also a re-start. This implicit and, almost certainly, unconscious insight was not reflected in *Geschichte des Völkerrechts* (1936) by German criminal lawyer, Arthur Wegner. This traces from antiquity to his present in only 362 pages, becoming more diplomatic than

⁴⁹ Karl Strupp & Julius Hatschek, *Wörterbuch des Völkerrechts und der diplomatie*, 3 vols., *Vereinigung wissenschaftliche Verleger*, Walter de Gruyter, Berlin, 1922-8.

⁵⁰ William E. Butler, *On the History of International Law and International Organization: Collected Papers of Sir Paul Vinogradoff*, The Law Book Exchange Ltd., Clark, N. J., 2009, pp. 61-143.

⁵¹ Robert Redslob, *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre*, Rousseau, Paris, 1923, especially, pp. 522-46.

⁵² J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, Clarendon, Oxford, 1928.

⁵³ Lord McNair, *The Law of Treaties: British Practice and Opinion*, Clarendon Press, Oxford, 1938. This was one of a proposed three, also covering France and Germany, supervised by Columbia University's Charles Hyde.

⁵⁴ Sir Geoffrey Butler & Simon Maccooby, *The Development of International Law*, Longmans, Green & Co. Ltd., London, 1928, especially, pp. 349-526.

legal history, after Westphalia in 1648 and again ignoring treaty developments.⁵⁵ Persecuted, Wegner fled the next year, which returns one to fellow *émigré*, Nussbaum, and his confronting assessment of the state of international legal history in 1947.

The establishment of the United Nations (*UN*) and its assumption from the defunct League of Nations of the leadership, in the development of international law through treaties, freshened scholarly interest in that subject but not really its history, with legal scholars focussing on the ‘brave new world’ of the present and those ‘things to come’. The latest English-language texts on international law—by Australian (of Russian parentage), Joseph Starke (formerly Starovic) in 1947 and American, Philip Jessup in 1948, who had both previously worked at Geneva—contained no historical introduction. A later work by Jessup, though not strictly on law, conveyed some correct sense of historical legal change.⁵⁶ Britain’s James Brierly did not add an historical section to new editions of his 1928 text but, in a shorter work (1944), he asserted the judgement, arguable without historical evidence but correct in this writer’s view, that treaties had by then overtaken custom, as the main form of international law.⁵⁷

The first four to five decades after the war was a golden age for detailed, archive-based historical scholarship, steadily expanding its scope beyond kings, generals, politicians and diplomats. This was not so, for international legal history. Still dominated by Continental scholars, this account begins, with one deliberate (1943) omission, in 1950. Unlike Nussbaum and Wegner, Carl Schmitt, initially thrived under the *Nazi* regime and was, for a time, a party member. More political than legal theorist, and certainly not historically trained, he seems to have come to international law by a then common German sentiment, antagonism towards Versailles of 1919. There is debate whether his main legal work, *The Nomos of the Earth in the International Law* (1950, English 2003) was written during the war but certainly seems coloured by Versailles. This work is more theory than history with the pantheon providing his milestones to Versailles, before he did consider later treaties. He shared much with compatriot, the, as yet, unmentioned Wilhelm Grewe, whom he influenced (see below).⁵⁸

⁵⁵ Arthur Wegner, *Geschichte des Völkerrechts: Handbuch des Völkerrechts 1/3*, Kohlhammer, Stuttgart, 1936.

⁵⁶ Joseph Starke, *An Introduction to International Law*, Butterworth & Co., London, 1947. Philip C. Jessup, *A Modern Law of Nations*, Macmillan, 1948; *International Regulation of economic and social questions*, Carnegie Endowment for International Peace, NY, 1955.

⁵⁷ J. L. Brierly, *The Outlook for International Law*, Clarendon Press, Oxford, 1944. See also his ‘The Codification of International Law’, *MichLR*, November 1948, 47(1), pp. 2-10.

⁵⁸ Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Duncker & Humblot, Berlin, 1950; *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen, Telos Press Ltd., NY, 2003; François Rigaux, ‘L’histoire du droit international revue par Carl Schmitt’, *JHIL*, 9, 2007, pp. 233-62; Stuart Elden, ‘Reading Schmitt Geopolitically: Nomos, territory and *Großraum*’, *Radical Philosophy*, 161, Mar/Jun 2010, pp. 18-26. He published in 1939, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag Zum Reichsbegriff Völkerrechts* and a collection of essays in 1940 entitled *Positionen und Begriffe im Kampf mit Weimar-Geneva-Versailles 1923-1939*. For a wider background see Detlev F. Vagts, ‘International Law in the Third Reich’, *AJIL*, Jul., 1990, Vol. 84, No. 3 (Jul., 1990), pp. 661-704. Ingo J.

Germany continued to lead the way in reviving international legal history, though on a different road to Schmitt. In 1949, the *Kaiser Wilhelm Institute*, re-named as *The Max Planck Institute for Comparative Public Law and International Law (MPICPLIL)*, moved to Heidelberg. In Munich, Georg Stadtmüller, a trained historian, though not of international law, published (1951) the first of a planned (but discontinued) series, which, in 200 pages, covered from ancient times to Vienna in 1815. More pertinent here, is its review by fellow German, the London-based Jewish *émigré* lawyer, Georg Schwarzenberger. He adjudged that, since Robert Ward (1795), ‘the history of international law tended to degenerate into **a mere history of its doctrine**’, rather than of the ‘**evolution of international law itself** [emphasis added]. International law scholars, he continued, still exhibited a ‘regrettable hesitation to master the **relevant historical source material**’ [emphasis added] leaving, in this ‘unduly neglected field’, this book, as ‘a lonely outpost in a desert that waits to be reclaimed.’⁵⁹

By 1960, Hans-Jürgen Schlochauer, the late Karl Strupp’s legally trained, former research assistant, had returned from exile to revive Strupp’s inter-war ‘Dictionary’ series, which, in 1962, had successive brief historical pieces by Wolfgang Preiser, Ernst Reibstein, Hans Ulrich Scupin and Ulrich Scheuner.⁶⁰ Much later, these were published in English in the *MPICPLIL*’s latest volume, which was devoted to international legal history, but had only about 140 pages, with eighteen, by Scupin, on the period between 1815 and 1914.⁶¹ (Grew briefly collaborated with them.) Reibstein, a legally trained journalist, who had also returned, published numerous works on international legal history (notably, in 1958 and 1963), though they were not archive-based.⁶² In 1964, the *Max Planck Institute for European Legal History* was founded at Frankfurt, with Ingo Hueck leading research. Preiser, who had studied both law and art history, drew attention to the limitations of existing international legal history scholarship. Most of his brief contributions are in German only, focusing on the pre-modern periods, and were not detailed, though they flagged the need to study more than just Europe.⁶³

Hueck, ‘The Discipline of the History of International Law--New Trends and Methods on the History of International Law’, *JHIL*, 3(2), 2001, pp. 194-217.

⁵⁹ Georg Stadtmüller, *Geschichte des Völkerrecht*, Vol. 1, Herman Schroder, Hannover, 1951; Georg Schwarzenberger, *ILQ*, 4(4), October 1951, pp. 527-8.

⁶⁰ Hans-Jürgen Schlochauer, *Wörterbuch des Völkerrecht und der diplomatie*, vol. 3, W. de Gruyter, Berlin, 1962.

⁶¹ R. Bernhardt et al. (eds.), *Encyclopedia of Public International Law: Vol. 7: History of International Law etc.*, North-Holland Pub. Co., Amsterdam, 1984.

⁶² Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis*, 2 vols., Karl Alber, Freiburg-Munich, 1958 & 1963.

⁶³ Wolfgang Preiser, *Die Epochen der antiken Völkerrechtsgeschichte*, Tübingen, 1956; *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode*, Steiner, Frankfurt, 1964; *Frühe völkerrechtliche Ordnungen der aussereuropäischen Welt* (Early international legal orders of the outside European world), Franz Steiner, Wiesbaden, 1976; *Macht und Norm in der Völkerrechtsgeschichte: kleine Schr. zur Entwicklung d. internat. Rechtsordnung u. ihrer Grundlegung* (Power & norm in the history of the people's rights: small swords for the development of the international Legal order & its foundation), Nomos, Baden-Baden, 1978. See also Alexander Bohm, Klaus Lüderssen, Karl-Heinz Ziegler (eds.), *Idee und Realität des Rechts in der Entwicklung*

Outside this group, Rome's Mario Toscano (1958; English, 1966) made an invaluable contribution with a history of the published collections of treaties.⁶⁴ Charles Alexandrowicz, Viennese-born and Polish-educated, while at the University of Sydney, published a study of international law in the East Indies in the 1500-1700s (1967), before returning to London to help found the *Grotian Society* and edit its 1968 *Studies in the history of the law of nations*.⁶⁵ The Netherlands' Jan Verzijl commended in *International Law in Historical Perspective* (1968-69). 'Detailed studies on special subject matters, for specific periods or in particular are indispensable.'⁶⁶ Neither his work nor those before, here cited, provided such studies.

As the century closed, little changed, with a few more general histories, the most important of which, by Grewe (in German 1984; English, 2000), is discussed below. Smaller accounts, adding little new detail, were by Polish international jurist, Manfred Lachs (1982, 272 pages), who noted but without specifics the rise of treaties in the 19th century;⁶⁷ Karl-Heinz Ziegler (1994, 267 pages), Preiser's student, whose main field was ancient Roman law;⁶⁸ Spanish international law and relations scholar, Antonio Truyol y Serra (1995, 188 pages);⁶⁹ French legal historian, Henri Legoh  rel (1996, 128 pages);⁷⁰ and, a rare non-European example, by highly British-educated Sri Lankan jurist, Chittharanjan Amerasinghe (2001, 26 pages).⁷¹

Of legal history journals, the first in English began in the USA in 1957.⁷² Meanwhile, in 1979 *The Osgoode Society for Canadian Legal History* was established in Toronto and the *Zeitschrift f  r Neuere Rechtsgeschichte* in Vienna. Next year, Hungarian-born legal scholar, Albert Kiralfy founded *The Journal of Legal History* at University College, London. In Australia, Macquarie University began *The Australian Journal of Legal History* (1997). The great bulk of their articles were on domestic law and, even those, rarely used archival sources.

So, towards the end of the last century, authoritative scholarly opinion pointed to the extraordinary lack of detailed international legal history. Then, in 2000, came Grewe's major

internationaler Beziehungen: Festgabe f  r Wolfgang Preiser (Idea & reality of law in the development of international relations: Celebration of Wolfgang Preiser), Nomos, Baden-Baden, 1983.

⁶⁴ Toscano, *op. cit.*

⁶⁵ Charles Alexandrowicz, *An introduction to the history of the law of nations in the East Indies: 16th, 17th and 18th centuries*, Clarendon Press, Oxford, 1967 and *Studies in the History of the Law of Nations*, (Grotian Society Papers 1968), Martinus Nijhoff, The Hague, 1970.

⁶⁶ J. H. W. Verzijl, 'Research into the History of the Law of Nations', in J. H. W. Verzijl (ed.), *International Law in Historical Perspective*, vol. 1, A. W. Sijthoff, Leiden, 1968, pp. 400-34, especially p. 433.

⁶⁷ Manfred Lachs, *The Teacher in International Law: Teachings And Teaching*, Martinus Nijhoff, The Hague, 1982, especially p. 68.

⁶⁸ Karl-Heinz Ziegler, *V  lkerrechts-geschichte. Ein Studienbuch*, C. H. Beck, Munich, 1994.

⁶⁹ Antonio Truyol y Serra, *Histoire du droit international public*, Economica, Paris, 1995.

⁷⁰ Henri Legoh  rel, *Histoire du droit international public*, Presses Universitaires de France, Paris, 1996.

⁷¹ Chittharanjan Amerasinghe, 'The Historical Development of International Law-Universal Aspects', *Archiv de V  lkerrechts*, 39(4), December 2001, p. 367-93.

⁷² The *American Society for Legal History*, which, from 1955 was at Temple University, began publishing in 1957 the *American Journal of Legal History*.

work, *Epochs of International Law*. He was, apparently, not a *Nazi* party member but worked for its government, before enjoying a post-war, celebrated diplomatic and scholarly career, under the Christian Democrats.⁷³ Even Bardo Fassbender, one of the astute few to have rumbled Grewe over his past, endorsed the ‘exceptional importance and influence’ of his work, as the ‘only thorough description’ of the history of modern international law in the ‘last fifty years in any language, with no successor being in sight.’⁷⁴ His work is so widely seen as the pinnacle of international legal history to that date and, so often, cited, that one wonders what these scholars think is the answer to the question, ‘what is [international legal] history?’

Historians should always interrogate their sources, be they documents--governmental or non-governmental--oral testimony or secondary works, something many international law scholars seem not to have done. Grewe wrote large parts of this work when he was young, not historically trained, working for the *Nazi* government and in a Germany where Versailles and the League of Nations, were seen as expressions of an international law, which upheld an unfair settlement: a view shared by many non-Nazi Germans and non-Germans alike. The idea that international law is merely the instrument of power is central to his work—as with Schmitt—and forms the basis of his ‘epochs’—of which his British epoch (1815-1919) was first published in 1943!⁷⁵ Whether the two preceding ‘epochs’—Spain (1494-1648) and France (1648-1815)—or the later League ‘epoch’ (1919-44), were written by then, is unclear. What is clear is that, while the war with Britain raged, he wrote that the anti-slave trafficking campaign was merely a device to advance Britain’s maritime supremacy,⁷⁶ a view surprisingly endorsed by some recent English-language scholars (see below).

The mantra long ago impressed on this scholar was ‘first read the footnotes, not the book’. The sole authority, for Grewe’s wartime claim about Britain’s anti-slavery campaign, is relatively short (120 pages), without archival sources and by a young German economist not historian in 1906, a time of intense Anglo-German naval and colonial rivalry, in a series edited by senior economist, Gustav Schmoller, then a very influential political figure.⁷⁷

⁷³ Grewe’s unbroken success brings to mind that of Timothy Tullie, 17th century rector of Cliburn, Cumberland, who prospered under both Cromwell and the Restoration. Much later, a sardonic Anglican rector, cheekily quoted Shakespeare’s ‘All’s well that ends well’, to brand Tullie, for being this “bright particular star” of Presbyterianism, while the Commonwealth lasted, but who altered his orbit without dimming his lustre by becoming a Canon of York.’ Rev. James Wilson (ed.), *The Victoria History of the Counties of England: A History of Cumberland*, vol. 2, Archibald Constable & Coy. Ltd., London, 1905, p. 94.

⁷⁴ Bardo Fassbender, ‘Stories on War and Peace On Writing the History of International Law in the “Third Reich” and After’, *EJIL*, 13(2), 2002, pp. 479-512, especially, p. 480.

⁷⁵ Wilhelm G. Grewe, ‘Die Epochen der Modernen Völkerrechtsgeschichte: Erster Teil, I. Völkerrecht und Staaten’, *ZGS*, 103(1), 1943, pp. 38-66 & ‘Die Epochen der Modernen Völkerrechtsgeschichte: IV. Das englische Zeitalter. 1815 -1919’, *ZGS*, 103(2), 1943, pp. 260-294.

⁷⁶ Wilhelm G. Grewe, *Epochs of International Law*, Walter de Gruyter, Berlin, 2000, especially, pp. 551-60.

⁷⁷ Franz Hochstetter, ‘Die wirtschaftlichen und politischen Motive für die Abschaffung des britischen Sklavenhandels in Jahre 1806/07’, in Gustav Schmoller & Max Sering (eds.), *Staats und sozialwissenschaftliche Forschungen*, 25(1), Duncker & Humblot, Leipzig, 1906, pp. 1-120.

Schmoller was a vocal supporter of Germany's naval and colonial expansion, and had already published his claim that a ruthless Britain had asserted its maritime supremacy by such methods.⁷⁸ If Grewe had employed proper historical method, even by 1943, there were at least three major works that he should have consulted.⁷⁹ Before Grewe's English publication in 2000, there had been a surge of scholarly works, all of which he ignored, adding only an 1808 memoir of one of the campaigners. From this very 'unsolid foundation' (see below), Grewe both explains and extrapolates, for all times, that international law is just the instrument of self-interested power. The empirical evidence in this thesis, however, contradicts, except in respect to anti-slave trafficking, the implicit claim of his apparently original and core case study, that Britain in its 'epoch' (1815-1919, 143 pages) led the development of international law. He also fails to appreciate the signal role of the public in his focus on state Machiavellianism. Modern international legal scholars have not raised these same doubts.

Since Grewe, there have been more general histories of international law, mostly brief and almost entirely secondary source based. Tunisian, Slim Laghmani (2004), surveyed the field in 249 French language pages; France's Marie-Hélène Renaut (2007) did so in 190 pages.⁸⁰ Some chapters in the edited work by Matt Craven *et al* (2006) attempt some specific but still pantheon histories.⁸¹ The multi-authored *Oxford Handbook of the History of International Law* (2012) has over 1,000 pages but almost without any original, primary source-based scholarship, certainly on the subjects relevant to this thesis.⁸² Spaniard, Ignacio de la Rasilla del Moral, ends his account in 1700.⁸³ The large work by American, Stephen Neff, (2014) retains the focus on the pantheon, which inevitably leads to an over-emphasis on customary international law and less so on the rise of treaties. In 136 pages, he covers 1815-1915, only briefly interrupting his account of customary international law and the pantheon to mention

⁷⁸ Erik Grimmer-Solem, *The Rise of Historical Economics and Social Reform in Germany, 1864-1894*, Clarendon Press, Oxford, 2003, especially, pp. 208-9 & *Learning Empire: Globalization and the German Quest for World Status, 1875-1919*, CUP, Cambridge, 2019. Gustav Schmoller, *The Mercantile System and Its Historical Significance Illustrated Chiefly From Prussian History*, in *Studien Ueber Die Wirthschaftliche Politik Friedrichs Des Grossen*, 1884, Trans W.J. Ashley, Macmillan, NY, 1896.

⁷⁹ Frank J. Klingberg, *The Anti-Slavery Movement in England: A Study in English Humanitarianism*, YUP, New Haven, 1926; E.C.P. Lascelles, *Granville Sharp and the freedom of slaves in England*, OUP, London, 1928; Sir R. Coupland, *The British Anti-Slavery Movement*, Butterworth, London, 1933.

⁸⁰ Slim Laghmani, *Histoire du droit des gens. Du jus gentium impérial au jus publicum europaeum*, Pedone, Paris, 2004. Marie-Hélène Renaut, *Historie du droit international public*, Ellipses, Paris, 2007.

⁸¹ Matt Craven, Malgosia Fitzmaurice & Maria Vogiatzi (eds.), *Time, History and International Law*, Martinus Nijhoff, Leiden, 2006.

⁸² Bardo Fassbender & Ann Peters (eds.), *The Oxford Handbook of the History of International Law*, OUP, Oxford, 2012. Joaquín Alcaide Fernández, on international criminal law, discusses piracy briefly, slavery generally, and the white slave treaties of 1904 and 1910 in a half-page. The obscene publications treaty is not mentioned. On labour protection, there is nothing on the Berne conventions of 1906 nor bilateral social insurance treaties. On nature, there is no mention of protection of birds, plumage, African game, North Pacific fur seals or whales, and only a brief reference to sealing in the Behring Sea, in reference to law of the sea. On drug trafficking, there is one reference to the opium trade but not to treaties. There is little else on the other treaties of this period.

⁸³ Ignacio de la Rasilla del Moral, *History of International Law, 1550-1700*, OUP, NY, 2013.

random examples of multilateralism, the importance of which he does stress, in both treaties and organisations, while spending most time on the rules of war conventions. His own assessment, as to the lack of detailed histories, holds true for the periods covered in this thesis and for his own work.⁸⁴ Only Britain's Edward Keene, in a fine article, noted the 'Treaty-Making Revolution' of the 19th century (2012).⁸⁵ So, what detailed works are there?

Of the comprehensive list of major modern treaty subjects here identified, which are subdivisible, there are no such studies, on either commerce, communications or transportation, except for Sara Bannerman's (2013) sound, though limited, work in the sub-category of copyright, being mainly in relation to Canada alone.⁸⁶ On international public health, there is nothing, notably on the sanitary conventions, unless one includes drug trafficking here and not in transnational crime. Australian Melissa Bull (2008) does mention the drug treaties and some domestic law, though she relies totally on a few secondary sources.⁸⁷ On nature protection, which this thesis does not cover in detail, America's Mark Cioc (2009) used primary sources for treaties on African game, migratory birds and whaling. He does not see the bilateral bird treaty of 1916, as the diminished consequence of the unrealised multilateral plumage bird treaty, and misses early whaling preservation efforts,⁸⁸ as does the largely secondary source based work on whaling by Britain's Malgosia Fitzmaurice (2015).⁸⁹

On the treaty subjects examined in detail here, unsurprisingly, the rules for the conduct of war have received most attention. Belgium's Randall Lesaffer (2002) has stated that international legal history 'has been neglected by legal historians and distorted by international lawyers.'⁹⁰ He called for examination of the required methodology but seems not to see the need for archival research.⁹¹ Authors in his edited *Peace Treaties and International Law* (2004) relied almost entirely on secondary or public sources.⁹² American, Benjamin Coates (2016) provided mainly a 'discourse' study of international law in the USA, which he does extend from scholars to officials. He touches on the Hague peace conferences but not the signal leadership

⁸⁴ Stephen Neff, *Justice among Nations: A History of International Law*, HUP, Cambridge, Mass., 2014, especially pp. 201, 318-33.

⁸⁵ Edward Keene, 'The Treaty-Making Revolution of the Nineteenth Century', *IHR*, 34(3) 2012, pp. 475-500.

⁸⁶ Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1842-1971*, UBC, Vancouver, 2013.

⁸⁷ Melissa Bull, *Governing the heroin trade: from treaties to treatment*, Ashgate, Aldershot, 2008.

⁸⁸ Mark Cioc, *The Game of Conservation: International Treaties to Protect the World's Migratory Animals*, OHUP, Athens, Oh., 2009.

⁸⁹ Malgosia Fitzmaurice, *Whaling and International Law*, CUP, Cambridge, 2015.

⁹⁰ Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *BYIL*, 73, 2002, pp. 103-139, especially p. 103.

⁹¹ He used public not archival official sources in 'Charles V, Monarchia Universalis and the Law of Nations', *TVR*, 71 (1-2), 2003, pp. 79-124.

⁹² Randall Lesaffer (ed.), *Peace Treaties and International Law in European History: from the late Middle Ages to World War One*, CUP, Cambridge, 2004, especially, pp. 1-8.

of the USA on the opium convention.⁹³ The Netherlands' Maartje Abbenhuis (2018) is not a legal historian but used primary sources in providing valuable background on the Hague conferences.⁹⁴ Christopher Ernest Barber's New Zealand doctorate (2017)⁹⁵ is sound, though not legal, history on arbitration treaties, whereas American, Steven Harris's article (2016)⁹⁶ is both. The best work in this field is by German, Gabriela Frei (2020), on maritime warfare rules.⁹⁷ On transnational crime, American, Jenny Martinez (2011) built on the many historical works to relate persuasively the slave trafficking campaign to modern human rights law.⁹⁸ Britain's Edward Keene (see above) used some primary sources in a good article on anti-slavery treaties (2007),⁹⁹ while Canadian, Jean Allain's (2008) did not.¹⁰⁰ His article (2017) on the 'white slave traffic' again used only public sources, as did Israel's Nitzka Berkovitch (1999).¹⁰¹ On labour protection, there is only Berkovitch again and German (non-legal) historian, Sandrine Kott's fine chapter (2014), which only briefly mentions the treaties.¹⁰²

On Australia, there is no legal history on either this period or its treaty subjects,¹⁰³ except very general and brief on the 'evolution of Australia's international personality'.¹⁰⁴

⁹³ Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*, OUP, Oxford, 2016.

⁹⁴ Maartje Abbenhuis, *The Hague Peace Conferences and International Order, 1898-1915*, Bloomsbury, London, 2018. See also his *An Age of Neutrals: Neutrality and Great Power Politics, 1814-1914*, CUP, Cambridge, 2014 & Maartje Abbenhuis, Christopher Ernest Barber & Annalise R. Higgins (eds.), *War, Peace and International Order: The Legacies of the Hague Conferences of 1899 and 1907*, Routledge, London, 2017.

⁹⁵ Christopher Ernest Barber, *The evolution of global politics and the pacific settlement of international disputes, 1794-1907*, University of Auckland, Ph.D., 2017. See also, Richard Langhorne, 'Arbitration: The First Phase, 1870-1914', in Michael Dockrill and Brian McKercher (eds.), *Diplomacy and World Power: Studies in British Foreign Policy, 1890-1951*, CUP, Cambridge, 1996, pp. 43-55.

⁹⁶ Steven M. Harris, 'The Global Construction of International Law in the Nineteenth Century: The Case of Arbitration', *JWH*, 27(2), June 2016, pp. 303-25.

⁹⁷ Gabriela A. Frei, *Great Britain, International Law, & the Evolution of Maritime Strategic Thought, 1856-1914*, OUP, Oxford, 2020 & 'Freedom & control of the Seas, 1856-1919', in N. A. M. Rodger & Christian Buchet (eds.), *The Sea in History--The Modern World*, Boydell & Brewer; Boydell Press, Rochester, NY, 2017, pp. 59-69.

⁹⁸ Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law*, OUP, Oxford, 2011.

⁹⁹ Edward Keene, 'A Case Study of the Construction of International Hierarchy: British Treaty Making Against the Slave Trade in the Early Nineteenth Century', *IO*, Spring 2007, 61(2) pp. 311-39.

¹⁰⁰ Jean Allain, 'The Nineteenth Century Law of the Sea & the British Abolition of the Slave trade', *BYIL*, 2008, 78, pp. 342-88.

¹⁰¹ Jean Allain, 'White Slave Traffic in International Law', *JTHE*, 1(1), 2017, pp. 1-40. Nitzka Berkovitch, *From Motherhood to Citizenship: Women's Rights and International Organizations*, JHUP, Baltimore, 1999.

¹⁰² Sandrine Kott, 'From Transnational Reformist Network to International Organization: The International Association for Labour Legislation and the International Labour Organization, 1900-1930s' in Davide Rodogno, Jakob Vogel & Bernhard Struck, (eds.), *Shaping the Transnational Sphere: Experts, Networks and Issues from the 1840s to the 1930s*, Berghahn Books, NY, 2014, pp. 239-58. Kott's work focuses on the post-1919 period.

¹⁰³ See Appendix 2 and Horst Lucke, 'Legal History in Australia: the Development of Australian legal/historical scholarship', *ABR*, 34, pp. 109-48, which by omission, confirms the lack of international legal history. There is one useful article using archival sources but it is not legal history: Raelene Frances, "'White Slaves" and White Australia: Prostitution and Australian Society', 19(44), *AFS*, July 2004, pp. 185-200.

¹⁰⁴ D. P. O'Connell 'The Evolution of Australia's International Personality', in D. P. O'Connell (ed.), *International Law in Australia*, Law Book Co., Sydney, 1966, pp. 1-16; Günther Doeker, *Treaty-making Power in the Commonwealth of Australia*, Martinus-Nijhoff, The Hague, 1966, p. 4. Alison Pert, *Australia as a Good International Citizen*, Federation Press, Sydney, 2014; 'The Development of Australia's International Legal Personality', *AYIL*, 34, 2017, pp. 149-89. Melissa Conley Tyler, Emily Crawford & Shirley V. Scott, 'Australia's International Personality: Historical, Legal and Policy Perspectives', in Don Rothwell & Emily Crawford (eds.), *International Law in Australia*, 3rd ed., Lawbook Co. 2017, especially, pp. 1-7.

3. Methodology & sources

a. the (post-) modern methodology: ‘merely theoretic reasoners’

Earlier (p. 2), I contended that there was, as well as the above traditional source of the deficiency in sound international legal history, a modern source. This discipline developed in conjunction with the emergence of international relations, as a distinct discipline, and the two have, in many cases, developed similar methodologies. Unlike history, international relations focuses more on contemporary events, for which key evidential records, i.e., governmental internal documents, are generally not available. Thus, this discipline has largely relied upon secondary sources or, at best, official public sources. Historians, demanding detailed evidence, have largely not attempted ‘international’ history. The scale of the task of examining records of more than one or a small number of governmental records, is usually limited by access, cost, time, language and the great scale of research and writing. Conventionally, they had attempted to examine ‘international’ events using the sources of only one or a small number of countries. Many international relations scholars, unconcerned by the lack of such research, have felt freer to cover wide-ranging international developments in time, place and subject, using mainly secondary sources. That discipline, developing within the social sciences, is also more inclined to generalise, that is theorise, than history, where the emphasis is more on the specific or particular. International legal historians have relied more on the general ‘histories’ of international relations scholars, than those specific works of history scholars, as can be confirmed by inspecting their source citations.

The traditional methodology of so-called histories of international law, as detailed above, survives for many to the present day. The milestones in such chronological narratives are not treaties or related laws but, rather, the books published by the increasing pantheon of famed (nearly all male and European, in its widest sense) writers. This approach, similar to that used by earlier literary, philosophical, political and international relations theory studies, would seem outdated. In fact, it has prospered in the last forty years, as many areas of social enquiry, proudly flagged themselves as ‘post-modernist’, ‘post-structuralist’ and/or ‘post-colonial’. Many of such embraced the aim of studying the ‘discourse’ of a subject, rather than the subject itself, because a ‘binary’ approach to truth or falsity was ‘problematic’: one could only safely study expressions of ‘memory’, ‘meaning’ or ‘(re)imagining’, not ‘truth’. Parentheses appeared in unconventional places to reveal hidden meanings, only perceptible to ‘critical theorists’, not earlier scholars. ‘Spaces’ and ‘flows’ were ‘mapped’. New (obscure) terms, e.g. ‘epistemic community’, not new data were in vogue. What works became favoured were those covering big time periods, with big new ideas, using mainly secondary sources, and not focused and detailed, using primary sources, as a traditional historian would do.

Anthony Carty's *The Decay of International Law?* (1986) is an early example.¹⁰⁵ Even if rhetorical, his title is contradicted by all evidence. These trends featured from the mid-1980s in journals, especially the newer *Journal of World History* (1994), *Journal of International Legal History/Revue d'histoire du droit international* (1999) and *Rechtsgeschichte* (2002)--both at Max Planck institutes--*Journal of Global History* (2006) at Cambridge, *Ancilla Iuris* (2006), at University of Freiburg, *European Society for Comparative Legal History* (2009) in Den Hague, English/German-language *Journal on European History of Law* (2010) in London and *Contributions to Austrian Legal History* (2011) in Vienna.

So, while detailed, archival-based historical works were still slow to emerge,¹⁰⁶ several major or, at least, large theoretical works did. Former Finnish diplomat, Martti Koskenniemi, was youngish and legally but, apparently, not historically trained before his 'critical' theoretical work on international law (1989). With the pantheon featuring prominently, along with some public official records, this is not history. He claimed that his next major work (2001) was, though it really just revisits the pantheon. Even allowing again for some rhetorical latitude, international law had no more 'fall[en]' by 1960 than had it 'decay[ed]'. Section titles of his co-edited work (2017), including 'epistemologies', 'discourse' and 'legal critique', reveal that this is also not a policy study.¹⁰⁷ There have been a number of other theoretical works focusing on specific aspects of international law, notably human rights, close to the periods covered in this thesis, which sporadically tap into a selected past, without being historical scholarship, notably: Anthony Anghie (2004),¹⁰⁸ Thomas Skouteris (2009),¹⁰⁹ Samuel Moyn (2010),¹¹⁰ Anne Orford (2011),¹¹¹ Sudhya Pahuja (2011),¹¹² Emmanuelle Jouannet (2012),¹¹³

¹⁰⁵ Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, ManUP, Manchester, 1986.

¹⁰⁶ A brief and limited study of the growth of international legal history and the cause of its relative, original neglect include Ingo Hueck, 'The Discipline of the History of International Law', *JHIL*, 3, 2001, pp. 194-217; Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', *Der Staat*, 26, 1987, pp. 103-26.

¹⁰⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, CUP, Cambridge, 1989; *The Gentler Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, CUP, Cambridge, 2001; with Walter Rech & Manuel Jiménez Fonseca (eds.), *International Law and Empire: Historical Explorations*, OUP, Oxford, 2017.

¹⁰⁸ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, CUP, Cambridge, 2004.

¹⁰⁹ Thomas Skouteris, *The Notion of Progress in International Law Discourse*, T. M. C. Asser Press, The Hague, 2009 & 'Engaging History in International Law' in Jose Maria Beneyto & D. Kennedy (eds.), *New Approaches to International Law*, Asser Press, The Hague, 2012, pp. 99-121. The major work was his published doctorate and its title is clear that his subject is the 'discourse' of, not, international law itself, unless he sees no distinction there.

¹¹⁰ Samuel Moyn, *The Last Utopia: Human Rights in History*, HUP, Cambridge, Mass., 2010 & *Not Enough: Human Rights in an Unequal World*, HUP, Cambridge, Mass., 2018. Before his major work, he had studied history and French literature, a major birthplace of post-modernism, and some undergraduate law.

¹¹¹ Anne Orford, *International Authority and the Responsibility to Protect*, CUP, Cambridge, 2011; Anne Orford, 'Feminism, Imperialism and the Mission of International Law', *NJIL*, 71, 2002, pp. 275-96; *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, CUP, Cambridge, 2003; (ed.), *International Law and its Others*, CUP, Cambridge, 2006; 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect', *MiJIL*, 30(3), Spring 2009, pp. 981-1015.

¹¹² Sudhya Pahuja, *Decolonizing International Law: Development, Economic Growth & the Politics of Universality*, CUP, Cambridge, 2011. She says that international law 'has at its heart a "critical instability"', p. 25.

Guy Fiti Sinclair (2017),¹¹⁴ Rose Parfitt (2019)¹¹⁵ and Ignacio de la Rasilla del Moral (2021).¹¹⁶ Despite claims to be engaged in historical scholarship, their sources are mainly the pantheon, recent secondary works, notably Koskenniemi's, or famed (male) European theorists, who never studied international law or, arguably, history.¹¹⁷

Falling somewhere between these theoretical works and general histories, on the one hand, and, on the other, more specific and detailed histories, are the works of American Lauren Benton and her recent Australian, though partly American-educated, collaborator, Lisa Ford. Both seem to identify with fields such as 'post-colonialism' (including 'legal pluralism') and 'world' or 'global' history. Benton, apparently, has not studied law. Ford has, though her previous main work, despite its title, *Settler Sovereignty*, was on colonial not international law.¹¹⁸ Benton has written on 'global legal regimes', 'global law' and 'interpolity law', by none of which, she seems to mean international law, except, perhaps, its customary form. In her works covering vast periods, 1400-1900 and 1500-1850, based largely on secondary sources, examples are often so widely spaced in place, time and subject, that I question that they can prove such broad overall theses as, 'the centrality of the colonial encounter to the formation of international law', a conclusion with which this thesis strongly disagrees.¹¹⁹

The two's recent joint work, *Rage for Order* (2016), is more tightly focused in time, while the rest of the title, '*the British Empire and the Origins of International Law, 1800-1850*',¹²⁰ invites observation here, despite being on a slightly earlier period. To date international law's origins to then, can only be accepted if the authors made, which they do not, a distinction between the early modern, when customary international law prevailed, and modern periods, with the rise of treaties. Attributing these origins, albeit a little ambiguously, to Britain,

¹¹³ Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law*, trans. By Christopher Sutcliffe, CUP, Cambridge, 2012.

¹¹⁴ Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States*, OUP Oxford, 2017. He focuses on the *International Labour Organisation*, starting with its foundation in 1919 and does not cover its origins and the earlier international labour protection treaties.

¹¹⁵ Rose Parfitt, *The Process of International Legal Reproduction Inequality, Historiography, [and] Resistance*, CUP, Cambridge, 2019. This focuses on Ethiopia and the League of Nations in the 1930s but also has a notable early section on historical scholarship and international law.

¹¹⁶ Ignacio de la Rasilla del Moral, *International Law and History: Modern Interfaces*, CUP, Cambridge, 2021.

¹¹⁷ Louis Althusser, Michel Foucault, Jürgen Habermas and Jacques Derrida. A similar type of scholarship, by several of the same authors, pre-dominates in such collective works as Anne Orford & Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, OUP, Oxford, 2016; Samantha Besson & Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law*, OUP, Oxford, 2017; Markus D. Dubber & Christopher Tomlin (eds.), *The Oxford Handbook of Legal History*, OUP, Oxford, 2018.

¹¹⁸ Lisa Ford, *Settler Sovereignty: jurisdiction and indigenous people in America and Australia, 1788-1836*, HUP, Cambridge, Mass., 2010.

¹¹⁹ Lauren Benton & Adam Clulow, 'Legal Encounters and the Origins of Global Law' in Jerry Bentley, Sanjay Subrahmanyam & Merry Wiesner-Hanks (eds.), *Cambridge History of the World*, vol. 6(2), CUP, Cambridge, 2015, pp. 80-100, especially p. 81; Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, CUP, Cambridge 2002; Lauren Benton & Ronald J. Ross (eds.), *Legal Pluralism and Empire, 1500-1850*, NYUP, NY, 2013.

¹²⁰ Lauren Benton & Lisa Ford, *Rage for Order: the British Empire and the Origins of International Law, 1800-1850*, HUP, Cambridge, Mass., 2016.

cannot be accepted. Heavily based on secondary sources, with less primary sources, this work is more on internal imperial not international legal developments, with one exception. Their main claim on Britain's role is based on the interrelated treaty issues of slave trafficking and piracy, much like Grewe, whom they cite and with whom they seem to agree.¹²¹ They overlook the other modern treaties, then, on reciprocal commerce and navigation, posts, extradition and copyright, which clearly originated in Europe. Colonies initiated no treaties.

b. in defence of detail and description: 'many minute circumstances'

Invocation of von Ranke at the start of this thesis may rankle with (post-) modern scholars. German intellectual culture, which shaped Ranke, had earlier also influenced a visiting Sir John Sinclair to introduce its term 'statistics', meaning detailed social enquiry, into English (1791).¹²² He inspired Sir Frederick Morton Eden (1797) to conduct, in England, a similarly detailed social enquiry, which Eden subtitled a 'history'. He explained his methodology.

These, and many similar questions, cannot, as it seems to me, be fully and satisfactorily answered, unless many minute circumstances are previously stated, which have been rarely sufficiently attended to in the plausible and ingenious, but unsolid, speculations of several merely theoretic reasoners [emphasis added].¹²³

Researching and writing history must be, necessarily, a collective endeavour, due to the near infinite vastness of its 'many minute circumstances'. There is a case, therefore, for a division of labour, whereby muddy empiricists must first till the rich, empirical primary source soil, while theoretical or generalist aristocrats ('merely theoretic reasoners') feast in the big house, airing 'plausible and ingenious, but unsolid, speculations'. This is unashamedly the work of a serf. The details provided here are not mere description but the necessary core data upon which generalisations can be soundly made.

There is no doubt that historians' traditional focus on the state needed enhancement. The mainly French scholarship, from Jules Michelet through Marc Bloch to Ferdinand Braudel and the *Annales* school, contributed mightily in emphasising the need to see political developments within a wider context, both human—economic, social, cultural, intellectual—and natural—geographical, topographical, geological, climatic, botanical. This thesis implicitly engaged with these issues, particularly how geography influenced treaty engagement. On society, Karl Marx's economic determinism may often have been simplistically represented but its fundamental persuasion cannot be ignored. In unveiling the role of the public in treaty making, this thesis has intimated subtly at the leading role of Non-conformist Protestantism, with its recognisable geographical, religious, occupational and

¹²¹ Benton and Ford, *op. cit.*, chapters 1 & 5.

¹²² Sir John Sinclair, *The Statistical Accounts of Scotland etc.*, 21 vols., William Creech *et al*, Edinburgh, 1791-9.

¹²³ Sir Frederick Morton Eden, *The State of the Poor, or a History of the Labouring Classes in England from the Conquest to the Present Period, etc.*, vol. 1, B & J. White *et al.*, London, 1797, p. 4.

socio-economic signatures.¹²⁴ Scholars have raised the invisibility of women in earlier accounts and the equal absence of minorities--ethnic, religious and otherwise. This was part of a recent shift in focus from the state to 'civil society', including non-governmental organisations. All valid enhancements of the historians' craft, they are respected in this thesis.

On epistemology, writers, notably E. H. Carr (1961) have been invoked, in raising questions over the objectivity or, even, possibility of knowledge.¹²⁵ These questions arose from philosophy, notably Ludwig Wittgenstein (1922)¹²⁶, and science, as popularised by such as Karl Popper (1945, 1957 and 1959),¹²⁷ neither scientist nor historian and, soon after, Thomas Kuhn (1962), a physicist, at least.¹²⁸ Why Carr, like Austin, is given so much weight still, befuddles this scholar. A diplomat, untrained at a high level or lengthily as an historian (only in undergraduate ancient history), Carr, himself, belatedly wrote only contemporary history, without detailed archival research, but famously posed the question, 'what is history?' In fact, this had been precisely asked and better answered a half-century prior. American, Edward Cheyney (1907) sensibly replied about the need only to be aware of historians' and their sources' subjectivity.¹²⁹ In 1925, in Australia, English-born Sir Ernest Scott, dispensed with the same obstacles, reminding us that the historian's task simply involves 'finding the truth and telling it'.¹³⁰ History, thus, is only two things, truth and a story. Ranke remains mantled.

Not only 'truth' came under attack, so did the 'story'. Scholars, such as American, Hayden White questioned the validity of 'narratives', which historians constructed, perhaps, invented. He was youngish, with only a few researched articles on the medieval period, before turning to theorising about history, rather than researching and writing it. His *Metahistory* (1973)¹³¹ employs the simple methodology, often used not only in literary and philosophical studies, but also international legal history, of detailing the tomes, roughly chronological, of a pantheon of famed scholars, while corralling them into anachronistic categories in his own 'narrative'. This seems to this scholar both datedly narrow and elitist. He does not seem to think it necessary, just as with those other disciplines, in explaining a century of thought, to consider lesser known scholars, university or school curricula, let alone what the public thought about history. This thesis can be expected to address but not resolve these issues of

¹²⁴ See D. W. Bebbington, *The Nonconformist Conscience: Chapel and Politics, 1870-1914*, G. Allen & Unwin, London, 1982 & John D. Gay, *The Geography of Religion in England*, Duckworth, London, 1971.

¹²⁵ E. H. Carr, *What is History?*, Macmillan, London, 1961, especially, pp. 10-12.

¹²⁶ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, Kegan, Paul, etc., London, 1922.

¹²⁷ Karl Popper, *The Open Society and Its Enemies*, Routledge, London, 1945; *The Poverty of Historicism*, Routledge, Kegan, Paul, London, 1957; *The Logic of Scientific Discovery*, Hutchinson, London, 1959.

¹²⁸ Thomas Kuhn, *The Structure of Scientific Revolutions*, UCP, Chicago, 1962.

¹²⁹ E. P. Cheyney, 'What is History?', *Alumni Register*, University of Pennsylvania, Philadelphia, 1907.

¹³⁰ Ernest Scott, *History and historical problems*, OUP, Melbourne, 1925, p. 26. Scott, neither legally nor university trained, published one of the very few works which might be considered international legal history, concerning Australia: 'The "Shenandoah" incident, 1865', *VHM*, 42(2) September 1926, pp. 55-75.

¹³¹ Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe*, JHUP, Baltimore, 1973.

historiography. Instead, I post my propositions on history's door. I can do no other. So, sharing Ranke's 'pleasure in the particular', when examining 'many minute circumstances', this thesis drew upon various sources to study its twin aims at four levels: international, imperial, colonial and Australian; and within each, including both government and people.

At the international level, each of the several treaty subjects here studied, have various start points, as a matter of legislation and/or treaty-making, which lie approximately in the period from the late 18th to early 19th centuries, invariably in Europe. So, the account on each subject begins certainly outside Australia and, often, even Britain. In this period, there was no central international organisation to hold records on treaty developments. So, the records of governments and their peoples are the only primary sources. (For treaty texts, the recognised treaty collections were used.) Various limits, including time, cost and scale of research, led this thesis to adopt a conventional approach of using only one government's records for this international level, in this case, those of Britain. Obviously, there are issues of selectivity and bias in such an approach but this can be accommodated by cautious judgement, while other governments' views are often contained in each government's records. Secondary sources, based on non-British official records, could be expected to cover some of these deficiencies but, as the literature review confirms, these generally do not yet exist. Public source records, notably newspapers, sometimes documented not only foreign governments' views but also the international activities of non-official individuals and organisations.

The imperial level comes next. This is a necessary insertion between the thesis' twin subject areas—international and Australia—because only British government officials participated in international treaty conferences and policy-making on behalf of the colonies. This was then constitutionally necessary, as was accepted by the Commonwealth, which in the official advice of Alfred Deakin, as attorney-general in 1902, was a 'dependency', within the 'sovereign independent state' of the empire, with 'no Treaty power of any kind'.¹³² Australia, unlike Canada in some instances, was not officially represented at international treaty conferences until 1912. Even then they did not have formal treaty powers separate from Britain. So, the reports of Britain's engagement with foreign powers, conference attendance and negotiation of treaties, is here treated seamlessly, as part of the account of Australian responses to such processes. The public push for treaties and/or related domestic legislation within the empire also usually originated in Britain, with its more advanced civil society.

The third level is colonial. Any assessment involves evaluation. Britain's responses to the herein specified developments in international law are measured against those of foreign

¹³² Attorney-General's opinion, 28 May 1901, p. 7, vol. 1, CRS A1497 & 1901/68, CRS A8, NAA.

governments. The colonies' responses may be measured against Britain. Constitutionally, they could only follow Britain's lead over treaties though, on domestic law, sometimes a different picture emerges, such as over opium and bird plumage trafficking. The main point of comparison, for Australian responses, however, must be with those of Britain's other colonies, especially those of which were self-governing, with Canada the most important.

So, the main official sources used for the international, imperial and colonial levels were the formerly closed internal records of the imperial government's relevant bodies, notably, Colonial (CO), Foreign (FO), Home (HO), India (IO), War (WO) and General Post (GPO) offices, plus the Law Officers (LO), Board of Trade (BoT), Treasury and Admiralty. Public records, such as those of the imperial parliament, were also used.¹³³ These records often also include important communications of non-governmental organisations and individuals, engaging with that government on treaty and legislative issues. Newspapers, especially the *Times*, were also a valuable source for Britain's public campaigns.

At the Australian level, Britain's records were again an extensive source because they hold much of the Australian official and, even, some non-official correspondence. The less comprehensive and, often less systematic state of surviving Commonwealth records makes the British records even more valuable for the Australian account. To keep the thesis' scale manageable, responses of the state governments, where involved, are only studied using British and Commonwealth, not state, records. Newspapers were again an invaluable source for both some Commonwealth actions, as well as those of the Australian public.¹³⁴

4. Methodology--scope & structure

Methodology for sources shaped the thesis' scope and structure. The volume of records to be studied, so as to give a comprehensive account of 'what actually happened', in regards to the making of law and treaties, was unanticipated due to the limitations of existing scholarship.

a. scope

The original aim to cover all treaties proved unviable. While maintaining the originally selected time period, selection was made within the treaty subjects. One may sub-divide the total of these treaty-subjects in various ways, but eight categories commended themselves: rules of war, commerce, communications, transport, transnational crime and protection of health, nature and labour. Of these, three were chosen, thus, excluding the following.

¹³³ British governmental records are cited in the format advised by The National Archives (TNA). The citation begins with a document description followed by the TNA's format, which is usually a letter prefix indicating the department where the record was created, then the respective series, file and folio number, where recorded.

¹³⁴ Numbers which follow, indicate successively, the record series, file number and, in most cases, folio numbers. For Commonwealth records, first cited is the document form, author, correspondent (if applicable) and date. Then, the preceding letters and numbers indicate the record series, though these have all been allocated by the archives not the originating departments, after transfer. In the case of files, this is usually the case with few instances where the original number is preserved. Few Commonwealth series containing files or, even, volumes of bound records, are paginated, and, so, the date of the document is the best guide to its location.

Commercial treaties, including several sub-categories, were not only the largest in number but also of the greater interest to Australian governments. This is such a large subject that it would justify a separate thesis. Communications and transportation treaties, which were also essentially, commercial, should be studied in connection with that category. On protection of health, the major issue was the development of international sanitary measures to stop the spread of diseases, especially cholera, plague and yellow fever. This is also large subject, starting with many international conferences from 1851 and involving a number of multilateral treaties. At first, this was mainly concerned with the Mediterranean and Central Europe and only later, Britain's more distant colonies. This explains tardy and incomplete Australian responses, which require further, separate study. On protection of nature, most treaties, mainly on fisheries, seals and birds, concerned the northern hemisphere only. The proposed multilateral treaty, against plumage bird trafficking, greatly concerned Australia, but was not covered due to considerations of scale and because the treaty was never concluded.¹³⁵

Ultimately, the major treaty areas examined in detail were concerned with the conduct of war, transnational crime and protection of labour. This choice allows treatment of both British categories of 'political' and 'non-political' treaties, which raised different colonial issues.

b. structure

Of the eight chapters, 1 and 8 are more general, although they include detailed treaty statistics. This was done to provide the full context for the three specific case studies, which each comprise two detailed chapters, so as not to make the mistake of using exceptions to prove an incorrect rule—as do Grewe (2000) and Benton & Ford (2016) with anti-slave trafficking and piracy, to assert that Britain then led the development of international law. The middle three sections are each of two chapters, which are detailed case studies, of specific treaties. The detail and complexity of each treaty issue examined, each on quite distinct subject matters, made the broad approach in chapters 1 and 8 unviable. So, each of the three case studies are presented with its own distinct, largely chronological, narrative account.

Chapter 1 gives a deeper and wider background to the period of the case studies by outlining, from approximately 1851, developments in international law through treaties, which were changing in number, content and form, including requiring domestic application. The emergence of multilateral treaties and associated permanent governmental international

¹³⁵ Britain's early fishing treaties were confined to the northern hemisphere, especially near Europe and, while some were of concern to Canada and Newfoundland, they did not affect Australia. The latter was true of the plurilateral, regional treaty on preservation of African game (1900) and of North Pacific fur seals (1911), although all British colonies, including Australia, accepted a treaty obligation not to allow port entry to pelagic sealing ships. (The limited early moves for the international preservation of whales did not become a treaty subject, yet.) Britain signed the first (1895) but not second (1902) and more important, multi-party (European only) treaty, arguably on nature (bird) protection, though done largely for agricultural protection.

organisations are noted. How British and colonial, including Australian governments responded is detailed, including Britain's allowance, from 1877-8, of colonial choices of adhesion, to what Britain deemed 'non-political' treaties, expanding colonial treaty responses.

Section One addresses rules for the conduct of war, with Chapter 2 examining the Geneva or 'Red Cross' (1906) and multiple Hague peace (1907) conventions and Chapter 3, the *Declaration of London* (1909). Britain did not consult or allow colonies a choice of adhesion on these 'political' treaties but, as even they increasingly required domestic legal application, issues of prior consultation and choice between imperial or local colonial legislation arose. Only Canada asserted its desire for local legislation for over the 'Red Cross' treaty. Then, the Commonwealth exhibited unprecedented assertiveness over a lack of prior consultation on the *Declaration*, while also disagreeing with some of its specific aspects. The large bilateral network of general arbitration treaties was not included because Britain did not allow colonial choice of adhesion and colonies, except Canada, were not consulted until just before the war.

Section Two is on transnational crime, with Chapters 4 and 5 examining jointly the multilateral treaties on suppression of traffic in, respectively, white slaves (1904, 1910) and obscene publications (1910). Customary international law on piracy only received expression in treaty form in slave trafficking treaties and at Paris in 1856 and neither affected Australia to any extent.¹³⁶ Extradition, a large subject with many bilateral treaties, was also not included, as colonies had no choice of adhesion, and only Canada contested its domestic application. Suppression of drug trafficking, which could be considered as international health, was not included, as its first stage continues well past the First World War.

Section Three is on international labour protection, with Chapters 6 and 7 examining jointly (again, because of overlap in time and background) the only two multilateral treaties (1906), which were for the prohibition of, respectively, the use of white phosphorus in matches and night work for women. The other international labour issue was social insurance, including accident compensation, old age and invalidity pensions, maternity allowances and unemployment benefits. This subject was not included, as the only treaties resulting were bilateral and confined to Europe in 1904-14. Britain signed only one, with France (1909).¹³⁷

Chapter 8 continues the wider account of Chapter 1, by covering the period from 1906 to the First World War, focussing mainly on the other multilateral treaties concluded in that period but which were not examined in detail here, to give context to the treaties studied in detail.

¹³⁶ Slave trafficking did arise as an issue for parts of Australia later in the 19th century, over indentured Pacific island labourers, but was only as internal imperial not international issue, in terms of legislation.

¹³⁷ Labour insurance was discussed in semi-official international conferences, which Commonwealth representatives attended. This influenced Commonwealth's legislation in this period on old age and invalidity pensions and maternity allowances, plus consideration of unemployment insurance.

5. Argument & conclusions: the neglected rise of treaties & effects on Australian law

Any scholarly work is written within the context of other, earlier works. Any new work should relate to those earlier works, in terms of how they add to, support and/or contest their conclusions. Each new work, even if administratively entitled a ‘thesis’, is actually an ‘antithesis’ to the existing ‘thesis’, which, rather than a single work, most often will be a collection, which may or, more likely, not be in complete agreement. Each new thesis (actually, ‘antithesis’) should engage with that pre-existing body of works, constituting a ‘thesis’, to produce, perhaps only in small measure, an improved ‘synthesis’ of scholarship’s collective knowledge. This is achieved by each new work mounting new evidence to support an argument for the new conclusions drawn. New studies would be unwise to assume that there has not been earlier works on their subjects, yet, in very large measure, there were few such works with respect to the subjects herein studied.

This thesis addressed two major subjects approximately from the mid-19th century to the First World War: firstly, the development of international law, through treaties, and, secondly, how Australian governments and peoples, necessarily through the medium of the imperial government, responded. This study has not identified much existing scholarship and, thus, clear prior theses, against which to argue, on either subject, except implicit, due to each’s omission of the main developments, identified in this thesis.

a. the neglected rise of treaties and ‘la voix publique’

On international law generally, the only ‘thesis’, which this study detected, lies not on what the existing literature said but what it did not say. This literature has continued to focus on custom and, hence, (or, *vice versa*) the texts of certain famed European writers. This largely ignored the rise of treaties in number, content and form, which were both codifying customary international law and steadily closing the gap between domestic and international law. The above claims about the ‘fall’ or ‘decay’ of international law, in this period, cannot be accepted on any measurable basis, if the point on treaties is accepted.

Much of scholarship’s continuing focus on custom and the pantheon, not treaties, also resulted largely in the neglect of the driving force behind these changes in law—both statute and treaty. This was not governments, although only those could draft and sign the legal instruments, but ‘*la voix publique*’,¹³⁸ which usually spoke in varied, even contradictory voices, mediated by governments. This thesis, citing detailed evidence of activities by non-governmental individuals and organisations, redresses this shortcoming.

¹³⁸ The term ‘*la voix publique*’ or public voice, against acts ‘repugnant to the principles of humanity and universal morality’ was first invoked internationally by the *Declaration of the Powers, on the Abolition of the Slave Trade*, (Vienna, 8 February 1815) BFSP 3/971; CTS 63/473.

b. effects on Australian law

On Australian responses to these developments, there are no detailed studies, either general or specifically treaty issues examined in detail. Legal history on Australia has been overwhelmingly domestic in focus. So, there is again no existing collective thesis, against which this study can argue. Indeed, there is also no body of detailed literature and, thus, existing thesis on Britain's responses, for this period at least, which must be considered, as it shaped colonial, including Australian responses. Britain was generally slower than the Continent (or, even the *USA*) to embrace these treaty developments, although ultimately so doing, in most cases. While jealously guarding imperial paramountcy over foreign policy and treaties, Britain, in its increasingly liberal hold over its self-governing colonies, in particular, created increasing scope for the latter's autonomy in the international legal system.

On Australia alone, there is an often implicit, meta-thesis, and a type of 'nationalist' discourse, also found in other historical and legal works on other former British colonies. This suggests the striving, not always opposed, of Britain's former colonies to achieve a separate international personality or sovereignty. This study rejects this thesis for Australia, for the period and subjects here studied, except for the related twin issues of racial and economic protectionism. This thesis concludes that the imperial government drew mainly passive or diffident Australian governments, a disposition their public did not always share to the same extent, into the development of international law, through treaties and, so, to legislating for the modernisation of Australian law. The federal constitution, deprived of the 'and treaties' power, not the imperial constitution was the main obstacle, although few federal leaders would have had the will to exercise such a power. Ultimately, Australian governments generally accepted these treaty developments and the extent to which, they influenced domestic legislation, has been largely overlooked.

Chapter 1

‘the language of Vattel’: customary international law and the rise of treaties

From approximately the early 18th century, international law began to leave the early modern for the modern era, with the rise of treaties, which were changing in number, content and form. The impetus for this change emanated from the north of the European continent. Britain, seemingly secure for a century in the strictures of the domestic legislation of its *Navigation Code*, largely stood aloof from this process. This stance continued until the loss of many of Britain’s North American colonies after 1776. Following the American and French revolutionary wars, Britain’s rising commercial class successively pushed for the repeal of the *Code* between the early 1820s and late 1840s. This inevitably led Britain, often hesitantly, into greater treaty making, on an ever-increasing range of subjects, many of which required domestic legislation. This process accelerated after 1850 and included, especially from the 1870s, a new type of multilateral treaty. Britain’s decision, also at this time, to allow colonies a choice of separate adhesion, on what it deemed non-political treaties, steadily increased the partial autonomy of its colonies in the international legal system, without granting them sovereignty. The federal Commonwealth of Australia entered this evolving process in 1901.

1. ‘an intimate acquaintance’: treaties and the liberalisation of empire, 1851-79

The Continental-led rise of treaties, increasing in number, content and form, from the mid-17th century, was embraced by Britain after the USA’s independence and, later, coincided with Britain’s decision in 1877-8 to allow separate colonial adhesion to non-political treaties.

In 1770, England had claimed the first and, in 1829, Britain, the second half of New Holland, under custom, then the predominant form or source of international law. Authorities, as to that law, were primarily, legal scholars, whose writings were based on their respective views of a shifting combination of some supposedly universal norms—although confined, at least for some, to ‘civilised’ or Christian people--derived from supposedly natural (by then, rarely, god’s) laws or, increasingly, on how states actually behaved. In 1840, Sir James Stephen, a lawyer, in charge of Britain’s colonial affairs, mused that England’s Australian claim relied ‘on the proceedings of Captain Cook and the language of Vattel.’¹ In 1770, treaties were an important but subsidiary part of international law, more source than form; simply, mere contracts between sovereigns, which natural law ordained that they be honoured. They were relatively few in number; almost all bilateral; their subjects, mostly confined to those high policy issues, still surviving in crown prerogatives--not requiring parliamentary sanction with legislation—on alliances, war, peace and dynastic succession. By 1840, this was all changing.

¹ Minute, Stephen to Vernon Smith, 9 July 1840, CO209/6/56, TNA.

This change originated in northern Europe, where numerous contiguous land borders and common languages allowed for easier cross-boundary movement of people and goods, than did the oceans of island Britain's maritime empire. England only signed about twenty treaties, all with neighbouring states, in the 1500s, with only one (France), including commercial provisions and the others being mainly concerned with peace and/or alliance. In the 1600s, the pattern was almost identical. In the 1700s, Britain signed around 100 treaties, with those on commerce and navigation starting to increase, especially with the independence of the USA after 1776. In 1800-50 Britain signed around 250 treaties, with the new subject matters of anti-slavery (1815), posts (1839), extradition (1842) and copyright (1846) joining commerce and navigation. In 1840, Stephen welcomed Britain's claim over New Zealand's (NZ) north island being based, not on customary international and common law, as with Australia, but treaty and associated statute. He reflected that, this 'prove[d], if proof were wanting, how much wiser was the course taken for a negotiation of the Cession of the sovereignty . . . [by treaty with *Maori* and] our own Statute Book.'² The second half of the century would continue this treaty development at an even greater rate.

In 1851, the *Exhibition of Industry of all Nations* in London was a signal landmark, not only in the development of international commerce but also international law, which the former was driving. This event may symbolically have represented both Britain's global pre-eminence, in succession to France, and a new era of internationalism but disguised how far Britain lagged behind Europe in the development of international law, through treaties. Nevertheless, Britain's treaty making rate now accelerated at an even faster rate. In 1854, reflecting the rise in importance of commerce and treaties, the *CO*, split from the *WO*, under Stephen's successor, Herman Merivale, also a lawyer.

In only 20 years after 1850, Britain concluded approximately 350 bilateral and plurilateral treaties, an annual rate of about 18, compared respectively to 250 and five in the previous 50 years (1801-50). The sub-total of traditional treaties was approximately 21%, a reduced proportion from 1801-50. This was a period of Continental peace for Britain, interrupted only by the Crimean War, which inflated the number of traditional treaties. Commercial subjects overall, including fisheries (4) and copyright (4), represented nearly 40%, boosted to 52%, if postal (29) and telegraph (10) treaties are included. Other new treaty subjects included trademarks protection (5), arrest of seaman deserters (5), sugar production (4, all plurilateral), deceased seamen's estates (4), naturalisation (3, all with the USA) and exemption from military service (2). A bilateral treaty on settlement of claims (1850), was also new, Britain's first of sixteen, with the so-called *Alabama* arbitration of 1871-2, with the USA, being a

² Minute, Stephen to Vernon Smith, 9 July 1840, CO209/6/56, TNA.

notable event in this development towards general arbitration treaties.³ Anti-slavery treaties dropped sharply from 33% to 3.5% (eleven), as most of the relevant governments had accepted a British treaty. Marking the further expansion of treaty subjects, were Britain's first treaties on telegraphs (France, 1855), and trade marks (Russia, 1871).⁴

Australasia's colonies, unlike in British North America (*BNA*), generally had not yet had to address issues of slave trafficking, posts, extradition or copyright, due to distance. Bilateral commercial treaties were British colonies' main concern from mid-century, when the strictures of 'free trade' treaties replaced those of the *Navigation Code*. Various desires, either for protection of infant colonial industries or discriminatory preferences with trade partners, colonial or foreign, sometimes conflicted with either imperial preference or 'free trade'. After acts of Nova Scotia and New Brunswick were disallowed for imposing discriminatory or 'differing' duties on imports within the empire, colonial secretary, Lord Stanley, advised governors in 1843 to use their influence to prevent colonies legislating such duties for protection of their local industries and, if they did, to withhold assent. Such legislation, he explained, would 'render inevitable much serious practical difficulty' and, so, it was 'indispensable' that colonies have an 'intimate acquaintance' with and not 'ignorance' of treaties. Equally, with 40 separate colonial legislatures, Britain needed to know all colonies' commercial legislation, so as to be able to negotiate treaties 'with confidence' and fulfil treaty obligations, to avoid 'painful and injurious' consequences, such as paying compensation. So, colonies were now required to report annually any such legislation.⁵

This was the first such despatch sent to Australia, soon followed by volumes of treaty texts, after the imperial government had disallowed some Australian legislation, which had imposed protectionist, discriminatory customs duties, despite New South Wales (*NSW*) having elected voices. In 1850, a year after the *Navigation Code* ended, imperial constitutional legislation for Australia's colonies, both advanced and restricted self-government, providing that,

³ Charles C. Bearman, *The National and Private Alabama Claims and their Amicable "Final and Amicable Settlement"*, W. H. Moore, Washington D. C. 1871; Henry Richard, 'The Recent Progress of International Arbitration', *Conference of the Association for the Reform and Codification of the Law of Nations* (Cologne), Hodder & Stoughton, London, 1881; Thomas Willing Balch, *The Alabama Arbitration*, Allen, Lane & Scott, Philadelphia, 1900; Ephraim Douglass Adams, *Great Britain and the American Civil War*, Russell & Russell, NY, 1958, pp. 116-246; Tom Ingham, 'The Alabama Claims Arbitration', *ICLQ*, 54(1), January 2005, pp. 1-25.

⁴ The early statistics were calculated using Samuel Whatley, *A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, relating to Peace and War*, 4 vols., J. J. and P. Knapton et al, London, 1732; [anon.] *A Collection of All the Treaties of Peace, Alliance, and Commerce, between Great-Britain and other Powers from the Revolution in 1688 to the present time*, 2 vols., J. Almon, London, 1772-5; Lewis Hertslet, *A Complete Collection of the Treaties and Conventions at present subsisting between Great Britain & Foreign Powers so far as they relate to Commerce and Navigation; to the Repression and Abolition of the Slave Trade*, 2 vols., T. Egerton, London, 1820.

⁵ Edward Smith-Stanley, 14th Earl of Derby. Circular despatch, Stanley to governors, 28 June 1843, CO854/3/162, TNA. He termed this issue 'an office of great difficulty'.

*it shall not be lawful for the Legislatures of any of the said Colonies to levy any Duty, impose any Prohibition or Restriction, or grant any Exemption, Bounty, Drawback, or other Privilege, upon the Importation or Exportation of any Articles, nor to impose any Dues or Charges upon Shipping, **contrary to or at variance with any Treaty or Treaties** [emphasis added] concluded by Her Majesty with any Foreign Power.⁶*

This was, perhaps, the first imperial constitutional legislation providing expressly for limitations of legislation, albeit only colonial, due to treaty obligations.

From 1851, the main colonial concern over treaties and, thus, friction with Britain remained on bilateral commercial treaties, restricting colonial fiscal freedom. *BNA* colonies began challenging these restrictions from the late 1850s, due to expanding commercial relations with the *USA* and *France*. Britain was increasingly disposed to tolerate such local measures there, especially after the rebellion in the late 1830s and, then, when the first steps of confederation in 1867 created there a more united colonial voice. The Canadian constitution *Act* contained a treaty power, though only intended for the central government's domestic imposition of obligations arising from an imperial treaty.⁷ Canada soon began to push for its officers to negotiate, under imperial supervision and final sanction, commercial treaties.

In Australasia, there was some similar sentiment, though the main friction was more about inter-colonial trade, though some colonies, notably South Australia (*SA*) and *NZ*, occasionally talked of commercial treaties with foreign powers. In 1873, Britain moved to ease this friction by allowing Australasia's colonies to discriminate on trade, irrespective of treaties and imperial preference, though solely with each other.⁸ This opened the path to federation, which took an institutional first step in 1885 with the *Federal Council of Australasia*. Treaties were not included in the council's list of legislative powers.⁹

Another major development in this period was truly multilateral treaties. The earliest are difficult to differentiate from plurilateral treaties, as many were originally limited both in terms of number and identity (being mainly European) of signatories.¹⁰ In retrospect, the distinction is somewhat easier, especially as some of these, innovatively, were made open to

⁶ S.31 of *Act for the Better Government of Her Majesty's Australian Colonies, 1850*, 13 & 14 Vict. c. 59. *NZ's* constitutional legislation of 1852, framed by a short-lived Conservative government, imposed no such restrictions. *An Act to grant a Representative Constitution to the Colony of New Zealand 1852*, 15 & 16 Vict. c. 72.

⁷ *British North America Act 1867*, 30 & 31 Vict., c. 3. s.132 reads 'The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.'

⁸ *Australian Colonies Duties Act 1873*, 36 & 37 Vict., c. 22.

⁹ *An Act to constitute a Federal Council of Australasia*, 48 & 49 Vict. c. 60.

¹⁰ A treaty of eleven governments in 1865 on a lighthouse on Cape Spartel, is better regarded as pluri-lateral, due to its limits of membership and regional interest. *Convention relating to the establishment and Maintenance of a Lighthouse on Cape Spartel*, Tangier, 16 May 1865. The signatories were Austria, Belgium, Britain, France, Italy, Morocco, Netherlands, Portugal Spain, Sweden and *USA*.

later adhesion.¹¹ The first permanent international, governmental organisations (*PGIO*) were then established by such treaties, for postal and telegraphic communications, and were fully official, unlike the *International Committee of the Red Cross (ICRC)*.¹² These multi-party treaties also embraced a broadening subject matter and, often, required domestic legislation.

The Declaration Respecting Maritime Law (Paris, 1856) represents, arguably, the first of these new treaties. Although the subject matter--rules for conduct of war--certainly had a substantial and long-standing foundation in customary international law, this treaty was an effort at both codification and reform.¹³ The subject was new, in so far as it reflected the intention of rising commercial concerns to limit damage to maritime trade during war. The total of 52 signatories, including Britain, was arguably inflated, as 23 and five respectively, were German and Italian governments. Nonetheless, the other 29 included most of the important maritime powers, from Europe (fourteen) and Americas (eight), plus Turkey and Japan. The *USA*, though not a party, signalled it would respect the provisions.¹⁴ The original *Geneva Convention* (1864), arising from European sanitary conferences, has attained iconic status, despite its limited origins. Britain only sent to the conference junior officials, with no instructions and only signed a year later.¹⁵ A successor conference, at St. Petersburg in 1868, on renouncing the use of exploding bullets, attracted three more governments from outside the Continent, including Britain.¹⁶ The Brussels conference in 1874, after the Franco-Prussian War, was a more significant meeting but did not produce any substantive treaties.¹⁷

¹¹ The *Geneva Convention* of 1864, for example, originally only had a limited number of Continental signatories, plus Britain. The convention, however, over time, like others, acquired a status and support that justifies the designation, multilateral

¹² Both these *PGIOs* exist today with nearly 200 member states. The earlier *Central Commission for the Navigation of the Rhine* (1816) was only a regional body. Another body created at this time, the *International Meteorological Organization*, is often dated to 1873 though its formal establishment came later and although governmental officials were represented, this was neither a diplomatic or treaty-created body.

¹³ Frei (2020), *op. cit.*

¹⁴ **Europe:** Austria, Belgium, Denmark, France, (Anhalt-Dessau-Coethen, Baden, Bavaria, Bremen, Brunswick, Frankfurt, Germanic Confederation, Hamburg, Hanover, Hesse Cassel, Hesse Darmstad, Lubeck, Mecklenberg-Schwerin, Mecklenberg-Strelitz, Nassau, Oldenburg, Prussia, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Saxony and Wurtemberg), Greece, Italy (Modena, Parma and Sardinia), Netherlands, Norway, Portugal, Russia, Spain, Sweden and Switzerland. **Americas:** Argentine Confederation, Brazil, Chile, Ecuador, Guatemala, Haiti, Mexico and Peru. **Middle East:** Turkey. **Asia:** Japan. The *Declaration* would be constantly cited in the Hague conferences of 1899 and 1907 and the London conference of 1909.

¹⁵ *Convention for the Amelioration of the Condition of Wounded in Armies in the Field*, Geneva, 22 August 1864. Original twelve were Baden, Wurttemberg, Belgium, Denmark, France, Hesse, Italy, Netherlands, Portugal, Prussia a Spainnd), Spain and Switzerland. Soon after were Austria, Britain, Bavaria, Greece, Hamburg, Hanover, Russia, Saxony, Sweden-Norway and Turkey. There is no scholarly study on the convention but see John F. Hutchinson, *Champions of Charity: war and the rise of the Red Cross*, Westview Press, Boulder, 1996; Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, Harper Collins, London, 1998; Angela Bennett, *The Geneva Convention: The Hidden Origins of the Red Cross*, The History Press, Stroud, 2005.

¹⁶ *Declaration renouncing the use in time of War, of Explosive Projectiles under 400 Grammes Weight*, St. Petersburg, 11 December 1868. Signatories were **Europe:** Austria-Hungary, Baden, Bavaria, Belgium, Britain, Denmark, France, Greece, Italy, Netherlands, Portugal, Prussia, Russia, Sweden-Norway, Switzerland and Wurtemberg. **Americas:** Brazil. **Middle East:** Persia and Turkey.

¹⁷ Conference members only signed a final protocol.

Although the above treaties have attracted more notice, the more important multilateral treaties created in this period were in the commercial field, specifically, on communications.

On posts, numerous bilateral treaties had been concluded in Europe, before the first international conference, proposed by the *USA*, was held in Paris in 1863, attended by only fifteen Continental governments and produced only resolutions, not treaties. The *USA* continued to support this cause. Germany's new government, on unification in 1871, was concerned to unify the disparate private and public postal systems of nearly forty originally sovereign governments and, also, sought greater unification in Europe and beyond.¹⁸ Germany's proposal in 1872 for another international conference was received tepidly in France, in the wake of its defeat in war and fear of financial losses. Overall, however, commercial interests were strongly in favour of action and, so, France allied with Russia, agreed to Germany's repeated call for a conference at Berne in late 1874. Britain had already signed 25 bilateral postal treaties when it joined eighteen European governments, plus the *USA*, Egypt and Turkey, in concluding a convention establishing the *General Postal Union (GPU)* in Berne, to foster more uniform postal procedures.¹⁹ At the next conference in 1878, in Paris, when four more Latin American governments, Japan and the first British colonies joined, the signed convention changed the *GPU*'s title to the *Universal Postal Union (UPU)*.²⁰

On telegraphs, Prussia had signed numerous bilateral agreements with other German states, before a treaty with Austria-Hungary in 1849. Telegraph unions were established among those states in 1850 and those of western Europe in 1855. Conferences between both in 1852, 1855 and 1858 led to a conference in Paris in 1865, of 20 European parties, plus Turkey, which established, also in Berne the *International Telegraphic Union (ITU)*, the other first *PGIO*.²¹ By then, Britain had signed seven bilateral telegraph treaties but not that first multi-party convention, as its own telegraph systems were mainly privately owned. Britain and four others attended the next conferences at Vienna (1868) and Rome (1872). British India became a separate member while, Britain, along with two more European governments, plus Egypt

¹⁸ Carl Conrad Eckhardt, *Heinrich von Stephan, Founder of the Universal Postal Union*, UCoP, Boulder, Co., 1941.

¹⁹ *Treaty concerning the formation of a General Postal Union*, Berne, 9 October 1874 (ratifications exchanged 3 May 1875; EIF, 1 July 1875). The original members were: Austria, Belgium, Britain, Denmark, Egypt, France, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Norway, Portugal, Romania, Russia, Spain, Serbia, Sweden, Switzerland, Turkey and the *USA*. *Convention for the formation of a Universal Postal Union and Protocol*, Paris, 1 June 1878. The new foreign governments, which signed, were Brazil, Mexico, Japan, Peru and Salvador.

²⁰ G. A. Coddington, *The Universal Postal Union: Coordinator of the International Mails*, NYU Press, NY, 1964; Francis Lyall, *International Telecommunications: the International Telecommunications Union and the Universal Postal Union*, Ashgate, Farnham (UK), 2011.

²¹ Austria-Hungary, Belgium, Denmark, France, (Baden, Bavaria, Hamburg, Hanover, Prussia, Saxony and Württemberg), Greece, Italy, Netherlands, Portugal, Russia, Spain, Sweden-Norway and Switzerland and Turkey. Paul Reinsch, *Public International Unions: their work & organization: a study in international administrative law*, Ginn and Company, Boston, 1911, pp. 21-3.

and Persia, joined the year after the treaty conference, in St. Petersburg in 1875. Innovatively, private telegraph companies could become members.²²

Adopting the metric system of measurement of weight and length, for commerce and transportation, was the third commercially related, multilateral treaty concluded in this period. Arising partly from private research in Germanic Europe on geodesy in the 1860s, this eventually resulted, despite the Franco-Prussian War, in a Paris conference in 1872 and convention in 1875, where seventeen governments, including five American and Turkey's, established in Paris the *Bureau international des poids et mesures (BIPM)*, the third *PGIO*.²³ Britain did not accede until 1884, with opinion there divided, especially over potential changes to currency.²⁴ Colonial accession was not then offered, so none joined until 1907.

Only in retrospect, may the first *UPU* and *ITU* conventions be appreciated for their significance in the evolution of, not only international law but, also, the imperial constitution. Britain, initially, had been far from enthusiastic about participating in the 1874 *GPU* conference and its response to the 1875 *ITU* conference was only slightly more embracing. Ultimately, Britain accepted that it could not stand out from these developments. Through 1900, international linkages between governmental and non-governmental organisations also continued to accelerate.²⁵ The Continent was again the main source of this, as signified by the formation of the *International Law Association (ILA)* in Brussels in 1873. The distinction between the two categories soon became more blurred as, in some cases, governments cooperated with private bodies through such measures as subsidies or official representation at their conferences. In some cases, originally private bodies became fully governmental.

2. 'loosen the links': liberalisation of the imperial constitution, 1870-1900

The change in treaties, mainly in terms of the growth of multilateralism, necessity of domestic application and variety of subject matter, inevitably led to greater involvement of colonies in treaty making.

²² Reinsch, *op. cit.*, pp. 15-19. *Convention of the International Telegraphic Union*, St. Petersburg, 22 July 1875. New members were Egypt, Romania, Persia and Serbia. Germany succeeded the earlier membership of Prussia and the other German members. Britain acceded on 7 January 1876.

²³ *Bureau international des poids et mesures*, created by the *Convention for the International Uniformity and Perfection of the Metric System*, Paris, 20 May 1875. **Europe:** Austria-Hungary, Belgium, Britain, Denmark, France, Germany Italy, Portugal, Russia, Sweden-Norway and Switzerland. **Americas:** Argentina, Brazil, Peru, the USA and Venezuela. **Middle East:** Turkey. As at 1907, Canada was the only British colony to adhere. Leone Levi, *On the metric system of weights and measures*, International Decimal Association, London, 1863 and *On the introduction of metric weights and measures, and a decimal system of coinage, and on the advantage of having them taught in the elementary schools in the United Kingdom*, P. S. King, London, 1872.

²⁴ *Mitteuropäische Gradmessung* of 1862 was renamed *Europäische Gradmessung* in 1867 and *Internationale Erdmessung* (*Association Géodésique Internationale* or *International Geodetic Association*) in 1886.

²⁵ Thomas Davies, *NGOs: A New History of Transnational Civil Society*, Hurst & Company, London, 2013, pp. 44-64.

The blurred division between official and non-official international conferences and organisations had an impact on the empire's colonial policy. Britain soon began relaying to its colonies invitations from *NGOs* to send representatives to their conferences. The first such instance seems to have been in 1877, after the creation, five years earlier in London, of what a dubious colonial secretary, Lord Kimberley, said was 'called' the *International Penitentiary Commission*.²⁶ In 1872, the *CO* only asked certain colonies, including all of Australasia's, to send reports and later sent them the congress's proceedings.²⁷ In 1877, though, Kimberley's successor, Lord Carnarvon, suggested to colonies that it might be 'possible' that they might 'desire to be specially represented', at the next congress, in Stockholm.²⁸ Australian colonies only provided reports, though Victoria, with an official already in Europe, was represented.²⁹

As such conferences were not official, let alone treaty making, and did not involve the views of the *FO*, there was no concern in the *CO* over setting this precedent. This may have led these imperial offices to be relaxed over the first separate colonial representation at *UPU* and *ITU* conferences, which were clearly governmental, if deemed not quite 'diplomatic' or 'political'. The decisions on such representation, at both types of conference, were all made in the 1870s, when Britain made three decisions, profoundly changing the imperial constitution and ultimately enhancing the international personality of its colonies; decisions made, almost casually, with little consideration, let alone concern. For Australasia, ocean steam ships (1852) and telegraphs (1872)--driven by coal-steam and electricity--reduced transport and/or communication with Europe, respectively, from four months to one month and 24 hours.

In the first major decision, in mid-1872, Britain agreed to a request from newly unified Germany for 'direct negotiations' with postal administrations in India and Australia for 'conventions' (which Germany had already drafted). Britain's *GPO* supported the request. The *FO* was unconcerned and the *CO* readily agreed that the German case was strong. The one note of concern came from Henry Holland, the *CO*'s assistant under-secretary (and former *CO* legal adviser), who cautioned that such arrangements were

²⁶ Circular despatch, CO (Kimberley) to certain colonies, 4 April 1872, CO854/12/122-3; CO862/2/177; for Kimberley's doubts see CO323/320/112-16, TNA. (John Wodehouse, 1st Earl of Kimberley.) The origins of this organisation appear to have been in Frankfurt in 1846 and Brussels in 1847. The title in London in 1872 was *International Congress on the Prevention and Repression of Crime, including Penal and Reformatory Treatment*. Five years earlier, London had hosted a congress, which established the *commission*.

²⁷ NSW, Victoria, Queensland and Tasmania but neither SA nor WA responded; CO201/570/223-4; CO201/583/325-9; CO309/115/250-2; CO209/237/181-3; CO13/135/66-7; Circular despatch, CO (Carnarvon) to all colonies, 25 June 1874, CO854/15/162; CO862/3/44, TNA.

²⁸ Circular despatches, CO (Carnarvon) to colonies, 9 March, 18 June & 11 December 1877, CO854/18/135-7, 252, 454-5; CO323/329/358-72, TNA.

²⁹ CO862/3/229, CO862/4/7, 43, TNA.

*tending to loosen the links between the Mother Country & the Colonies. . . Germany & Australia w[oul]d deal with each other as if they were two independent Powers, if Count Bernstorff's views were accepted.*³⁰

So, at his insistence, the Liberal colonial secretary, Lord Kimberley, who readily accepted the 'convenience' of the proposal, informed the Australian colonies that, they were 'at liberty' to negotiate directly, provided that it was 'clearly understood', that any convention must be 'submitted' to Britain prior, for 'final sanction'.³¹ Holland need not have worried as, of the four colonies consulted, only WA showed interest while the more important colonies—NSW, Victoria and South Australia (SA)--turned the offer down, due largely to financial concerns.³²

Meanwhile, similar but more fruitful direct negotiations were opened with the USA. NZ had led this process, with the CO's approval, concluding a postal 'convention' in 1870, which appears to have been signed by the respective postal authorities, in consultation with the USA's consul, prior to being sent to London. Dynamic treasurer, Julius Vogel, also secured CO approval to conduct direct negotiations in Washington.³³ The USA was pushing a mail service across the Pacific Ocean and, so, opened direct negotiations with Canada, which Britain approved, as it did NSW's request for the same between its agent-general and the USA's London legation. NSW's post-master general (PMG) concluded in Washington a convention, identical to NZ's, in 1874. Next, NSW concluded a similar convention with Hawaii. Earlier, Victoria had submitted a convention with the USA to the CO but it was never finalised.³⁴ The CO approved all Australasia's colonies negotiating mail agreements with the Netherlands, for Batavia.³⁵ This relaxed attitude had limits. In 1875, the FO wanted NSW's colonial secretary admonished for communicating directly with the USA's secretary of state.³⁶ Australia's colonies concluded nine more such agreements before federation.³⁷

The second major decision by Britain was also on international communications and, equally, if not even more, constitutionally significant. In late 1874, Treasury briefed the CO on the GPU convention. There had been no advance consultation and, thus, none with the colonies. That Treasury and the GPO, not the FO, drove policy on this treaty may explain a further relaxation of what hitherto had been tightly controlled treaty making. Article 17 of the

³⁰ Minute, Holland to Kimberley, 6 August 1872, CO201/571/448-455, 675-84, 695-703, TNA. Albrecht von Bernstorff, German ambassador to Britain.

³¹ Circular despatch, Kimberley to Australian governors, 30 October 1872, CO201/571/455, TNA.

³² CO309/109/100-101, 126-133; CO309/111/147-157, CO18/175/335-8; CO13/130/262-4; CO201/576/62-6; CO201/579/98-102, 315-320; CO13/132/50-8, TNA.

³³ CO209/216/153-160; CO209/224/225-7; CO209/231/67-75, 104-9; CO309/112/24-41, CO361/9/147-8; TNA.

³⁴ CO201/218/22-32; CO201/219/173-4; CO201/575/158-160; CO201/576/6-11; CO201/577/96-8, 152-161; CO201/578/288-295, 361-8; CO201/579/523-30; CO201/582/144-8; CO42/724/594-6; CO309/112/24-41, CO374/9/239, TNA.

³⁵ CO201/580/135-40, 163-7; CO309/113/328-332; CO854/16/102-3, TNA.

³⁶ CO201/580/176-8, TNA.

³⁷ The USA concluded money order agreements with NSW and Victoria (1881), Tasmania (1882) and Queensland (1884). NSW concluded agreements on posts with Batavia (1882). An imperial treaty with France covered posts for Australia and NZ (1883). NSW was party to three imperial treaties with France (1890, 1891 and 1898.)

convention, ambiguously, partly due to the original French text, allowed ‘adhesion’ of ‘countries beyond sea’ (*pays outre mer*), which were not original signatories, on certain conditions. The *GPO* interpreted ‘countries’ to include colonies with independent postal administrations (only Gibraltar and Malta did not) and, despite financial costs entailed, wanted all to join, before the next conference, scheduled for 1878. The *CO*, deprecating *GPO* suggestions that it should represent the main colonies in *GPU* meetings, asked the colonies whether they desired to join.³⁸ So, colonies could become separate members of the first *PGIO*.

The convention came into force in July 1875 and the *CO* began, what would become a standard practice, at least for what were deemed non-political multilateral treaties, of informing colonies of developments, such as foreign ratifications.³⁹ Colonies’ subsequent ‘adhesion’ (the term used) had to be realised by Britain, thereafter, by separate diplomatic acts.⁴⁰ Canada and Newfoundland were anxious to join, only for France, whose colonies were not self-governing, to exercise the right under Article 17(6) to refuse them, as later entry required unanimous acceptance. Five crown colonies then quickly joined but when Britain also advised the desire of two more and some protectorates, Russia objected.⁴¹ The *CO*’s Richard Ebdon advised that France had not explained clearly why it had ‘shut out’ Canada and Newfoundland on ‘some question of postage’ but Russia’s position, that the colonies could join but without a vote, revealed the true motives. The convention’s Article 18 provided that each member ‘country’ was entitled to a vote but Ebdon, however, with Holland’s strong agreement, thought it would be ‘most unreasonable’ for Britain to support the *GPO*’s view that a colony was ‘entitled to be considered a separate country’. This ‘would place the affairs of the Union in the hands of Great Britain and her colonies.’⁴² Britain, either with this motive or, perhaps, no calculation at all, for the first time was allowing colonies to attend international governmental conferences, including of a treaty making kind.

The proposed successor treaty would allow new members, including colonies, to join but would restrict Britain’s colonies to one collective vote, to which the *GPO* objected. Ebdon felt the self-governing colonies would decline to join on this basis. Holland pondered various methods, proposed by Ebdon, by which Britain could preserve the colonies’ ‘power of independent action’, without ‘swamping’ the *GPU*.⁴³ At the 1878 conference, Britain faced strong opposition to separate votes for its colonies. Ultimately, British India, which was

³⁸ CO323/319/289-346; CO854/15/419-28; CO862/3/85; CO323/329/305-309, TNA.

³⁹ CO323/323/130-4, TNA.

⁴⁰ CO323/328/519-522, TNA.

⁴¹ The first crown colonies to join were Ceylon, Labuan, Jamaica, Trinidad and Bermuda. Britain then advised the desire to join of the Falklands, British Honduras and the West African protectorates. CO323/329/292-304, 311-20; CO323/328/617-622; CO323/330/67-81, TNA.

⁴² Minute, Ebdon to Malcolm, 27 November 1877, CO323/334/515-17; CO323/483-6, 518-541, TNA.

⁴³ Minute, Holland to Herbert, 5 January 1878, CO323/334/518, TNA.

treated a separate 'country', and Canada were each granted a vote. The other small group of colonies also joined as a single unit. All Australasian colonies declined, as did Natal and the Cape, believing either that there was no advantage or, even, financial costs.⁴⁴

Britain's approach to the *ITU* was very similar. Again, it was not the *FO* but the *GPO* directly involved in the treaty making process, as it was then seeking a better coordinated imperial telegraph system, extending east from London to the Pacific Ocean, via both the original route through Europe, the Middle East and Indian Ocean to Australia (in 1871-2) with a second line going around the Cape. The *GPO* wished to 'induc[e]' ten colonies, including all Australasia's, plus the Cape, Natal and Mauritius, to become 'adherents', before the next conference in 1878. There was a financial cost to membership but the *GPO* promised 'full rights' and 'all advantages', arising from 'accession', including separate representation at conferences.⁴⁵ The issue of voting was deliberately unmentioned (as the *CO* anticipated that the colonies would desire a vote and Russia would object). There was no specific reference or provision with respect to colonies in the convention, like *GPU*'s, but, later admission was allowed to additional 'states', a term as ambiguous as the *GPU*'s 'countries'.

The initial colonial response was mixed. Mauritius was first to agree. In Australia, the colonies (excluding Queensland and WA) were about to meet, primarily to discuss telegraphs but, for some reason, unanimously resolved not to discuss the connection to Europe. Before this, SA, which hosted the only existing international cable linkage, through its Northern Territory (*NT*), was willing to join. NZ, whose isolation had just been alleviated by cable connection with Sydney in 1876, was just as keen. NSW and Victoria prevaricated, while WA declined membership. Tasmania and Queensland only explicitly accepted the offer of representation, without clearly answering the question of adhesion, the latter vaguely saying that the private companies that owned the cables into that colony would be bound by the convention. Victoria finally agreed, in time to join NZ and SA's representatives at the postponed London conference of 1879.⁴⁶ In another precedent, after that conference, the *FO* pursued formal agreement from these three to the revised regulations. The *GPO* pursued Natal and the Cape, neither of which at that stage had external cables, until first, Natal, and, then, the Cape agreed.⁴⁷ All this meant that the colonial role in treaty making was expanding.

The third major decision arose, almost innocuously, from bilateral commercial treaties but, ultimately, had much wider consequences. In late 1875, the *FO* was preparing to open

⁴⁴ CO323/337/443-50; CO323/338/52-65, 95-104, 118-130, 140-3, 162-172, 180-5, 204-20, 234-52, 256-8, 263-87, TNA.

⁴⁵ Letter, *GPO* to *CO*, 12 September 1877, CO323/328/425-6, TNA.

⁴⁶ CO323/339/380-90, 405-17, TNA.

⁴⁷ CO323/328/424-8; CO323/336/131-5, 213-27, 259-61, 437-42, TNA.

negotiations with France on three treaties due to expire in mid-1877, which did not apply to the colonies, except to Australian wool, Canadian paper, plus India's cotton and jute. The *FO* told the *CO* that a number of such treaties would be duly renewed with other European powers and, although seeking the *CO*'s advice on colonial views, stressed that the colonies 'must be bound by the engagements entered into' by Britain.⁴⁸ Later, in early 1876, the *CO*'s Robert Herbert, raised the 'difficulty', into which it was placed in such treaty making, whereby it would be asked at short notice to advise on colonial interests, creating the 'danger' of important colonies objecting to a treaty's obligations. 'We cannot let the colonies negotiate their own treaties', he conceded, but they should be allowed a choice of accession, after the treaty's signing, giving them time to make a considered decision.⁴⁹ He provided a draft article to be inserted into commercial treaties to this effect. The *FO* readily agreed.⁵⁰

Understandably, no one realised the enormous ramifications of this decision. There were only two to four truly multilateral treaties in existence at this time (on maritime warfare, the *GPU*, *ITU* and the metric system, the latter to which Britain had not yet adhered). There was nothing to indicate the marked growth in such treaties in the coming years. This decision, in one sense liberal in its intent, would create unanticipated complications, for Britain, as it endeavoured to fulfil its growing international legal responsibilities. Foreign powers were entitled to feel aggrieved, when Britain signed major multilateral treaties, only for some of its larger territories and populations to exclude themselves from treaty obligations.

There is little doubt that the imperial government did not anticipate the change or, better, the further accelerated change in treaty making, when making these major decisions in the 1870s. For, thereafter, the rate of treaty making continued to accelerate. Britain signed approximately 500 bilateral and plurilateral treaties in the twenty-one years between 1880 and 1900. This annual rate of 23 was a substantial increase on the previous 29-year period and 23 times what it had been at century's start. About one-third of these were political treaties on various traditional subjects, an increased share compared to the 80 years prior. New political subjects, which had first arisen for Britain in the previous periods, continued to grow, including on extradition (10%) and claims or arbitration (3%). The total share of commercial treaties, evenly divided between standard commerce and/or navigation treaties and a variety of other subjects, fell to about 25%, though adding those on fisheries (16) makes it about 30%.

Within these total statistics is hidden the other major treaty development, the notable increase in multilateral treaties, over the previous period, when arguably, there had only been four.

⁴⁸ Letter, *FO* to *CO*, 9 October 1875, CO42/739/701-5, TNA.

⁴⁹ Minute, Herbert to Malcolm and Pauncefote, 17 April 1876, CO323/323/484-503, TNA.

⁵⁰ CO323/340/314-330, TNA.

Between 1880 and 1900, there were, arguably, about 30, dealing with six or seven truly global issues. On the, by then, well-established treaty subject of international communications, there were more treaty-making conferences of, respectively, the *UPU* at Lisbon (1885) Vienna (1891) and Washington (1897) and the *ITU* at Berlin (1885) and Paris (1890). If the *UPU*'s name change to 'Universal' was premature in 1878, it was certainly appropriate by 1897, when nearly every sovereign government had joined.⁵¹ The membership of the *ITU* at century's end was narrower, with Brazil the only American state. Japan and Siam, along with three more European states and Tunis, joined in 1885. China had earlier made a declaration of cooperation. The 1890 conference revised the operating regulations, without concluding a treaty.⁵² Meanwhile, in 1884, a related measure, which could also be seen as concerned with the conduct of war, a multilateral convention was signed in Paris, on France's initiative, for protection of submarine cables in war.⁵³ Britain signed with the reservation that, it would 'be free to act . . . as if the Convention did not exist', if it was a belligerent in war.⁵⁴

Reflecting the rise of commercial over rural interests, protection of intellectual, as well as, real property was also addressed multilaterally. Britain had signed eight more bilateral trademark treaties since 1871⁵⁵ and in 1884, after legislating anew, joined the *Union for the Protection of Industrial Property (UIP)*, with an *International Office (IOUIP)* in Berne, after a convention signed in 1883 by eight European and three South American states.⁵⁶ The aim was to give patent holders, in any member country, priority, for a fixed period, in

⁵¹ *Additional Act to the Convention of June 1, 1878, establishing a Universal Postal Union with Final Protocol*, Lisbon, 21 March 1885. New sovereign members were: **Europe**: Bulgaria, Montenegro. **Americas**: Bolivia, Brazil, Chile, Costa Rica, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Salvador, Uruguay, Venezuela. **Asia-Pacific**: Hawaii, Japan, Siam. **Africa**: Liberia. **Middle East**: Persia. *Universal Postal Convention*, Vienna, 4 July 1891. New foreign members were the Congo Free State, Tunis and, later, Bosnia-Herzegovina (1892). *Universal Postal Convention*, Washington, 15 June 1897. New signatories were China, Orange Free State and, later, Panama (1904).

⁵² *Regulations in execution of the International Telegraph Convention of July 22, 1875*, Berlin, 15 September 1875. The new members were: **Europe**: Bosnia-Herzegovina, Bulgaria and Montenegro. **Americas**: Brazil, Danish East Indies. **Asia**: Japan, Siam. **Africa**: Tunis. Regulations attached to the *International Telegraph Convention of St. Petersburg of 22 July 1875 (revision)*, Paris, 21 June 1890.

⁵³ *Convention for the Protection of Submarine Cables*, Paris, 14 March 1884. The original signatories of 1884-5 were: **Europe**: Austria, Belgium, Britain, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Romania, Russia, Serbia, Spain, Sweden-Norway. **Americas**: Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Guatemala, Salvador, Uruguay and the USA. **Asia**: Japan. **Middle East**: Persia, Turkey and Tunis (1889). Britain enacted the *Submarine Telegraph Act 1885*, 48 & 49 Vict. c. 49 and *Submarine Telegraph Act 1886*, 50 Vict. c. 3. On 1 December 1886 the parties signed a declaration explanatory of two articles in the convention. A final protocol was signed 7 July 1887 to put the treaty into effect from 1 May 1888.

⁵⁴ *Declaration of British government*, Paris, 14 March 1884.

⁵⁵ Russia (1781), Germany (1875), Spain (1875) Switzerland (1877 and 1880), USA (1877), Denmark (1879) and Portugal (1880). There is little scholarship on this. Leone Levi, *JSA*, 'On Trade Marks', 18 March 1859, pp. 262-72; Stephen P. Ladas, *The International Protection of Industrial Property*, HUP, Cambridge Mass. 1930.

⁵⁶ *The International Convention for the Protection of Industrial Property*, Paris, 20 March 1883; original signatories were **Europe**: Belgium, France, Italy, Netherlands, Portugal, Serbia, Spain and Switzerland. **Americas**: Brazil, Guatemala, which withdrew in months, and Salvador. *Protocol respecting the Expenses of the International Office (Industrial Property)*; *Bureau International de l'Union pour la Protection de la Propriété Industrielle* (International Office of the Union for the Protection of Industrial Property.) Cuba signed the protocol for the bureau in 1904 and Austria-Hungary in 1909.

securing patents in another member country, so as to limit poaching of inventions. At Madrid in 1891, two related conventions were signed, on the international registration of trademarks and prevention of false indications of origins in goods.⁵⁷ Britain strongly disagreed with some of the former's provisions, as did the *USA*. Neither signed.⁵⁸ Of the latter treaty, Britain was one of only eight signatories.⁵⁹ The 1883 head convention, slightly modified in 1900 by an additional act, was signed by all but two original parties, along with new parties.⁶⁰

Copyright was the second major intellectual property subject. Britain had signed thirteen bilateral treaties from 1846 when, in 1886, it was among ten original signatories, including six European, of the convention, additional article and protocol, creating the *International Union for the Protection of Literary and Artistic Works (UPLAW)*.⁶¹ The treaty gave reciprocal copyright protection and control over translations to member states' creators of literary, musical, dramatic, painting, engraving, sculpture works. In Paris in 1896, an even larger group signed a modifying additional act, as membership, thereafter, continued to increase.⁶²

Treaties on more general commercial questions remained bilateral, as governments jealously guarded their trading interests. One minor exception in this period was a very widely signed treaty at Brussels in 1890, to establish an *International Bureau for the Publication of Customs Tariffs (IBPCT)* to collect and disseminate data.⁶⁴ If tariffs could not be generally reduced or removed, greater knowledge of them could facilitate trade growth.⁶⁵ There was progress on one vital trade commodity. A series of plurilateral agreements, on the reduction of subsidisation of sugar production (1864, 1868, 1869, 1875, 1876, 1887, 1888 and 1889), as

⁵⁷ *Arrangement for the Prevention of False Origins in Goods & Arrangement concerning the International Registraton of Trade Marks*, Madrid, 14 April 1891. Original signatories, plus Tunis and less Salvador, signed a protocol in 1891 on expenses of the permanent international office in Berne.

⁵⁸ **Europe:** Belgium, France, Italy, Netherlands, Portugal, Spain and Switzerland. **Americas:** Guatemala. Original parties, Serbia, Brazil and Salvador, did not sign. Tunis was a new signatory

⁵⁹ Brazil, Britain, France, Guatemala, Portugal, Spain, Switzerland and Tunis.

⁶⁰ *Additional Act modifying the International Convention for the Protection of Industrial Property of 20 March 1883 & Madrid Agreement Concerning the International Registration of Marks of 14 April 1891 as revised*, Brussels, 14 December 1900. The two non-signing parties were Italy and Salvador. The new parties were Denmark, Japan and Serbia, plus later, Cuba, Germany and Mexico.

⁶¹ Prussia (1846 & 1855), Hanover (1847), France (1851), Anhalt- Bernburg & Anhalt-Dessau-Coethen (1853), Hamburg (1853), USA (1853), Belgium (1854), Spain (1857 & 1880), Sardinia (1860), Italy (1885) and Germany (1886). Convention for the creation of an International Union for the Protection of Literary and Artistic Works, Berne, 9 September 1886. The other original parties were from **Europe:** Belgium, Britain, France, Germany, Italy Luxembourg, Spain and Switzerland; **Americas:** Haiti; **Africa:** Liberia and Tunis.

⁶² Monaco (1889), Montenegro (1893) and Sweden-Norway (1896). Soon, Haiti (1898), Japan (1899), Denmark (1903) and Liberia (1908).

⁶⁴ *Convention concerning the Creation of an International Union for the Publication of Customs Tariffs*, Brussels, 5 July 1890. The earliest non-colonial members of the *IUPCT* were: **Europe:** Austria-Hungary, Belgium, Britain, Denmark, France, Greece, Italy, Netherlands, Romania, Russia, Serbia, Spain, Switzerland, Bulgaria (1891), Norway (1896), Germany & Sweden (1904). **Americas:** Argentina, Bolivia, Brazil, Chila, Costa Rica, Dominincan Republic, Guatemala, Ecudaor, Haiti, Mexico, Nicaragua, Paraguay, Peru, Salvador, *USA*, Uruguay, Venezuela, Honduras (1898), Panama (1904), Cuba (1909). **Africa:** Congo, Egypt. **Middle East:** Turkey, Persia (1892); **Asia:** Siam, Japan (1891), China (1894).

⁶⁵ This can be seen as a forerunner of the *General Agreement on Trade and Tariffs* of 1947 and the proposed but, unrealised, *International Trade Organisation*.

cane and beet sugar producing countries competed, saw signatories steadily increase from the original four, culminating in the multilateral agreement of 1902.⁶⁶

On international transportation, which was as fundamental to commerce as communications, there were numerous plurilateral treaties with respect to waterways important to international trade (Dardanelles, 1856, Scheldt, 1863 and Suez Canal, 1885 and 1888) and transnational rivers (Danube, 1865, 1879, 1881 and 1883, Congo and Niger, 1885). On railways, there were successive Continental congresses. (1883, 1886, 1890, 1893 and 1898), including for standardisation of freight travel, leading to the creation in 1893 at Berne of the *Office Central des Transports Internationaux Ferroviaires (OCTI)*.⁶⁷ On maritime transportation, the *ILA* promoted standardisation from 1877 but the *USA*'s proposal at Washington in 1889, for a *PGIO*, went unrealised until, in 1897, the *Comité Maritime International (CMI)* was founded, with a permanent bureau at Antwerp. No related treaties were proposed yet, while Continental members, forming national maritime associations, including one of British shipowners (formed in 1893), jointly pressed Britain, unsuccessfully to attend its successive semi-official conferences at Monaco (1901), Copenhagen (1902) and Lisbon (1904).⁶⁸

Inevitably, the growth of commerce-driven international transport and communications not only facilitated further spread of commerce but also of diseases. The first international action on sanitary measures, such as quarantine and reporting of outbreaks of pandemic diseases, notably cholera, plague and yellow fever, had arguably begun in 1831, with the Egyptian initiative to engage foreign consuls to serve on an *International Quarantine Board* in Alexandria.⁶⁹ There was no treaty on the subject until 1851, when France, Portugal and

⁶⁶ Belgium, Britain, France and the Netherlands were the first parties. Austria-Hungary, Germany, Italy, Russia and Spain were later signatories by 1889.

⁶⁷ First, Austria-Hungary, Bulgaria, Serbia and Turkey concluded the *Convention respecting railways*, Vienna, 9 May 1883. In 1885, Belgium convened in Brussels the first conference of over 200 delegates from Europe and the *USA* to consider ways of improving railway transportation for freight and, which founded *L'association internationale du Congrès des Chemins de Fer*, based there. Congresses were held in Milan (1887), Paris (1889), St. Petersburg (1892), London (1895) and Paris (1900). On 15 May 1886, at Berne, Austria-Hungary, France, Germany, Italy and Switzerland, with Netherlands acceding later, signed two final protocols of the second international conference 'for the technical unification of railways' and 'to settle arrangements for locking freight cars before going through customs.' By the *International Convention respecting the carriage of goods by rail*, Berne, 14 October 1890, seventeen Continental governments agreed on railway freight regulations and established *OCTI* at Berne in 1893. This was followed by the *Special arrangement relative to the international transport of certain goods by rail*, Berne, 13 June 1893; *Convention respecting transport of goods by rail*, Paris, 9 August 1893; *Additional declaration to the convention respecting transport of goods by rail*, Berne, 20 September 1893; *Additional convention respecting transport of goods by rail*, Paris, 16 June 1898; *Arrangement respecting transport of goods by rail*, Paris, 24 October 1898.

⁶⁸ N. V. Boeg, 'The International Maritime Committee and the Development of Maritime Law,' *NJIL*, 34, 1964, pp. 200-5. CO323/475/173-88; CO323/479/277-80, TNA.

⁶⁹ LeVerne Kuhnke, *Lives at Risk: Public Health in Nineteenth Century Egypt*, UCalP, Berkeley, Ca., 1990; Nancy Elizabeth Gallagher, *Egypt's Other Wars: Epidemics and the Politics of Health*, Syracuse UP, Syracuse, NY, 1990. Norman Howard-Jones, Norman Howard-Jones, 'Origins of international health work', *BMJ*, 1, 1950, pp. 1032-37 & *The scientific background to the International Sanitary Conferences 1851-1938*, WHO, Geneva, 1975.

Sardinia, signed a convention in Paris, which the last two shortly denounced.⁷⁰ Disagreement over measures, arising from concerns over restrictions on trade and shipping—notably by Britain—limited cooperation. No multilateral convention was concluded at subsequent conferences at Paris (1859, where a wider convention went unratified), Constantinople (1866), Vienna (1874), Washington (1881) and Rome (1885), until Venice in 1892. This and the conventions concluded in Dresden (1893) and Paris (1894) were on cholera, focusing on Europe. That, at Venice (1897), was on the plague and more global in focus. Britain had signed and ratified all by 1900, with a reservation on the last.⁷¹

Natural resources, which lay outside national jurisdictions, were becoming increasingly important as an international issue as powers extended their external outreach, and their commerce and populations grew at home. Agreements to preserve resources, such as fisheries, to avoid competition driven over-exploitation or conflict, first appeared in earlier traditional treaties. The *USA's* independence forced Britain to enter fishery treaties for the north Atlantic, especially off Newfoundland, from 1818.⁷² Those with France followed from 1857.⁷³ For the North Sea, Britain concluded bilateral fishery treaties with France (1839 and 1867) and Belgium (1852 and 1891), plus plurilateral treaties, with those two, plus Denmark, Germany and the Netherlands (1882 and 1889). Treaties with the *USA* on the Behring Sea's fur seals (1891, 1892 and 1896) would eventually become plurilateral. Britain stood apart from European conventions on measures against *phylloxera* (1878, 1881 and 1889), as it had no grapevines, but advised those of its colonies which did, without allowing accession.⁷⁴ In 1895, Britain joined twelve European governments in Paris in signing a protocol on the 'protection' of wild birds important to forests and agriculture but stood out from the successor

⁷⁰ J. Lane Notter, 'International Sanitary Conferences of the Victorian Era', *TESL*, NS, 17(1), 1898, pp. 1-14; Norman Howard-Jones, 'Origins of international health work', *BMJ*, 1, 1950, pp. 1032-37; J. H. L. Cumpston, *Australian Maritime Agreement and the Evolution of International Agreements concerning Quarantine*, Albert J. Mullett, Govt. Printer, Melbourne, 1913; Neville M. Goodman, *International Health Organizations and their work*, The Blakiston Company, Philadelphia, 1952; Norman Howard-Jones, *The scientific background to the International Sanitary Conferences 1851-1938*, World Health Organization, Geneva, 1975.

⁷¹ *International Sanitary Conventions*: Venice, 30 January 1892. Austria, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, Netherlands, Portugal, Russia, Spain, Sweden-Norway and Turkey; Dresden, 15 April 1893. Austria, Belgium, France, Germany, Great Britain, Italy, Liechtenstein, Luxembourg, Netherlands, Russia, Serbia and Switzerland; Paris, 3 April 1894. Austria, Belgium, Denmark, France, Germany, Great Britain, Greece, Hungary, Italy, Netherlands, Persia, Portugal, Russia, Spain, Sweden-Norway. Britain ratified and made a separate declaration on 18 November 1897; Venice, 19 March 1897. Austria, Belgium, Denmark, France, Germany, Great Britain, Greece (did not ratify), Italy, Luxembourg, Montenegro, Netherlands, Persia, Portugal, Rumania, Russia, Serbia, Spain, Sweden-Norway, Switzerland and Turkey. Britain ratified on 20 August 1900.

⁷² Britain's treaties with the *USA* exclusively or partly on fisheries followed in 1854, 1871, 1873, 1874 and 1888.

⁷³ In 1854, 1871, 1884, 1885 and 1891.

⁷⁴ This was a precursor to the formation of the information gathering and reporting *International Institute for Agriculture* in 1905. Although Britain did not adhere, Victoria enacted legislation against phylloxera: *Vine Disease Act* 54 Vic. no. 1155 of 1890 & 62 Vic. no. 1578 of 1898.

convention (1902).⁷⁵ In 1900, in London, Britain led five European governments, plus the Congo Free State and Liberia, in signing a convention to 'preserve' African game.⁷⁶

Some other multi-party treaties then might, along with those on anti-slave trafficking, arguably, as early human rights' protection. On 'native' protection and/or slavery, an original eleven European states, along with Britain, the USA and Turkey, with others, later, signed the *General Acts* of the conferences at Berlin (1885) and Brussels (1890) on Africa. They created the *Bureau de la Repression de la Traite (BRT)* in Brussels and *Bureau International Maritime de la Traite (BIMT)* in Zanzibar to monitor their agreement to restrict slave, arms and liquor trafficking.⁷⁷ On labour conditions, Britain joined most Continental governments in signing four protocols in Berlin (1890), the first on this subject.⁷⁸

Across the Atlantic, there had been some parallel developments. The idea of some form of organisation of the recently independent American republics, then exclusively for Latin America, is dated to the Congress of Panama in 1826, following in the wake of the USA's announced 'Monroe Doctrine' (1823). The proposed treaty, on a mutual defence agreement and general representative assembly, was signed only by its sponsor, Gran Colombia.⁷⁹ In 1888-9, the USA revived pan-Americanism, mainly for trade purposes, and an eighteen-nation conference at Washington D. C., established the *International Union of American Republics (IUAR)*, served by the *Commercial Bureau of the American Republics*, based there.

Colonies proceeded on their own various paths in responding to Britain's invitations to accede to certain of these new multilateral treaties. Britain did not inform or invite accession from colonies to the metric convention, as, not being an original party, it had not negotiated a

⁷⁵ *Protocol respecting proposed International Convention for the Protection of Wild Birds Useful to Agriculture*, Paris, 29 June 1895. The signatories were Austria-Hungary, Belgium, Britain, France, Germany, Italy, Monaco, Netherlands, Portugal, Russia, Spain, Sweden-Norway and Switzerland. Otto Herman, *The International Convention for the Protection of Birds, concluded in 1902, and Hungary*, Victor Hornyánsky, Court Printer, Budapest, 1907.

⁷⁶ *Convention for the Preservation of the Wild Birds, Animals and Fish in Africa*, London, 19 May 1900. The parties were Britain, Congo Free State, France, Germany, Italy, Liberia, Portugal and Spain. This did not enter into force and was succeeded by the plurilateral *Convention Relative to the Preservation of Fauna and Flora in the Natural State*, London, 8 November 1933, *IF* 1936. Robert Boardman, *International organization and the conservation of nature*, Macmillan, London, 1981, pp. 34-9; Mark Cioc, *The Game of Conservation: International Treaties to Protect the World's Migratory Animals*, OhUP, Athens, Ohio, 2009.

⁷⁷ *General Act of the Congress of Berlin respecting (1) Freedom of trade in the Bason of the Congo, (2) the Slave Trade (3) Neutrality of Territories in the Basin of the Congo (4) Navigation of the Congo (5) Navigation of the Niger; and (6) Rules for Future Occupation on the Coast of the African Continent*, 26 February 1885; *General Act of the Brussels conference relating to the African Slave Trade, with annex & declaration*, Brussels, 2 July 1890, EIF 31 August 1891; AABP; BFSP 82/55; CTS 173/293; *International Convention respecting the Liquor Traffic in Africa*, Brussels, 8 June 1900. The core group of European states, along with Britain, the USA and Turkey, were joined, variously, in the latter two conventions by Luxembourg, the Congo, Liberia, Persia and Zanzibar. A tripartite treaty between Britain, the USA and Germany on Samoa (1889) contained similar provisions.

⁷⁸ Curiously, no protocols, cited in work files, are recorded in the FCO's treaty database or other treaty lists.

⁷⁹ Frances L. Reinhold, 'New research on the first pan-American, 1938, *HAHR*, 18(3), 1938, pp. 342-63; Ralph Sanders, 'Congressional Reaction in the United States to the Panama Congress of 1826', *The Americas*, October 1954, 11(2), pp. 141-54.

provision for separate colonial adhesion. On the *ITU*, all Australia's other colonies, *NSW* (1884), *Tasmania* (1885), *WA* (1894) and, lastly, *Queensland* (1896), eventually adhered. The Australian colonies' non-adherence to the *UPU* had come under local criticism from local commercial bodies. All but *SA* sent representatives to the congress at Vienna in 1891, after which all six colonies were admitted in 1892, sharing a single vote with *NZ*.⁸⁰ (This was now one of three votes, including Canada and all other colonies jointly, allowed to British possessions, separate to one each for Britain and British India.⁸¹) Perhaps surprisingly, Britain allowed a choice of adhesion to the submarine cables convention, as it might be equally seen as a 'political' (conduct of war) not communications treaty and, to which, colonies could only give effect within their three-mile maritime jurisdiction. *SA* and *Victoria* (1885), *Queensland* (1886) and *NSW*, *Western Australia (WA)* and *Tasmania* (1888) all adhered. In 1890, all Australia's colonies were represented, by *NZ*, at the conference, which established the Brussels international customs bureau. *NSW*, *Tasmania*, *Victoria* and *Queensland*, plus *NZ*, immediately adhered. In 1897, however, when membership renewal arose, the Australian four (and eight other British colonies, not including *NZ*) were the only original parties to decline, due to costs and anticipation of the coming Commonwealth taking over customs.⁸² Britain informed colonies of the railway congresses in Europe through the 1890s but, not being a party, did not offer separate accession. Generally, partly due to geographic distance, the Australian colonies did not see the relevance to themselves of some of these major multilateral treaties and/or were concerned by financial costs of accession.⁸³

On protection of industrial property, Britain was not an original signatory to the 1883 convention but, after passing the *Patents, Designs, and Trade Marks Act 1883*, declared its accession in April the next year, while reserving the right for separate colonial adhesion, through *OiCs* under that *Act*, once colonies also had legislated, as necessary.⁸⁴ The *CO*, urged by the *BoT*, had already advised the desirability of uniform legislation and now provided copies of its *Act*.⁸⁵ (Most British colonies already had variously followed earlier English legislation on patents, inventions, designs and merchandise or trade marks. *NSW* had led Australasia in 1851, with only *Queensland* not yet legislating.⁸⁶) The colonial response proved

⁸⁰ *SMH*, 20 January & 20, 26 November 1890; 2, 8 April; 16, 30 May; 6, 11 June, 24 September; 2 October; 31 December 1891.

⁸¹ France had two votes for its possessions, while Denmark, Germany, Netherlands, Portugal and Spain one each.

⁸² Item 4, CRS SP822/37; minute, Barton to Atlee Hunt, 22 February 1901, 1958/16751, CRS A425, NAA.

⁸³ Item 4, CRS SP822/37, NAA.

⁸⁴ 46 & 47 Vict. c. 57, 1883, amended by 48 & 49 Vict. c. 63, 1885.

⁸⁵ CO323/354/414-9, 440-64; CO854/24/364; CO323/357/552-63, 591-600, 662-5; CO854/25/59-62, 112-8; CO862/6/97, 125, 145, TNA.

⁸⁶ *NSW*: 16 Vic. no. 24, 1851; 28 Vic. no. 9, 1865; 42 Vic. no. 27, 1879. *Tas*: 22 Vic. no. 22, 1858; 28 Vic. No. 6, 1864. *WA*: 36 Vic. no. 1, 1872; *SA*: 22 and 23 Vic. no. 18, 1859; 26 & 27 Vic. no. 20, 1863; 40 & 41 Vic. no. 78, 1877; 41 and 42 Vic. no. 101, 1878; 44 Vic. no. 201, 1881. *NZ*: 24 Vic. no. 14, 1860; 30 Vic. no. 9, 1866; 33 & 34

underwhelming. Just before the second conference of 1891, the *CO* renewed its call for both accession and uniform legislation but the Australian colonies were not keen. *NSW* replied that such action was undesirable and impracticable, Victoria pointed to difficulties, while Tasmania and *SA* both said that it was a matter best left to a federal government. *WA* was not prepared to act without the others. Although the convention had prompted a fresh wave of legislation, of mixed applicability, throughout the empire, only Queensland and *NZ* acceded through 1900.⁸⁷ Even they objected to uniform legislation, with *NZ* admitting that there would be advantages but it would be too expensive. Canada thought such legislation desirable but agreed with Newfoundland over difficulties. Both the Cape and Natal objected. Subsequently, the *CO* relayed the *IOUPIP*'s requests for statistical information, to which most colonies, including all Australasia's, complied. Only Canada objected because it had not adhered.

On copyright, in Australasia, with limited domestic publishing production and local legislative application necessarily limited jurisdictionally, only *NZ* (1842), Victoria (1869), *SA* (1878) and *NSW* (1879) had earlier followed Britain's legislative lead. Britain did not consult colonies in advance of Berne in 1886 but secured provision for their joining the union. As with extradition, imperial legislation and *OiCs* applied the treaty to colonies, except Canada. Colonies were consulted on the imperial bills before enactment, which all but Queensland approved, with most indicating that they would make further enactments. Ultimately, only Queensland (1888 and 1893), Victoria (1890) and *WA* (1887 and 1895) legislated. Tasmania only so did for newspapers (1891).⁸⁸

On international sanitary measures, England had enacted around sixteen specific quarantine acts between 1710 and 1825. *NSW* was Australia's first colony to follow in 1832, as, later, did the others.⁸⁹ The unrequited invitation to Australasia's colonies to attend the Washington conference in 1881 (Cape Colony also declined and only Canada attended), led to Australia's first inter-colonial quarantine conference, focusing on greater uniformity of laws.⁹⁰ Britain held that notice of the 1892 conference was too short to invite Australasia's colonies and, as with the 1893 conference, really only concerned Europe. Nonetheless, the latter conference,

Vic. no. 89, 1870; 43 Vic. no. 30, 1879; 45 Vic. no. 22, 1881; 46 Vic. no. 4 & no. 16, 1882. **Vic:** 27 Vic. no. 221, 1864; 40 Vic. no. 539, 1876.

⁸⁷ CO323/357/591-605, TNA.

⁸⁸ **NZ:** Ordinance no. 18 of 1842; **Victoria:** 33 Vic. no. 350 of 1869 & 54 Vic. no. 1076 of 1890; **SA:** 41 & 42 Vic. no. 95 of 1878 and **NSW:** 42 Vic. no. 20 of 1879; **Qld:** 51 Vic. no. 2 of 1887-8 & 56 Vic. no. 6 of 1892-3; **WA:** 51 Vic. no. 3 of 1887 & 59 Vic. no. 24 of 1895; **Tas:** 55 Vic. no. 49 of 1891. CO862/7/105, TNA.

⁸⁹ **UK:** 9 Ann. c. 2, 1710; 6 Geo. 4, c. 78, 1825. **NSW:** 3 Wm. 4, no. 1, 1832; 5 Vic. no. 12, 1841; 13 Vic. nos. 35 & 36, 1849; 58 Vic. no. 2, 1894; 61 Vic. no. 25, 1897. **WA:** 3 Wm. 4, no. 1, 1833; 12 Vic. no. 24, 1849; 14 Vic. no. 2, 1851; 32 Vic. no. 12, 1868; 52 Vic. no. 7, 1888. **Tas:** 2 Vic. no. 11, 1838; 4 Vic. no. 19, 1840; 5 Vic. no. 14, 1841; 45 Vic. no. 1, 1881. **NZ:** 5 Vic. no. 15, 1841-2; 40 Vic. no. 60, 1876. **SA:** Ordinance no. 3, 1850; 40 & 41 Vic. no. 64, 1877; 55 & 56 Vic. no. 545, 1892; 59 & 60 Vic. no. 659, 1896. **Vic:** 16 Vic. no. 23, 1852; 17 Vic. no. 28, 1854; 28 Vic. no. 264, 1865. **Qld:** 27 Vic. no. 9, 1863; 50 Vic. no. 25, 1886.

⁹⁰ CO862/5/51, TNA. Cumpston, *op. cit.*, pp. 9-14.

which unexpectedly did conclude a treaty, wanted some colonies advised (Malta, Gibraltar, Cyprus and Canada) and invited membership of all British colonies. Canada, Natal, Ceylon, St. Helena and Lagos agreed but all others, including Australasia's, declined.⁹¹ Britain's colonies were not invited to the 1894 conference, where Britain signed with a declaration that it applied to all except the self-governing colonies. As ratification by all parties was delayed, until after the 1897 Venice conference, colonies were not yet invited to accede. These developments led to Australia's second intercolonial quarantine conference and further legislation but only WA acceded to the convention. (Canada also stood out). This was the main subject at the third intercolonial quarantine conference in 1900 but, like a number of multilateral treaty subjects, these colonies were now looking to the coming Commonwealth to take over responsibility for such treaty matters, as quarantine fell within its proposed powers.

3. 'a distinctively disruptive measure': treaties and the constitution, 1890-1900

Britain's successful determination to remove any suggestion of a separate treaty power in the Commonwealth's constitution would create later problems, as it sought to secure the Commonwealth's accession to treaties.

Treaties were not significant subjects for most Australian (but not British) framers of the Commonwealth constitution during the 1890s. With acceptance of the imperial government's paramountcy in such matters and, probably, a general lack of interest and knowledge among many local politicians, references to treaties were scarce. At the federation conference of 1890, Queensland's Samuel Griffith spoke of the imperial *Act* (of 1873) empowering the colonies to make 'treaties' containing 'differential duties'. He called the Federal Council 'a treaty-making body'. (He seems to have been anticipating inter-colonial 'treaties' only.)⁹² Victoria's Alfred Deakin referred, without explicit commendation, to the federal courts of the *USA* having jurisdiction over treaties, as well as federal laws.⁹³ Tasmania's Andrew Inglis Clark went further, anticipating the proposed federation making foreign treaties.

Inglis Clark had met fellow Unitarians, including the famed jurist Oliver Wendell Holmes, when touring the *USA*, where he was impressed by its federal constitution, which made express provision for treaties. His draft for the constitutional convention of 1891 included, in the powers of the proposed federal parliament, some drawn almost *verbatim* from the *USA*

⁹¹ CO323/385/516-21, 562-71; CO323/394/59-71, 75-7, 283-312; CO854/31/615-31, 636; CO323/398/18-21, 46-57, 121-2, 159-61, 186-7, 298-301, 501-5; CO323/402/226-8, 274-84, 305-7, 493-7, 527-8, TNA.

⁹² *The Proceedings of the Federation Conference, 1890, held in the Parliament House, Melbourne*, no. 3, 10 February 1890, Government Printer, Melbourne, 1890, pp. 9-11. R. B. Joyce, 'Griffith, Sir Samuel Walker (1845-1920)', *ADB*, vol. 9, NCB:ANU, 1983, <http://adb.anu.edu.au/biography/griffith-sir-samuel-walker-445/text11119>.

⁹³ *The Proceedings, 1890 p.* 25. R. Norris, 'Deakin, Alfred (1856-1919)', *ADB*, vol. 8, NCB:ANU Canberra, 1981, <http://adb.anu.edu.au/biography/deakin-alfred-5927/text10099>; J.A. La Nauze, *Alfred Deakin: a biography*, 2 vols., MUP, Carlton, Vic., 1965.

constitution. These included, from Article 1(s.7), ‘To define and punish piracies and felonies on the high seas and offences against the Laws of Nations’. He also provided that, not only federal laws but also, ‘all Treaties which shall be made by the Federal Dominion’ were to be binding on ‘the Courts, Judges, and people of every Province, anything made by the laws of the Parliament of any Province to the contrary notwithstanding’. Furthermore, any law by a ‘Province’, which was repugnant to this act, any federal act or ‘any such Treaty’, would be ‘void and inoperative’, to the extent of its repugnancy. The federal judicial power would extend to all cases, among other matters, ‘under any Treaty made’ by the federal government ‘with any other Country.’⁹⁴ Both of these were quite different wording of the similar provisions in the *USA* constitution (Articles III s. 2 and VI).

At the convention, the Griffith-chaired constitutional committee appointed a drafting committee of Griffith, Inglis Clark and SA’s radical liberal Charles Kingston.⁹⁵ Griffith was the dominant voice, especially after the more middle-ground liberal, NSW’s Edmund Barton, replaced an ailing Inglis Clark, whose expansive *USA*-inspired provision for the ‘law of nations’ did not survive. Surprisingly, his provision for treaties being made by the federal government, which would be binding on courts and provincial parliaments did, less the explicit provision for voiding provincial laws repugnant to such treaties. An exclusive federal powers list was inspired by the *Federal Council of Australasia Act* and the *USA*’s constitution (Article I, s.8). Among modifications to Inglis Clark’s list, was the insertion (possibly by Griffith) of ‘External affairs and treaties’. From what Griffith had said in 1890 and Barton affirmed in 1897, Griffith had in mind the domestic application of treaties, such as for which Canada’s constitution provided, whose validity local courts could not challenge.⁹⁶

In London, the bill’s treaty provisions were the first issues noted by the experienced and legally trained assistant undersecretary, Sir John Bramston. He described the convention’s apparent presumption, that the imperial parliament would pass such a bill, ‘without alteration’, as a ‘false move.’⁹⁷ Ultimately, the *CO*’s head, Sir Robert Herbert (who, like Bramston, had served in Australia), being sensitive to ‘offend[ing]’ the colonists, decided that

⁹⁴ See, respectively, sections 45(viii), 92 and 62(ii), Clark, AI 1891, Draft Federation Bill and proposed amendments, Item C4/E18, UTLS&RC. H. Reynolds, ‘Clark, Andrew Inglis (1848–1907)’, *ADB*, vol. 3, NCB:ANU, 1969, <http://adb.anu.edu.au/biography/clark-andrew-inglis-3211/text4835>.

⁹⁵ The constitutional committee, all legally trained, comprised these three, plus NSW’s ageing Sir Henry Parkes and rising Edmund Barton, Deakin and SA’s more conservative John Downer. John Playford, ‘Kingston, Charles Cameron (1850–1908)’, *ADB*, vol. 9, NCB:ANU, Canberra, 1983, <http://adb.anu.edu.au/biography/kingston-charles-cameron-6966/text12099>; Martha Rutledge, ‘Barton, Sir Edmund (Toby) (1849–1920)’, *ADB*, vol. 7, NCB:ANU, Canberra, 1979, <http://adb.anu.edu.au/biography/barton-sir-edmund-toby-71/text8629>; Peter Bartlett, ‘Downer, Sir John William (1843–1915)’, *ADB*, vol. 8, NCB:ANU, MUP, Canberra, 1981, <http://adb.anu.edu.au/biography/downer-sir-john-william-6007/text10261>.

⁹⁶ Official Record of the Debates of the National Australasian Convention, Sydney, 2 March to 9 April, 1891, Angus & Robertson, Sydney, 1891. *NSW LC*, vol. 89, 17 August 1897, p. 3011.

⁹⁷ File minute, Bramston, 26 May 1891, CO201/612/37–39, TNA. R. B. Joyce, ‘Bramston, Sir John (1832–1921)’, *ADB*, vol. 3, NCB:ANU, 1969, <http://adb.anu.edu.au/biography/bramston-sir-john-3044/text4475>.

the *CO* should remain 'quite inactive', as the bill was yet to be finalised.⁹⁸ Indeed, only after a premiers' meeting in 1895 was federation revived, with the next convention's first session not held until early 1897, where all treaty provisions survived, again with little comment, after which this draft was also sent to London, where the reaction was now very different.

In the *CO*, Charles Davis, in the initial detailed review, seemed unconcerned, though observing, with possible disdain, the 'growth of the "Democratic Idea"', which its latest form reflected.⁹⁹ The rising, legally trained John Anderson, in contrast, bridled sharply on a large number of points of this 'distinctly disruptive measure', with its 'slavish adherence' to the 1891 draft and *USA* inspiration. Specifically, after observing that the provision that the act 'shall bind the Crown', was both 'unnecessary and offensive', he turned to the treaty provisions in the preamble's s.VII, which he also deemed 'unnecessary', given s.52. For, taken together, he thought that they 'appear[ed] to mean that the Commonwealth is to make its own commercial & other treaties.'¹⁰⁰

*I do not see how they can be allowed to stand. The power of making Treaties belongs to the Sovereign, and unless the Commonwealth is to be completely independent, the control of its external relations must remain in the hands of H[er]. M[ajesty].*¹⁰¹

He declared. 'All treaties are in the nature of contracts between sovereigns, and the Queen is sovereign of Australia just as much as of the United Kingdom.'¹⁰² So, to

*give the Commonwealth the power of making treaties and of conducting its own External affairs is equivalent to making it an independent sovereign state directly responsible to foreign countries. Treaties may and have been made by H.M. affecting part or parts only of her dominions, but it is to Her Majesty's Gov[ernmen]t that the foreign powers, party to the Treaty, looks for the strict observance of the Treaty obligations not to the Gov[ernmen]t of those part of H.M.'s dominions to which the Treaty applies.*¹⁰³

He added testily that, if these provisions were 'seriously intended', then

*it would have been simpler and easier to invite the Imperial Parliament to say at once, "The Commonwealth of Australia shall henceforth be an independent sovereign state provided that H.M. may appoint a Governor-General to act as figurehead of such state and may disallow any law passed by the legislature within a year".*¹⁰⁴

If this was not the intention, he concluded, then the bill had to be 'carefully redrafted, so as to express clearly and unmistakeably what fraction of the sovereignty they mean to leave with

⁹⁸ File minute, Herbert, 28 May 1891, CO201/612/37-39, TNA. B. A. Knox Herbert, Sir Robert George Wyndham (1831–1905), *ADB*, vol. 4, NCB:ANU, 1972, <http://adb.anu.edu.au/biography/herbert-sir-robert-george-wyndham-3757/text5921>.

⁹⁹ Minute, Davis to Bramston, 17 June 1897, CO13/152/158-162, TNA.

¹⁰⁰ Minute, Anderson to Bramston, 19 June 1897, CO13/152/164-71, TNA.

¹⁰¹ *ibid.* He added that the framers were 'forgetting or overlooking of the difference between a Federal union of independent sovereign states, and a union of colonies, which are not sovereign states, but states exercising certain functions specifically delegated to them. In other words, they have proceeded as if the whole of the functions and powers of the sovereign had to be divided between the Commonwealth and the states instead of only the part already delegated to the states and perhaps some additional parts due to the enlargement of the area within which the powers are to be exercised.'

¹⁰² Memorandum by Anderson, 7 July 1897, CO13/152/186-97, TNA.

¹⁰³ Memorandum by Anderson, 7 July 1897, CO13/152/186-97, TNA.

¹⁰⁴ *ibid.*

the Crown & Parl[iamen]t of the U.K'.¹⁰⁵

Anderson was also troubled by what he called a 'serious constitutional innovation', in that s.VII provided that treaties, as well as federal laws, would be 'immediately binding on the Courts, Judges and people, of every State, and of every part of the Commonwealth.'¹⁰⁶ He conceded that treaties were binding on signing sovereigns immediately but, as the Privy Council had confirmed in 1892, where such treaties involved 'any interference with the rights or any property of individuals or any restriction on their liberty of action', legislation was necessary to enable the Crown to enforce them. If a treaty was ratified by legislation, it became binding on judges and courts 'not as a Treaty, but as a law.'¹⁰⁷

*To make Treaties made by the Crown on behalf of the Commonwealth immediately binding not only on the Crown but on all H. M.'s subjects in the Commonwealth and on the Courts would be an invasion of the liberty of the subject and an encroachment on the powers of Parliament.*¹⁰⁸

He gave the example of a treaty, applied to the Commonwealth, granting most favoured nation treatment, as regards nationals, navigation and commerce. If immediately binding on ratification on the Commonwealth by s.VII and there were, then, no discriminatory Commonwealth laws, the Crown would be equally bound to refuse assent to any later discriminatory legislation, in conflict with the treaty.¹⁰⁹

Anderson also held 'most serious objections' to s.52, the opening clause of which would grant to the Commonwealth 'full power and authority to make laws', with respect to the listed subjects. He noted that these included 'regulation of trade and commerce with other countries', copyright, 'navigation and shipping' and 'external affairs and treaties'. As he had previously warned about s.VII, the first and fourth of these suggested the Commonwealth would assert a treaty making power. Even the power of 'external affairs', without explicit reference to treaties, concerned him. Moreover, the section's opening words, if read with s.52(36), could empower the Commonwealth to repeal important imperial legislation, associated with treaties, such as on copyright and navigation.¹¹⁰ He could not see another

¹⁰⁵ *ibid.* He also objected to the provision giving the proposed high court jurisdiction 'in all matters' affecting 'consuls or other representatives of other countries', which he said were 'practically taken bodily' from the USA's constitution. He mused whether this was based on misunderstanding that 'ministers of a foreign power are accredited to the sovereign of a state, and unless Australia setting up as such and means to have its own ambassadors and ministers, it cannot have the ministers of foreign powers in Australia.'

¹⁰⁶ Copy of Federal Constitution under the Crown, framed and approved by the Australasian Federal Convention, at Adelaide, South Australia, 22nd March to 23rd April, 1897.

¹⁰⁷ Memorandum by Anderson, 7 July 1897, CO13/152/186-97, TNA. The judgement to which he referred is *Walker v. Baird and another*, [1892], LRAC (London): 491-7, *Canadian Reports, Appeal Cases* (Toronto), 10: 262-71 (Privy Council).

¹⁰⁸ Memorandum by Anderson, 7 July 1897, CO13/152/186-97, TNA.

¹⁰⁹ *ibid.*

¹¹⁰ This provided: 'The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States concerned, of any legislative powers which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.'

purpose for such provisions, except to make the imperial and Commonwealth parliaments co-equal. If ‘seriously’ intended, such ‘Full power to legislate in regards to these matters is equivalent to separation’, a demand to which, he concluded with ‘no hesitation’, the imperial parliament would never consent. For that parliament would not

*provide funds for the defence of a state . . . the foreign affairs, shipping and treaties of which it has not full and undivided control, through ministers responsible to it.*¹¹¹

So, in view of the *LO* doubts that the *Colonial Laws Validity Act 1865 (CLVA)* would apply to the Commonwealth, given that this *Act*’s definition of ‘colony’ differed from the bill’s, he held it necessary to make explicit expression as to its applicability.

Anderson had yet another major concern on treaties. He pointed out that under s.57 the governor-general’s power to withhold or reserve assent to a bill would be ‘subject to the provisions of the Constitution’ and, so, had to be read with s.70, which restricted him to acting only ‘in Council’. He warned that if a bill was ‘inconsistent with the obligations’ of a treaty applied to the Commonwealth, the governor-general, if ‘advised by his Ministers’,

*must assent, and a breach of the treaty arises for which HMG are responsible. . . The position of the Governor if he can no longer act on instructions from H.M.G. on matters of Imperial concern is entirely revolutionized, and the unity of the empire ceases from the moment it becomes impossible for HM to discharge effectively through Her Representative her responsibilities as sovereign.*¹¹³

He held that the governor-general must, in some unspecified matters, be able to act on royal instructions and not just (Commonwealth) ministerial advice.

To much of this, Bramston affirmed ‘Certainly’, adding that they would have to explain to the Australians that ‘no foreign power will make a treaty except with H. M.’¹¹⁴ The new undersecretary (junior minister), Edward Wingfield, cautioned. ‘Yes—but I expect they will try to obtain power to make separate treaties or conventions’ (a fear, proven unfounded). He affirmed that ‘the clauses which purport to confer treaty making powers’ were to be ‘struck out’, so as ‘not to conflict with the exclusive right of the Crown to make treaties.’¹¹⁵ Bramston floated the idea of sending a constitutional expert to Australia, to explain ‘how far they can go without infringing on the essential attributes of H. M. & her Gov[ernmen]t. here.’¹¹⁶ Ultimately, that or a formal written despatch were ruled out. Instead, colonial secretary, Joseph Chamberlain resolved on a more prudent or deceptive course. The ‘desirable’ changes were more likely to be accepted, he confided, ‘if they **appeared to proceed spontaneously**

¹¹¹ *An Act to remove Doubts as to the Validity of Colonial Laws 1865*, 28 & 29 Vict. c. 63.

¹¹³ Memorandum by Anderson, 7 July 1897, CO13/152/186-97, TNA.

¹¹⁴ Margin note by Bramston on minute, Anderson to Bramston, 19 June 1897, CO13/152/164, TNA.

¹¹⁵ Margin note by Wingfield on minute, Anderson to Bramston, 19 June 1897, CO13/152/164, TNA.

¹¹⁶ Minute by Bramston, 26 June 1897, CO13/152/171, TNA.

[emphasis added] from a prominent member of the Convention'.¹¹⁷

The premiers' visit for the Queen's Jubilee gave a desired opportunity. Procedurally, the person to consult was Kingston, the convention's president, but some imperial officials regarded him as 'disloyal'.¹¹⁸ So, Chamberlain chose NSW's George Reid, whom he termed 'Dean' of the premiers.¹¹⁹ After some unrecorded meetings, Chamberlain 'most earnestly' commended, 'confidential[ly]' and 'privately', for Reid's 'personal attention', seventeen principal, 'very desirable' and 80 'friendly suggestions', to obviate likely parliamentary objections. He would not 'press', he gently assured, but leave it to Reid's 'own judgement'.¹²⁰ He offered briefings by parliamentary counsel, Sir Henry Jenkyns (who privately, had many 'criticisms' of the bill).¹²¹ Chamberlain, 'anxious to avoid the possibility of friction', soothed that the changes were not 'important' to Australia. 'Believe me'.¹²²

Reid did not share this confidence with any of the premiers in London nor, it would seem, the convention, soon after, with one exception. Barton was his NSW political rival but Reid had just appointed him to NSW's Legislative Council (LC) to lead its response to the bill. Reid also knew Barton now chaired the convention's three-man constitutional drafting committee, for which Reid arranged for his private secretary, Robert Garran, to assist. Contributions at the convention of the other two committee members, Barton's friend and NSW progressive liberal, Richard O'Connor and SA's more conservative John Downer, suggest that Barton did not disclose Chamberlain's secret 'friendly suggestions'.¹²³ As neither Reid nor Barton had previously objected to the contentious clauses, the likely explanation for their actions was personal ambition to be inaugural prime minister, through winning imperial favour.¹²⁴

¹¹⁷ These words were inserted by Anderson into the draft of letter, Bertram Cox to the Law Officers, 10 November 1899 and repeated in the Law Officers' reply; CO418/6/101-115, 384-392, TNA.

¹¹⁸ The governor of South Australia, as quoted in B. K. de Garis, 'The Colonial Office and the Commonwealth Constitution Bill', in A. W. Martin (ed.), *Essays in Australian Federation*, MUP, Melbourne, 1969, pp. 94-121, which is drawn from B. K. de Garis, *British influence on the federation of the Australian colonies, 1880-1901*, D. Phil thesis, University of Oxford, 1966.

¹¹⁹ G. McMinn, 'Reid, Sir George Houston (1845-1918)', *ADB*, vol. 11, NCB:ANU, Canberra, 1988, <http://adb.anu.edu.au/biography/reid-sir-george-houston-8173/text4289>.

¹²⁰ File copy of letter, Chamberlain to Reid, (day unrecorded) July 1897, CO201/152/206-7, TNA.

¹²¹ Letter, Jenkyns to Bramston, 15 July 1897, CO201/152/228-9, TNA. Jenkyns soon published *British Rule & Jurisdiction beyond the Seas*, Clarendon Press, Oxford, 1902.

¹²² File copy of letter, Chamberlain to Reid, (day unrecorded) July 1897, CO201/152/206-7, TNA.

¹²³ There, the NSW liberal, Richard O'Connor, replaced Griffith on the drafting committee. Martha Rutledge, 'O'Connor, Richard Edward (Dick) (1851-1912)', *ADB*, vol. 11, NCB:ANU, Canberra, 1988, <http://adb.anu.edu.au/biography/o'connor-richard-edward-dick-1102/text13691>.

¹²⁴ de Garis, *op. cit.*, p. 108-9; R. R. Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government*, Angus & Robertson, Sydney, 1897; R. S. Parker, 'Garran, Sir Robert Randolph (1867-1957)', *ADB*, vol. 8, NCB:ANU, Canberra, 1981, <http://adb.anu.edu.au/biography/garran-sir-robert-randolph-410/text10827>. If Garran was also taken into Reid's confidence, he did not disclose this and, soon after, represented the changes as emanating from NSW's LC, although also mentioning that Chamberlain's proposed changes were given to Reid in 1897, whom he said, gave them to the drafting committee, although it seems only to Barton. See John Quick and Robert Randolph Garran, *Annotated Constitutional of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901.

During the 1897-8 sessions, Barton did not disclose that he essentially was acting on secret instructions, via Reid, who himself alluded to ‘information’, which he had gained in London, about the ‘difficulty’, which might arise, over certain words in the draft.¹²⁵ Barton moved amendments, which he claimed, repeatedly, had been ‘suggested’ by the *NSW LC*.¹²⁶ This was, in a sense, true. In the *NSW LC* in August 1897, Scottish-born Normand Maclaurin led the opposition to the phrase ‘and treaties’, among other treaty references, as he had in 1893 on the 1891 draft. He cited English legal authority Sir Thomas Erskine Holland, to support his incontrovertible argument that only sovereign not dependent states could make treaties.¹²⁸

Barton’s first amendment, for the preamble’s ‘clause 7’, was to ‘Omit’ the words “and all treaties made by the commonwealth” and also ‘treaties’, later in the clause. His second was that “and treaties” should ‘disappear’ from clause 52.’ Continuing with an appearance of detachment, he said that the *LC* ‘expected’ him to explain its ‘desire’, which was that, while

*conced[ing] that we should make certain trade arrangements, which would have force enough if ratified by the Imperial Government, the sole treaty-making power is in the Crown.*¹²⁹

He reassured delegates. ‘I do not think the constitution will be in any way minimised or weakened by the omission of the words.’¹³⁰

Reid then interjected that he ‘strongly support[ed]’ the amendments, which he would move if Barton did not.¹³¹ When Barton protested that he already had, Reid countered that Barton had only ‘hinted’ at the need for the changes.

*This is an expression which would be more in place in the United States Constitution, where treaties are dealt with by the President and the senate, than in the constitution of a colony within the Empire. The treaties made by her Majesty are not binding as laws on the people of the United Kingdom, and there is no penalty for disobeying them. Legislation is sometimes passed to give effect to treaties, but the treaties themselves are not laws, and indeed nations sometimes find them inconvenient, as they neglect them very seriously without involving any important legal consequences.*¹³²

Barton sought to reclaim the floor, emphasizing, ‘our clause includes treaties which the Federal Council Act does not!’¹³³ (This seems an out of order reference to ss.52(29).) This amendment was accepted without debate. A lengthy discussion of s.VII’s other contentious

¹²⁵ Official record of the debates of the Australasian Federal Convention, second session, Sydney, 2nd to 24th September, 1897, W. A. Gullick, Govt. Printer, Sydney, 1897, p. 242.

¹²⁶ Commonwealth of Australia Draft Constitution Bill: with report of debates in the Legislative Assembly and Legislative Council, 12th May to 26th August, 1897, William Applegate Gulick, Govt. Printer, Sydney, 1897.

¹²⁸ *NSW LC*, vol. 68, 6 December 1893, pp. 1644-71; vol. 89, 17 August 1897, pp. 3007-20, 18 August 1897, pp. 3078-82, 19 August 1897, p. 3200, 24 August 1897, p. 3291. Ann M. Mitchell, ‘Maclaurin, Sir Henry Normand (1835-1914)’, *ADB: NCB*, vol. 10, ANU, MUP, 1986, <http://adb.anu.edu.au/biography/maclaurin-sir-henry-normand-7412/text12893>.

¹²⁹ Official record, second session, pp. 239, 246, 253.

¹³⁰ *Ibid.*, p. 240.

¹³¹ *ibid.*, pp. 239, 253.

¹³² *ibid.*

¹³³ *ibid.*, p. 243.

subject, Commonwealth jurisdiction over British ships at sea after quitting Australian ports, also referred to treaties. Victoria's Isaac Isaacs affirmed that, if they struck out 'treaties' and made other amendments, 'the Imperial Government will then agree to the clause.'¹³⁴ To this, SA's John Symon chorused that 'we are all agreed that the words "and treaties" have to be eliminated'.¹³⁵ Barton reaffirmed the need to delete this, deftly crediting this 'suggest[ion]' to his 'hon[ourable] and learned friend Mr Isaacs'. This also was adopted.

In the 1898 session, when Barton formally moved, 'in accordance with the suggestion' of the NSW LC, the deletion of 'and treaties' from s.52(29), SA's Patrick Glynn, raised an 'objection', saying that 'it may be wise to retain them'. When the chairman ruled the clause had to be consistent with the preamble's now amended s.VII, Glynn withdrew but urged that 'an opportunity for reconsidering the matter should be provided'.¹³⁶ Although the amendment was adopted and discussion moved to the next sub-section, after the adjournment Barton sought to confirm that, 'I take it we have omitted the words "and treaties", before quickly returning to the sub-section under discussion, which prompted Deakin to interject that he understood that the convention president was to

*look at the words "and treaties" with a view to see how far, by omitting them, we would limit the powers of the Federal Parliament within the range of the powers which the Canadian parliament already enjoys.*¹³⁷

No one responded. This amendment passed and the matter was never revisited.

Barton and Reid did not raise all of Chamberlain's 'suggestions' openly in the convention but, apparently, acted on them regardless, unilaterally and discreetly. Barton had said at one point that, 'it would be well to leave [minor changes of expression] to the Drafting Committee.'¹³⁸ Some of those, which followed, however, were clearly major changes, even of unanimously approved provisions, made without the convention's knowledge and, thus, discussion of their significance, which could also have informed the people asked to vote for the bill.

So, when the bill emerged from Barton's drafting committee, after the convention had closed, the offending (in the view of the imperial government) words, 'full power and authority', in the covering phrase at the start of s.52 had been excised. Anderson had specifically mentioned four sub-sections, in relation to which these words had troubled him, as possibly empowering

¹³⁴ *ibid.*, p. 246. Zelman Cowen, 'Isaacs, Sir Isaac Alfred (1855–1948)', *ADB*, vol. 9, NCB:ANU, Canberra, 1983, <http://adb.anu.edu.au/biography/isaacs-sir-isaac-alfred-6805/text11773>.

¹³⁵ Official record, second session, p. 247. Don Wright, 'Symon, Sir Josiah Henry (1846–1934)', *ADB*, vol. 12, NCB:ANU, Canberra, 1990, <http://adb.anu.edu.au/biography/symon-sir-john-henry-8734/text15293>.

¹³⁶ Official Record of the debates of the Australasian Federal Convention, third session, Melbourne, 20th January to 17th March, 1898, R. S. Brain, Govt. Printer, Melbourne, 1898, pp. 30–1. Gerald O'Collins, 'Glynn, Patrick McMahon (Paddy) (1855–1931)', *ADB*, vol. 9, NCB:ANU, Canberra, 1983, <http://adb.anu.edu.au/biography/glynn-patrick-mcmahon-paddy-6405/text10949>.

¹³⁷ Official Record, third session, pp. 30–1.

¹³⁸ *ibid.*, pp. 1069, 2247–64.

the Commonwealth to make treaties or to repeal treaty-related imperial legislation, the latter with respect to copyright and ‘navigation and shipping’. Barton and Reid had led the discussion for the successful amendment of the preamble’s s.VII, to limit Commonwealth shipping laws to British ships in coasting not ocean trade. The convention approved the related ‘navigation and shipping’ sub-section of s.52 (as was that on copyright), without discussion, but this also disappeared from the resulting bill.

Similarly, neither Barton nor Reid raised in the convention imperial concerns over the governor-general’s lack of autonomous powers in s.70. In a long preceding discussion on s.68, over the role of commander-in-chief, Deakin proposed to replace ‘Queen’s Representative’ with ‘acting under the advice of the Executive Council’. Barton opposed this strongly, as both unnecessary and implicitly understood. (Others contended that military command came under the crown’s prerogative or was a matter of military necessity.) After Deakin’s amendment was defeated, there was no such discussion of s.70, which was accepted as it stood.¹³⁹ When the draft was finalised, however, a provision for the governor-general to act without council had been inserted, as an alternative, before the original provision for acting ‘in Council’. On the High Court’s original jurisdiction in s.77, that over treaties was retained but ‘public ministers’ of other countries was removed certainly because, as Anderson had argued, it could be taken as a right to host ambassadors.

While the new draft bill was being examined in London in late 1899, against the changes desired by the imperial government, public referenda in four Australian colonies gave it their approval.¹⁴¹ This, Anderson conceded, rendered ‘impossible’ any further major changes to the body, though not preamble, of the bill. So, he found ‘not very helpful’ the *LOs*’ report of late 1899, which urged exactly that.¹⁴² Among their major concerns was the ‘external affairs’ power in the now s.51 (previously s.52), which had survived. They were unsure whether these words were meant to embrace relations with foreign, as well as, British governments but in either case, they argued, ‘this does not seem a suitable subject for legislation’ by the Commonwealth parliament and urged insertion of some (unspecified) ‘limiting words’.¹⁴³ Anderson agreed that ‘external affairs’, despite treaties now being omitted, when read with the preamble’s s.2, could imply the power to appoint ambassadors and make treaties. He emphasised that this was ‘undoubtedly one where there sh[oul]d be no room for doubt’ so

¹³⁹ *ibid.*, pp. 2249-64.

¹⁴¹ The four were NSW, Victoria, Tasmania and SA.

¹⁴² Minute, Anderson to Selborne and Chamberlain, 30 December 1899, CO418/6/96-98, TNA.

¹⁴³ Law Officers’ report, Richard E. Webster & Robert B. Findlay to Chamberlain, 21 December 1899, CO418/6/101-15, TNA.

that, 'Nothing in this Act or the schedule thereto shall be held to diminish or impair the prerogative of the Crown in regard to the direction and control of foreign affairs'.¹⁴⁵

Herbert weighed in that s.51 may now be 'swallowed' as a whole, 'without demur', except for the provision on external affairs.¹⁴⁶ He agreed with the *LO* that, while the Commonwealth parliament could be allowed to legislate on external affairs,

*all communications with Foreign Powers, negotiations of Treaties etc must be conducted (as in Canada) by H.M. Government subject to such exceptions as may be made to this rule for convenience, where no important principle is involved. This is necessary anyhow & should be enough.*¹⁴⁷

So, while 'external affairs' survived, the preamble's 'shall bind the crown' did not.

How exactly this was done is unrecorded. Selborne and Chamberlain agreed with Anderson and Herbert's advice and, so, summoned Australia's representatives to London to agree to the changes. In what order this took place is also not recorded. Whether Barton and his colleagues in London later in 1900, primarily to discuss the provisions for appeals to the Privy Council, knew before or after of the changes, or agreed to them, is unknown. At first, Barton pretended to his colleagues that he knew nothing prior about the changes desired by London but finally admitted the truth to Deakin, justifying himself by claiming that the instructions had been confidential.¹⁴⁸ On 9 July, the bill was enacted, as the constitution for the Commonwealth of Australia. Thus, 'external affairs' but not 'and treaties' had survived.¹⁴⁹

4. 'a curious difficulty': the Commonwealth's first steps with treaties, 1901-05

In the first five years of federation, the Commonwealth struggled uncertainly, though ultimately successfully, to engage with the international legal system, as it was developed by the growth of treaties.

On federation, treaties were almost solely the responsibility of the two smallest of the Commonwealth's original seven departments—*External Affairs (DEA)*, which advised the prime minister, and *Attorney-Generals (AGs)*. Barton, now prime minister and minister for external affairs, had studied classics not law at the *University of Sydney* but worked for a solicitor before being admitted to the bar. Arthur Atlee Hunt, Barton's private secretary through the federation process, had been trained, similarly, although without attending university, and was appointed head of *DEA* in May 1901.¹⁵⁰ The inaugural attorney-general was Deakin, who had studied law at the *University of Melbourne* and been admitted to the

¹⁴⁵ Minute, Anderson to Selborne and Chamberlain, 30 December 1899, CO418/6/96-98, TNA.

¹⁴⁶ Minute, Herbert, 9 January 1900, CO418/6/99-100, TNA.

¹⁴⁷ Minute, Herbert, 9 January 1900, CO418/6/99-100, TNA.

¹⁴⁸ de Garis, *op. cit.*, p. 109.

¹⁴⁹ *An Act to constitute the Commonwealth of Australia 1900*, 63 & 64 Vict., c. 12.

¹⁵⁰ His appointment over the more legally qualified Thomas Bavin, who briefly assumed Atlee Hunt's original duties before resigning, was surprising.

bar. The head of his department and, also, first parliamentary draftsman was Robert Garran, who had studied arts at Sydney University, before being admitted to the bar, also after training under a solicitor. *Trade and Customs (T&C)*, initially under Kingston, a solicitor, and *PMG* had some role in treaty advice. All, like most of the first cabinet, came from Non-conformist protestant backgrounds, inheriting liberal dispositions, and had been closely involved with drafting the constitution. None had studied international law.¹⁵¹

Treaties may not have appeared important to the constitutional framers or were at the forefront of the legislative and policy concerns of the inaugural Commonwealth government but they immediately became an issue. The initial steps can euphemistically be described as complicated, with the Commonwealth inexperienced. Questions soon arose, and continued through 1914, more about the Commonwealth's relations with the states than Britain. The former included whether the Commonwealth was bound by treaties to which the now states had acceded before federation; could the states continue to adhere to treaties without reference to or, even, the adherence of the Commonwealth; did the Commonwealth have to consult the states prior to treaty adherence; could the Commonwealth adhere to treaties, whose obligations, in whole or part, fell under the states' not Commonwealth's legislative powers; and, could the Commonwealth adhere to a treaty, if some not all states agreed?

In the second week after federation, the Commonwealth was compelled to decide on its treaty procedure. In 1900, Britain had concluded four various commercially related bilateral treaties, to which the *CO* had asked the colonies, before federation, whether they desired accession.¹⁵³ Then, in January 1901 Chamberlain asked the Commonwealth that, whether the states had all agreed to adhere to the Honduran treaty and, if so, did it desire formal notification to be given on it's not the states' behalf.¹⁵⁴ Barton initially was relaxed with having the states continue to choose adhesion independently (if not already decided), not only of each other but also of the Commonwealth. Kingston, however, thought it better not to set a precedent and await cabinet

¹⁵¹ Garran was familiar with standard international law texts; see Quick and Garran, *op. cit.* For external legal advice, Commonwealth officials on occasions consulted Sir W. Harrison Moore, author of *The Constitution of the Commonwealth of Australia*, J. Murray, London, 1902. Moore also put himself forward to offer advice on legal matters (1901/670, CRS A6, NAA). The government's legal authorities do not seem to have turned to more distant Sydney and Adelaide, where, respectively, were Australian-born Pitt Cobbett, the only real international law expert in the Commonwealth, and English-born John Salmond, a specialist in jurisprudence and the law of torts. (The second governor-general would turn to Salmond on colonial governors' powers.) The works of international law upon which Deakin and Garran relied were E. H. Hall's *A Treatise on International Law*, Clarendon Press, Oxford 1880, whose fourth edition was published in 1895, and Sherston Baker's student textbook, *First Steps in International Law*, K. Paul, Trench, Trübner & Co. Ltd., London, 1899. Helen M. Davies, 'Hunt, Atlee Arthur (1864–1935)', *ADB: NCB*, vol. 9, ANU Canberra, 1983, <http://adb.anu.edu.au/biography/hunt-atlee-arthur-6766/text11699>; John McCarthy, 'Bavin, Sir Thomas Rainsford (Tom) (1874–1941)', vol. 7, *ADB: ACB*, ANU, Canberra, 1979, <http://adb.anu.edu.au/biography/bavin-sir-thomas-rainsford-tom-86/text865>.

¹⁵³ The treaties were with Honduras on general commerce, the *USA* on disposal of real and personal property, Costa Rica on registration of trade marks and, shortly, with Japan, on deceased estates.

¹⁵⁴ The *CO*'s communications are in CO323/456/359-70, 345-6, 466-80; CO323/465/207-11 ; CO309/150/116-9; CO418/14/362-6, TNA. Despatch, Chamberlain to Hopetoun, 10 January 1901, vol. 1, CRS CP78/14, NAA

consideration of the general questions. Barton, instead, advised his decision on the Honduran treaty to the CO, which seemed unconcerned, confirming that four states had adhered and two had not, without mentioning the Commonwealth.¹⁵⁵ So, in March, Chamberlain sought to clarify the ‘classes’ of which (commercial) treaties the Commonwealth or the states respectively would decide future accessions. The CO continued to send treaties to the states, while asking if the Commonwealth wanted them to decide independently.¹⁵⁶

Reading and clearly regretting Barton’s original decision, Atlee Hunt asserted himself for the first time, arguing that this had set a precedent of ‘questionable’ legality, holding that the Commonwealth, as a legal entity, distinct from the states, could not adhere on their behalf. Leaving aside the short-term issues of treaties already signed but to which were not acceded prior to federation, he argued that continuing indefinitely this approach could result in some but not all of the Commonwealth being bound. He predicted delay and friction. He doubted that there could be clear demarcation of treaties, being either for the Commonwealth or states.

*I submit that it is most desirable that in all treaties, of whatever nature, into which the colonial adherence clause is inserted by the British Gov[ernmen]t, the Commonwealth should be referred to by name and the names of the States comprising the Commonwealth omitted.*¹⁵⁸

Then, in a rhetorical flourish, rare for this Strict and Particular Baptist, he counseled.

*It appears to me also that it was clearly the intention of the framers of the Constitution and of the people who accepted it that Australia should speak with one voice only to the outside world.*¹⁵⁹

Barton accepted his advice to ask Deakin about both the desirability of adhesion to these treaties and generally, ‘whether the Constitution gives the Commonwealth power to make any law of an enabling character which may help to meet the curious difficulty disclosed.’¹⁶⁰

Deakin responded that in the cases where treaties were already executed, it would avoid the necessity of amending those, which had already named the states, or offending the states, by suggesting their supersession, if the current practice was allowed to continue for the moment. In fact, unlike Atlee Hunt, he seems to have suggested that, to avoid possible friction, all future treaties should continue to include the states as well as the Commonwealth. There would be treaties on which the states ‘may or may not be consulted by the Commonwealth at its discretion’ but also others on which ‘they certainly ought to be heard’, if they concerned ‘matters wholly within the legislative powers of the States’ and ‘beyond the legislative power of the Federal Parliament’. To Deakin, ‘it seem[ed] but natural’ that, in most such cases, the

¹⁵⁵ Barton, understandably, was also concerned that the need to insert the ‘Commonwealth’ into the ratified treaty text might necessitate further negotiations and a new treaty. Minute, Barton to Atlee Hunt, 28 January 1901, 1901/68, CRS A8, NAA; CO418/9/98-100, TNA.

¹⁵⁶ Despatch, Chamberlain to Hopetoun, 8 March 1901, CO418/14/362-6, TNA.

¹⁵⁸ Minute, Atlee Hunt to Barton, 19 April 1901, 1901/68, CRS A8, NAA.

¹⁵⁹ Minute, Atlee Hunt to Barton, 19 April 1901, 1901/68, CRS A8, NAA.

¹⁶⁰ Barton’s note on minute, Atlee Hunt to Barton, 19 April 1901, 1901/68, CRS A8, NAA.

states should ‘decide for themselves as to the course to be adopted.’ He was comfortable with this, though mindful of the need not to conflict with s.92 and s.99 of the constitution, if some but not all states chose accession. Accordingly, he deemed adherence to these treaties, being on interests ‘wholly within the scope of State legislation and contain[ing] nothing injurious affecting the Commonwealth,’ could be decided separately by the states.¹⁶¹ They must, however, notify this through the Commonwealth, which must be the sole vehicle of communication with the outside world.

*The Commonwealth must speak and set out for the whole of its people over the whole of its territory in respect of all matters affecting them.*¹⁶²

Deakin argued that the Commonwealth must exercise oversight of all treaties, even if only the states, as colonies, were the only parties named. For no matter the specific subject, all treaties ‘affect the people of Australia without regard to arbitrary provincial boundary lines’, beyond which, the states ‘have, both by the express enactment of the Constitution and its whole tenor and nature renounced that independence and all individual right of action’ with themselves and with ‘authorities’ external to the Commonwealth.¹⁶⁴ He proclaimed that the states retained authority over domestic matters, ‘not diminished’ by federation, but, otherwise, they

*have united in one indissoluble Federal Commonwealth under the Crown[,] constituting themselves a single State with but one executive and one representative government.*¹⁶⁵

Even, he continued, if a treaty was of concern only to state legislative power, when treaties

*pass beyond the circumference of domestic statutes[, they] fall with every other subject under the unlimited category “External Affairs” when they are to be dealt with in relation to foreign powers or other parts of the Empire.*¹⁶⁶

The Commonwealth, he said, should be the sole channel of communication between the states and CO, including communications with foreign powers, on all treaties of whatever nature.

Turning to Barton’s question, as to the legislative power of the Commonwealth under treaties, Deakin added that, whether the states or Commonwealth adhered was not the key point.

Adherence to a Treaty . . . is an executive Act. The States Executives have exercised that power and undoubtedly the Commonwealth Executive is at least equally capable of the same determination. The legislative power of the Commonwealth is mainly carved out of that previously enjoyed by the States and is, so to speak, enveloped by the undisturbed portion of their regime.

The executive power of the Commonwealth unlike the legislative is derived directly and independently from its fountain head--the Crown. It may be contended that it has a higher and larger scope than that of the States (see Sections 61 & 64) . . . Its powers

¹⁶¹ Attorney-general’s (Deakin) opinion, 28 May 1901, p. 7, vol. 1, CRS A1497 & 1901/68, CRS A8, NAA.

¹⁶² *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ Attorney-general’s (Deakin) opinion, 28 May 1901, p. 7, vol. 1, CRS A1497 & 1901/68, CRS A8, NAA.

¹⁶⁶ *ibid.*

*are at least co-extensive with its legislative charter.*¹⁶⁷

He then set out an expansive definition of the external affairs and hidden treaty power without yet defining its limits.

*The power to pass laws relating to external affairs certainly carries with it authority to provide by statute for adherence to Treaties and for all other relations with the Home Government and through it with foreign powers. At present this power is concurrent with that of the States so far as the States have or ever had any such power themselves. It by no means follows that this particular and novel legislative power of the Commonwealth does not comprise a considerable endowment legislative and executive over and above anything the States have ever enjoyed, but whatever its extent it is ample to cover adherence to treaties and all matters in connection with them.*¹⁶⁸

Rather than attempt to define those limits, he supported Barton's suggestion of confirming, by specific laws, some of the most important areas.

*It would be judicious and advantageous to provide by [an] Act that the Commonwealth Executive shall administer all existing State laws in regard to naturalisation and Aliens, the people of any race for whom it is deemed necessary to make special laws, immigration and emigration, the influx of criminals, Treaties and Conventions, and all other external affairs.*¹⁶⁹

He then articulated a rationale for Commonwealth paramountcy on such national matters.

*The whole scope and spirit of the Constitution require that save for the purpose of their domestic policies within their own domains the States shall be blended and absorbed into one political entity. They may still appear in some aspects as a body of allied States but to the Empire of which they form a part and to the world without it they have become and must remain a nation and a Commonwealth one and indissoluble.*¹⁷⁰

After all this, Deakin concluded in apparent self-contradiction of his starting position, by noting that as Canada, not its provinces, were named in treaties, he thought it 'would be well' to invite Chamberlain to do likewise for Australia.¹⁷²

Before Barton could decide policy, the confusion arising from his original decision forced his hand. As he scrambled to clarify the various state responses to the four treaties before him, he missed the accession deadline for the Honduran treaty by two days, just made the Costa Rican and Japanese treaties deadlines, respectively, by two days and a month. He so frustrated the CO with delay over the USA treaty, that its ratification did not include any Australian government, forcing the CO to conclude a separate convention next year, to which the Commonwealth not the states adhered. In the meantime, in September 1901, Barton followed Deakin's advice, telling Chamberlain that all future treaties should only mention the Commonwealth, not the states, while promising to always consult the states.¹⁷⁴ The CO, after

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ Attorney-general's (Deakin) opinion, 28 May 1901, p. 7, vol. 1, CRS A1497 & 1901/68, CRS A8, NAA.

¹⁷² *ibid.*

¹⁷⁴ Letter, Barton to governor-general, 12 September 1901, 1901/68, CRS A8, NAA; CO323/462/290-6, TNA.

consulting the *FO*, readily accepted Barton's proposal, especially as the *FO* decided to avoid including any colony by name in future treaties. So, from 1902, the *CO* sent bilateral treaties, which only occasionally affected the state's legislative spheres, only to the Commonwealth.

During the above, in mid-1901, the Commonwealth asked for copies, none of which it had, of all 'non-confidential' treaties, to which any Australian colony was bound. Friction between 'free trade' Britain and its protectionist self-governing colonies over commercial treaties had eased, following the grant of choice of treaty adherence in 1877-8 and, in 1898, allowance of denunciation of adherence to pre-1878 treaties. The Commonwealth was about to discover the problems of being a federation of pre-existing colonies and that commercial treaties often covered persons as well as goods. In early 1902, Japan protested the Commonwealth's attempt, under the new *Immigration Restriction Act*, to block entry of Japanese labourers into Queensland, the only Australian party to Britain's 1894 commercial treaty with Japan.¹⁷⁶

In 1901, Deakin had opened his inaugural opinion on treaties by declaring that the

*Empire as a sovereign independent state possesses full contracting powers which are exercised by the Imperial Government alone. The Commonwealth has no Treaty powers of any kind under its Constitution and being a dependency can acquire none save those with which it may be endowed from time to time.*¹⁷⁷

Now, he took a very different line, arguing that the creation of the Commonwealth terminated Queensland's accession to the treaty.¹⁷⁸ There was some agreement in the *CO* but, ultimately, the *LO* advised that only the Crown, not dependencies, could make or break treaties. The contending opinions were never formally decided, as the Commonwealth chose to retreat, admitting the Japanese, without conceding the constitutional point. Australian sensitivity over this was revived when Barton was surprised by press reports that Britain signed a treaty with Japan in January 1902. Caught unawares, he publicly welcomed this, wrongly, as 'largely a commercial one', when it was on alliance.¹⁷⁹ He only received the text with an uninformative despatch days before leaving for the colonial conference in London in early 1902.¹⁸⁰

Treaties were not among the five topics the Commonwealth proposed for discussion there but Barton raised, in a very tentative manner, the need for 'communication', which he then strengthened to 'prior consultation' over, especially, commercial treaties. *NZ*'s Richard Seddon gave some support, while Canada's Sir Wilfrid Laurier expressed satisfaction with Britain's inclusion of Canadian officials in commercial treaty negotiations. Chamberlain easily evaded making any wide commitment and the conference only resolved unanimously

¹⁷⁶ *Protocol providing for the accession of Queensland to the Treaty of Commerce and Navigation of 16 July 1894*, Tokyo, 16 March 1897; UKTS 23/1894; ATS 66/1901.

¹⁷⁷ Attorney-general's (Deakin) opinion, 28 May 1901, p. 7, vol. 1, CRS A1497 & 1901/68, CRS A8, NAA.

¹⁷⁸ Attorney-general's (Deakin) opinion, 16 January 1902, pp. 271-6, vol. 1/1, CRS A1497, NAA.

¹⁷⁹ *Telegraph* (Brisbane), 1 February 1902.

¹⁸⁰ File 1163, CRS A6661, NAA.

that, 'so far as may be consistent with the confidential negotiation' of treaties, the 'views of the Colonies affected [the *CO* inserted this word into Barton's motion] should be obtained in order that they may be in a better position to give adhesion'.¹⁸¹ Bilateral commercial treaties soon re-emerged as a concern in imperial relations but, before then, this resolution would have a major impact on bilateral extradition and, especially, general arbitration treaties.¹⁸²

Britain had concluded two treaties on extradition in 1900, which were advised to colonies in late 1901. While Canada was certainly consulted on such treaties with the *USA*, the *CO*'s assistant legal adviser, John Risley observed, 'I believe we never consult the Colonies about Extradition treaties'. To this, Bertram Cox, senior legal adviser, replied. 'We must of course send [the *OiCs*] out in circular to the Colonies', for publication and application.¹⁸³ This approach did not change in this period. As with bilateral commercial treaties, notice of these continued to be sent only to the states through 1901 but, then, from 1902, exclusively to the Commonwealth. The main issue that arose was whether foreign officials made applications to state governors or governor-general. Some doubt soon arose and the Victorian government insisted on still being the avenue for such applications. In 1903, the Commonwealth legislated in a compromise fashion, with the governor-general being the primary authority but able to delegate this to state governors. In drafting the bill, Garran had wanted to follow the Canadian path, whereby the imperial *Act* was suspended but Deakin overruled him. A provision for direct communication with foreign governments attracted opposition from the *FO*, which insisted on the 'long' or diplomatic channel being retained for extradition.¹⁸⁴

Britain concluded its first general arbitration treaty, with the *USA*, in 1897.¹⁸⁵ The establishment of the *Permanent Court of Arbitration (PCA)* at The Hague in 1899 led to more such treaties, under which disputes were to be referred to the *PCA*, though Britain's treaties limited this obligation.¹⁸⁶ The *CO*'s Francis Round observed that, although 'none of the colonies have been consulted', the convention was 'equally binding on all parts of the

¹⁸¹ Colonial Conference, 1902: Conference between the Secretary of State for the Colonies: Minutes of proceedings and papers laid before the conference, *CO*, Miscellaneous no. 144, October 1902, pp. 105-7.

¹⁸² Occasionally, the Commonwealth took an interest in specific political treaties such as those for Samoa and the New Hebrides but the limited presence of foreign powers in the South Pacific, as opposed to near *BNA*, meant these were rare instances.

¹⁸³ Minutes, Risley to Cox and Cox to Risley, 23 May 1901, CO323/465/780; also, CO323/465/277-306, 563-70, 780-4; CO323/466/249-258, 264-9, 361-71, 561-9, 789-92, 902-5; CO323/467/109-15, 199-224, 620-34, 710-12, 854-8; CO323/476/450-2, 501-8; CO323/477/115-20, 472-6; CO862/10/143; CO862/12/216; CO862/13/47, TNA.

¹⁸⁴ Files 1188, 1189, 1190, 1191, 1192, 1193, CRS A6661; 1901/87/5, CRS A8; vol. 1/1, CRS A1497; 1903/86, 1903/4262, 1903/6113, 1905/6561, 1913/7693, CRS A1; 1901/11, 1903/12, 1905/5 and 1906/35, CRS A2863; SF20/30 and H327/1/8, CRS A467, NAA. G. B. Castieau, 'The Statutory Basis of Extradition in Australia', *PANZSIL*, vol. 1, The Society, Melbourne, 1935, pp. 122-42.

¹⁸⁵ The senate did not ratify the treaty, so it did not enter into force.

¹⁸⁶ Britain's similarly worded, three-article treaties, all for a fixed term of five years but renewable, agreed to refer to the *PCA* disputes, which had not 'been settled by diplomacy', provided they did not affect their 'vital interests, the independence, or . . . honour', nor the 'interests of third Parties.'

Empire' and Britain could not permit colonies 'having an option' of acceding or declining.¹⁸⁷ As only sovereign powers not colonies could appear before the *PCA*, even if the dispute directly concerned a colony, the *CO*'s head, Sir Montagu Ommaney, thought that Britain should not so refer any such dispute without an affected colonies' concurrence.¹⁸⁹

Earlier, the *FO*'s experienced Sir Francis Villiers had agreed to 'gladly give effect . . . as far as may be practicable' to the conference resolution of 1902, on consulting self-governing colonies on treaties, which affected them. The *CO* had advised the *FO*, however, that this referred 'mainly' to treaties on commerce and navigation.¹⁹⁰ The *FO* decided that this commitment did not include these arbitration treaties. So, the *FO*, initially, did not even advise the *CO* of the treaty with France of October 1903.¹⁹¹ When the *CO* only learnt of this 'very important' treaty through a parliamentary paper, without any covering policy advice, Round told Cox that it 'may affect the settlement of various international colonial questions'.¹⁹² They decided to send that paper to self-governing colonies, while only in a routine 'library' despatch but specifically advised that it was for the information of ministers, not just governors (whose private secretaries sometimes neglected to pass such papers to ministers.)¹⁹³ Ommaney was incredulous that the *FO* had not consulted the *CO* prior, as 'clearly' colonial interests, such as the Newfoundland fisheries, contested by France, could be affected. Nonetheless, he deemed. 'But it is done', and did not pursue the principle at issue.¹⁹⁴

Unsurprisingly, therefore, the *FO* acted the same way after signing the next two arbitration treaties, with Italy and Spain, in February 1904, only advising the *CO* afterwards, by sending the treaties without covering letters.¹⁹⁵ *CO* officers anticipated, correctly, that there would be more of these treaties, some 'perhaps more far-reaching' and, so, the *FO*'s attention should be drawn again to the colonial conference resolution. They expected the *FO* to respond that the colonial provision in these treaties was a sufficient 'safeguard' but thought it wise to make the *FO* 'more careful in future'.¹⁹⁶ Round, doubtfully, argued that the 1902 colonial conference resolution was not 'confined' to commercial treaties, so colonies might have grounds for

¹⁸⁷ Minutes, Round, 7 August and Ommaney, 12 August 1901, CO323/466/264-9, TNA.

¹⁸⁹ *ibid.* Ommaney was permanent under secretary for colonial affairs.

¹⁹⁰ Letter, *FO* to *CO*, 28 October 1902, CO323/477/539-43, TNA. Villiers was assistant under secretary of state from 1896 to 1905. See obituary in the *Times*, 19 November 1925.

¹⁹¹ *Agreement between the United Kingdom and France providing for the Settlement by Arbitration of Certain Classes of Questions which may arise between the two Governments*, London, 14 October 1903.

¹⁹² Minute, Round to Cox, 16 December 1903, CO323/486/885-6, TNA.

¹⁹³ 'Library' despatches conveyed documents for information only and did not ask for any action to be taken.

¹⁹⁴ Minute, Ommaney, 21 December 1903, *ibid.*

¹⁹⁵ *Agreement between the United Kingdom and Italy providing for the Settlement by Arbitration of Certain Classes of Questions which may arise between the two Governments*, Rome, 1 February 1904; *Agreement between the United Kingdom and Spain providing for the Settlement by Arbitration of certain classes of questions which may arise between the two Governments*, London, 27 February 1904.

¹⁹⁶ Minute, Green to Risley and Round, 9 March 1904, CO323/493/347, TNA.

complaint about not being consulted if, later, they were affected by these treaties.¹⁹⁷ So, Sir Charles Lucas, Ommaney's deputy, advised the *FO* that he did not consider arbitration treaties to be outside the scope of the 1902 resolution. He asked that, before future such treaties were ratified, the *FO* should allow time for the *CO* to consult interested colonies.¹⁹⁸

Conservative foreign secretary, Lord Lansdowne, was not sympathetic. Citing the *CO*'s own words, he responded that the 1902 resolution applied 'mainly' to commercial treaties and, so, arbitration treaties 'cannot be held to come within [its] scope', even if the *CO*'s own definition was 'left out of account'. As these treaties did not require ratification, there would not be time for consultation between signature and acceptance. Furthermore, they were not 'of a nature', which required separate adhesion of colonies.¹⁹⁹ They were 'simply engagements' to refer 'differences of a legal nature' or interpretation of treaties, on matters not affecting 'vital interests, the independence or the honour' of the parties, to the Hague Tribunal, when they could not be resolved diplomatically. They did not concern 'third parties'.²⁰⁰ So, Lansdowne concluded that it would be 'idle' to seek the colonies' prior consent for, as either party could, 'without difficulty', refuse arbitration of any issue, 'there was not the slightest prospect' colonies being compelled to accept arbitration on an issue that they considered 'inadmissible'.²⁰¹ Having said all that, he readily conceded that when, after agreement to arbitration, colonies should be consulted, if affected, when Britain negotiated the required 'special agreement' on procedure. This would provide adequate protection for the colonies.²⁰²

Risley 'anticipated' this rebuff but colonial secretary, Alfred Lyttleton, decided 'not [to] press the matter further' though Round suggested, with Cox's and Ommaney's approval, that the correspondence be put on record, without communicating it to the colonies.²⁰³ To late 1905, Britain successively signed eight more general arbitration treaties and the *FO* continued to send only the texts, without covering advice, and the *CO* again only circulated them to the colonies by library despatch, without a covering letter or asking for observations.²⁰⁴ This procedure underwent significant review in the wake of the *Declaration of London* of 1909.

¹⁹⁷ Minute, Round to Anderson, 10 March 1904, *ibid.*

¹⁹⁸ Letter, *CO* to *FO*, 16 April 1904, CO323/493/349-50, 587, TNA. Lucas had been permanent assistant under secretary since 1897.

¹⁹⁹ Letter, Lansdowne Charles Richard John Spencer-Churchill, (9th Duke of Marlborough), 7 May 1904, CO323/494/230-3, TNA. Henry Charles Keith Petty-Fitzmaurice, 5th Marquess of Lansdowne.

²⁰⁰ Letter, Lansdowne, 7 May 1904, CO323/494/230-3, TNA.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ Minute, Risley to Round and Cox, and by Round, 10 May 1904; letter, *CO* to *FO*, 26 May 1904. CO323/494/230, 234-5, TNA.

²⁰⁴ All were again entitled conventions '*providing for the Settlement by Arbitration of certain classes of questions which may arise between the respective Governments*' and were with Germany (12 July 1904), Sweden-Norway (11 August 1904), Switzerland (16 November 1904), Portugal (16 November 1904), USA (12 December 1904, which again the senate did not ratify), Austria-Hungary (11 January 1905), Netherlands (15 February 1905) and Denmark (25 October 1905). Britain also signed three specific arbitration treaties in this period, all with France, as

On multilateral treaties, both the Commonwealth and *CO* also began in confusion after Australian federation in 1901. From then to the end of 1905, Britain stood out from the Paris conference and European-only convention on the protection of birds useful to agriculture (1902), the Continental-led convention creating the *International Seismological Association* (Strasbourg, 1903), the Hague convention on the exemption of hospital ships from harbour dues (1904) and the conference in Brussels, where parties signed (including by the *USA*) two initial, procedural protocols on maritime law (1905). Britain attended The Hague conference on civil procedure and, although sympathetic, did not sign the convention, which did not enter into force.²⁰⁵ In Paris, Britain did sign the Brussels sugar convention (1902), sanitary convention (1903) and preliminary *projet* on suppressing the white slave traffic (1904). Hence, Britain only invited treaty adhesion of the colonies, including the Commonwealth but not its states, to the latter three. The Commonwealth eventually requested accession, to the second (1909) and third (1909) but not first treaty. On multilateral treaties, Britain's main concern with the new Commonwealth was it addressing those concluded before federation.

In early January 1901, the *CO* sent the texts of the three Hague conventions of 1899 on rules of war, which Britain had eventually ratified (but not of the three declarations, which it had not), to the *colonies* only in a parliamentary paper, without instructions, in a routine *Bluebook*.²⁰⁶ There is no record that this was sent to the Commonwealth but, as these were treaties, which the *CO* deemed 'political', there was no call for colonial responses. All Australia's colonies had acceded to the submarine cables convention of 1884, which Britain curiously did not treat as a 'political' treaty. Although there is no record of a contemporary legal instrument, regarding the Commonwealth's successor accession, today's Commonwealth records claim that it acceded in 1901. The *CO* did advise the colonies, unusually, of its decision not to sign The Hague convention on the exemption of hospital ships from harbour dues (1904), if only because it anticipated later accession and, thereafter, the need for local legislative application. These were all political treaties, whereas Britain's main treaty concern with the new Commonwealth was having it address the pre-existing, major non-political multilateral treaties.

After some confusion in 1901, the *CO* resolved to exclude the states and send invitations to accede only to the Commonwealth. When, in mid-1902, someone in the *CO* strangely sent the

follows: referring to *Arbitration of the Question of the Grant of the French Flag to Muscat Dhows*, 13 October 1904; relative to the *Arbitral Tribunal contemplated by Article II of the Convention of April 8, 1904, respecting Newfoundland*, 7 April 1905; extending the period for delivery of the *Agreements to the Arbitral Tribunal on the Subject of Muscat Dhows*, 19 May 1905. CO323/495/657-9, TNA.

²⁰⁵ This was a treaty on private international law and would be revived after the First World War.

²⁰⁶ These were bound volumes, for information only, without covering despatches requiring action.

invitation to accede to the Brussels sugar convention to the states, other officials countered that ‘Surely’ this was for the Commonwealth.²⁰⁷ Thereafter, the states were not sent such invitations. Before this, on the *Convention for the Publication of Customs Tariffs* (1890), not the *CO* but Belgium’s consul, who sought support from local commercial bodies, began urging the Commonwealth immediately after federation, to adhere. Senior public servants were yet to appointed (they were in May) so, the acting head of *T&C* advised Barton that Kingston had commended that the Commonwealth ‘subscribe’ to the convention, so as to receive the *International Bureau*’s publications. Barton quickly agreed, possibly thinking he was just subscribing to a journal, and the consul confirmed the Commonwealth’s membership of the bureau. Obviously, both parties should have communicated through the imperial government, which was surprised and unhappy to learn, over a decade later, of this supposed ‘accession’, realised without any formal diplomatic instrument.²⁰⁸

Commonwealth membership of the *UPU*, through adherence to the Washington convention of 1897, where Victoria had represented all states, was also soon raised, this time by the *PMG*,²⁰⁹ At *WA*’s suggestion, however, the *CO* did not notify the *USA* of Commonwealth accession. In mid-1901, the Commonwealth, in anticipation of its legislation later that year applying the relevant constitutional power, asked Britain to notify its adherence. Again, the *CO* did not comply, partly because Tasmania had earlier communicated its accession directly to the *USA*, ignoring the correct diplomatic path. (Britain was also concerned with the complexities arising from the South African colonies’ adherence during the Boer War.) Only in late 1903 did the *CO* respond, delaying the Commonwealth’s accession until mid-1904, with the Commonwealth taking over the colonies’ original joint vote, though now excluding *NZ*.²¹⁰

The Commonwealth’s adhesion to the *ITU* convention went relatively more smoothly. In December 1900 the *CO* had invited the Commonwealth, not the states, to send a representative to the forthcoming *ITU* conference. In March 1901, the Commonwealth advised that it had taken control of postal and telegraphic administration from the states, leading the *CO* to enquire about its adhesion to the convention. The Commonwealth was waiting, first, for the appropriate legislation, which was enacted late in the year.²¹¹ A concern then arose in the imperial post office whether the *Act* was inconsistent with *ITU* regulations, which the Commonwealth denied. After that assurance accepted, there was further delay, deemed unnecessary by the *CO*, while the Commonwealth completed negotiations with a

²⁰⁷ *CO* minute, 16 September 1902, CO418/22/436, TNA.

²⁰⁸ Letter, R. Ewing to Atlee Hunt, 8 March 1901, 1958/16751, CRS A425, NAA.

²⁰⁹ Charles Duffy. A *NZ* official sat with him but took no part in the debates.

²¹⁰ 1904/3677, CRS MP273/1, NAA.

²¹¹ *Post and Telegraph Act 1901*, no. 12 of 1901.

private telegraph company, before it asked for adherence, in place of the states, in July 1902. This was advised to Austria-Hungary and took effect in January 1903.²¹²

On copyright, Britain was preparing new imperial legislation to provide for the 1896 amendment of the head convention of 1886. The colonies had been asked for their observations on two bills in late 1899, their responses overlapping with federation.²¹³ Tasmania, SA and WA (plus NZ) strongly supported the bills while Victoria and Queensland held it to be now a federal matter, with NSW yet to reply in early 1901, when the CO asked the Commonwealth for its views. Kingston again wanted to wait until a cabinet discussion but the CO pressed for a reply so the bills could be enacted. Perhaps surprisingly, Barton apparently acted on his own initiative in sending an unusually straightforward response in April that he would be 'pleased' to see the bills passed as long as they 'preserv[ed] intact the constitutional powers' of the Commonwealth by insertion of a clause to that effect, which could also cover other colonies, notably Canada.²¹⁴ The CO was a little taken aback but expected Canada to react similarly. Imperial legislation did not proceed at this stage, and the Commonwealth proceeded to legislate in 1905, taking responsibility from the states.²¹⁵

Protection of industrial property followed a similar path to copyright. After conclusion of an amending act in December 1900, the CO asked all colonies in July 1901 if they wished to accede, after Britain ratified (which it did in September 1902) and they had brought their legislation into 'harmony' with the convention, as so modified.²¹⁶ Queensland and NZ, the only current colonial adherents were now joined by WA, which had legislated in 1900, and seven crown colonies in asking for accession. Of the other colonies with responsible government, Canada, Newfoundland and Natal also continued to stand out, while the Cape was positive but needed more time to legislate.²¹⁷ Possibly inadvertently, the Commonwealth was sent neither records of the conference nor the Property Union's request for recent legislation and, on learning of the former, asked for a copy. In the CO, Bertram Cox advised that the Commonwealth be advised of Queensland's request, whose notification was duly delayed.²¹⁸ Then, when the CO informed the Commonwealth it was about to notify Queensland's accession, Barton asked the CO not to do this, as Queensland had not yet

²¹² CO418/9/301-8; CO418/10/330-9, CO418/17/474-6, 525-8; CO418/31/193-5; CO323/473/229-31, 295-301; CO323/479/673-9; CO323/480/346-51, 701-9, TNA.

²¹³ CO323/453/557-65; CO862/12/61, TNA.

²¹⁴ The draft telegram is in Barton's hand. Minute, Barton to governor-general, 25 April 1901, 1901/1128, CRS A6; 1901/670, CRS A6, NAA.

²¹⁵ CO418/9/469-76, 506-10; *Copyright Act 1905*, no. 25 of 1905.

²¹⁶ Circular despatch, 2 July 1901, CO854/37; CO862/12/136, TNA.

²¹⁷ CO323/467/569-80; CO862/12/136; CO418/12/778-83; CO418/22/519-24; CO209/263/19-23, TNA. The seven crown colonies were Gambia, British Honduras, Ceylon, Trinidad, Gold Coast, Seychelles and Leeward Islands, with the CO declining the latter two for some reason.

²¹⁸ CO323/467/374-84, TNA. No. 78, vol. 1, CRS CP78/8, NAA.

legislated appropriately and the Commonwealth was about to so do.²¹⁹ The *CO* was entitled to point to Barton's earlier advice that the states should be allowed to decide separately on adhesion to treaties concluded before federation. Instead, the *CO* accepted this new attitude but had to wait until 1907 for Commonwealth adherence.

On the 1897 Venice sanitary convention, Britain, after ratification, updated in mid-1899 all colonies, not just the nine, which had expressed agreement to accession, and detailed what obligations were entailed. All Australian colonies except Tasmania replied, generally committing themselves to carry out aspects of the treaty, with Queensland (and *NZ*) speaking mistakenly that they would 'adhere' to some provisions.²²⁰ Then, in March 1900, Italy declared Australia plague-ridden, criticising specifically the procedures in the ports of Sydney, Perth, Adelaide and, even, supposedly plague-free Melbourne, from where most ships to Italy began. All ships departing Australia had to dock at specified Italian ports for quarantine. The *CO* was sceptical of the claims but advised the colonies' agent-generals and, even Lord Hopetoun, the nominated governor-general for the new Commonwealth. He was given no specific instructions. Then, in November, with equal suddenness, Italy announced the lifting of the restriction. There is some likelihood that Italy, the convention's sponsor, anticipating the Commonwealth's formation, was attempting to compel its early adhesion.²²¹

Meanwhile, thirteen foreign signatories, including Britain, had ratified the convention and an amending declaration of January 1900. One year later, the *IO* commended the need for an empire quarantine conference to seek more uniform procedures, though there were doubts all self-governing colonies would agree fully.²²² Britain itself was reluctant to see trade being further restricted by quarantine. Then, in March 1901, Italy again declared Australia (plus the Cape and Reunion) plague-infected. Barton simply put this aside, not even sending the reply that the *CO* expected.²²³ He told an enquiring state that the Commonwealth would not take over quarantine until it had legislated, the future of which was not even approximately known. He did later accept Atlee Hunt's advice to ask the states to advise if they were plague-free and, then ask Italy, through London, to lift the ban.²²⁴ When concern over Australia spread to Belgium, in July, Chamberlain sent the Commonwealth his earlier despatches, without inviting adherence but stressing the importance, as a matter of international comity, not just treaty obligations, of reporting all plague outbreaks, now the Commonwealth had

²¹⁹ CO323/485/501-8; CO418/26/451-3; CO323/482/411-3, TNA.

²²⁰ CO854/35/192-3; CO862/11/194; CO309/148-335-6; CO234/69/160-2; CO13/163/336-7; CO18/226/1901; CO209/262/488-90, TNA.

²²¹ CO418/7/177-9, 280-2; CO418/16/109-113; CO323/455/819-26, TNA.

²²² CO323/465/165-72, 268-76, 304-37, 428-9 TNA.

²²³ 1901/144/1, CRS A8, NAA. CO418/16/106-13, TNA.

²²⁴ File note, 24 May 1901, 1901/1461, CRS A6, NAA.

assumed the authority from the states.²²⁵ While, this was constitutionally if not fully administratively correct, the coordinating role, which Atlee Hunt had inspired, bore fruit, when Italy accepted assurances that all but Queensland were plague-free Italy lifted the ban on all but there, only for a month later to re-impose it on Sydney and Brisbane.²²⁶

Through all this, the states and *CO* continued to communicate directly with each other on quarantine, only for the *CO* to realize colonies were only notifying adhering colonies of outbreaks, thereby compromising one of the key functions of the convention.²²⁷ So, in February 1902 the *CO* asked the Commonwealth if it wished to adhere. Barton asked Deakin for advice, as to any 'legal or constitutional difficulties'.²²⁸ Deakin replied that this was 'distinctly one of the external affairs' of the Commonwealth, which was 'sole guardian' of Australia's trade and commerce, which might be 'seriously injure[d]' by 'neglect' to adhere to or comply with the convention. Furthermore, for any government to 'neglect' the obligations of the convention could prejudicially affect innocent neighbours. The Commonwealth had not yet legislated with respect to quarantine, which included infectious diseases, navigation and shipping, but had the power. Concurrence of the states would 'always be necessary' because 'much' under the convention fell within their powers, such as sanitation on shipping. So, he urged obtaining 'explicit' adherence of all states before the Commonwealth adhered 'on behalf of the whole of them' and, then, itself. For the present, the only role he saw for the Commonwealth was to communicate between the states and other signatories.²²⁹ At the end of August 1902, the Commonwealth advised its desire for adherence in this limited sense, which the *CO* accepted, and this was formalised before the year's end.²³⁰

* * *

This chapter has detailed the developments in the two main subject areas of this thesis. First, the rise in importance of treaties in international law, as they grew in number and changed in subject and form. Treaties increasingly required domestic application, through statutes and, increasingly, networks of bilateral treaties assumed multilateral form, especially from the mid-1870s. Second, Britain's decision in 1877-8 to allow colonies a choice of adhesion to treaties, which it deemed non-political, expanded the role of colonies in this process. Pre-federation, Australian colonies responded variously to Britain's invitations of treaty adhesion.

²²⁵ CO418/16/165-6, TNA.

²²⁶ CO418/16/353-8, 377-80, TNA.

²²⁷ CO862/12/142; CO418/10/399-400; CO418/13/787-90; CO418/14/559-61; CO418/16/134-6, 162-7, 326-8; CO418/23/250-3, 318-23, 363-9, 539-45, 612-17, 678-84; CO323/477/289-303; CO862/13/49, TNA.

²²⁸ Opinion, Deakin, 22 April 1902, vol. 1/1, CRS A1497, NAA.

²²⁹ Letter, governor-general to prime minister, 14 February 1902, vol. 1, CRS CP78/14, NAA; CO418/23/363-9, TNA.

²³⁰ Despatch, governor-general to colonial secretary, 26 August 1902, vol. 1, CRS CP78/18; no. 91, vol. 2, CP78/8, NAA. CO418/19, TNA.

The Commonwealth then took over a central role in slowly bringing Australia into the fast evolving international legal system.

From the mid-eighteenth century, international law underwent a remarkable change through the rise in treaties, which were changing in number, content and form. Britain's rate of treaty making is a strong indication of this change from the early modern to the modern period. In the 16th and 17th centuries, England concluded only about twenty treaties annually, nearly all bilateral and on alliance and peace settlements. The annual total for the 18th century grew to about 100, with an increasing number on commerce and navigation, including such provisions in alliance and peace treaties. Britain's 19th century total increased ten-fold, to about 1,000 with many new subjects including anti-slave trafficking, extradition, postal and telegraphic communications, protection of copyright and industrial property. The northern Continent led this development, except for Britain on slave-trafficking and, perhaps, commerce and navigation, after the *USA's* independence. Many of these subjects began in bilateral agreements but, in the century's latter half, became subjects of multi-party agreements, as did other new treaty subjects, such as rules on the conduct of war and anti-disease measures. A notable feature of these new treaties is that they were associated with domestic legislation.

Britain's colonies had no treaty-making power and were, initially, automatically bound by all treaties. The geographic remoteness of the Australian colonies meant, initially, the new treaties, such as on anti-slave trafficking, commerce, navigation, extradition, copyright and posts had far less practical effect on them than the colonies in *BNA* and *West Indies (WI)*, where there was greater interaction with the *USA* and, to some extent, France and Spain. Indeed, this latter situation led Britain in 1877-8 to allow colonies a choice of separate adhesion to it deemed 'commercial' not 'political' treaties. This was, unknowingly, a major constitutional step, given the rise of treaties. Britain also allowed colonies to become separate members of the new *PGIOs* on posts, telegraphs, industrial property and copyright. Generally, Britain sought to induce its colonies to participate in this growing international legal system.

The Australian colonies major interest in bilateral treaties before 1901 was over restraints imposed by Britain's bilateral commercial treaties on their fiscal freedom, especially to legislate commercial protection. The other most numerous type of bilateral treaty, on anti-slavery, never really affected or interested them. Of bilateral political treaties, the many on extradition were advised only so colonies could carry out their obligations, if necessary, and they also legislated as requested under imperial legislation, unlike Canada. Initially, Britain's postal treaties were confined to the northern hemisphere but later in the century, Australian colonies variously became either party to a British bilateral treaty or concluded their own non-treaty agreements with both foreign and colonial postal administrations. Australia's

colonies' responses to the major multilateral treaty developments from the 1870s was mixed, with some not seeing the relevance or deprecating costs arising from adherence.

From January 1901 through 1905, the Commonwealth gradually moved to succeed its states in adhering to the major multilateral treaties concluded before federation, including on customs information, posts, telegraphs, copyright, sanitary measures, and, belatedly, industrial property protection. All fell under the Commonwealth's exclusive powers. By 1906, the Commonwealth had through treaty accession joined the *UPU*, *ITU*, *UPIP*, *IPLAW* and, less officially, the *IUPCT*, plus accepted obligations on international public health. From then, the number of new multilateral treaties increased markedly, not only in number but content. How Australia and Australians responded to a selection of them, both political--rules for the conduct of war--and non-political--transnational crime (traffic in 'white slaves' and obscene publications) and protection of labour (prohibition of white phosphorus matches and night work for women), is next examined in detail in the thesis.

PART 2

INTERNATIONAL RULES ON THE CONDUCT OF WAR

Chapter 2

‘one indivisible whole’: Hague and Geneva treaties on the conduct of war

The codification by treaty of long-standing customary international rules for the conduct of war began at Paris in 1856 and reached its first peak at The Hague in 1907. Britain deemed such treaties to be ‘political’ and, therefore, initially did not allow colonies a choice of separate adhesion nor accord them prior consultation. (This was initially the same for bilateral extradition and arbitration treaties.)¹ As with other modern treaties, however, these increasingly required domestic application. Britain’s preferred choice, of imperial legislation, began to come under challenge from 1906, led as usual by Canada, but later followed by the Commonwealth. After the Commonwealth’s protest, over the *Declaration of London* in 1909 (see Chapter 3), Britain agreed in 1911 to prior consultation, though, not separate conference representation or choice of adhesion on multilateral treaties on the conduct of war. (This also led to Britain turning over, what it called, a ‘new leaf’ on colonial consultation over certain other political treaties, including those on the new subject of general arbitration.) Australia’s slowly mobilising ‘*la voix publique*’ also began to call for separate colonial representation at such treaty conferences. After rejecting this in 1914, Britain conceded in 1919, after the war effort of the colonies, such representation at the iconic conference at Versailles.

Britain’s constitution—an imperial constitution, uncoded but not unwritten—changed, with manifestations less obvious than with the constitutions of the Commonwealth of Australia or the USA. Britain’s decision in 1876-7, to allow a choice of colonial adhesion to ‘commercial’ but not ‘political’ treaties, was a significant change in the imperial constitution. The distinction between ‘political’ and ‘commercial’ treaties in 1876-7 was never precise and became less so subsequently, as treaty-making embraced a raft of new subjects, including in multilateral form, which began to become significant only after 1875, only two years before that landmark constitutional decision. After 1875, the number of multilateral treaties on subjects, which were not clearly ‘political’, increased steadily and recognisably, as did ‘political’ treaties, including those on the conduct of war. Britain’s decision, in 1911, to consult the self-governing colonies, prior to the conclusion of certain ‘political’ treaties, was another significant development in the imperial constitution.

Most treaties of the early modern period were nearly all ‘political’, concerned with alliance, peace and dynastic succession. The subsequent rise of commercial treaties was more a phenomenon of the modern period. Treaties on the conduct of war, starting with the multi-party one concluded in Paris in 1856 on maritime warfare, represented a new subject matter, including those concluded at Geneva in 1864 and St Petersburg in 1868, followed by those at

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The Hague in 1899.² Britain deemed all these to be ‘political’ treaties, along with those on the equally new subjects of extradition and arbitration. Generally, the original British position was that colonies were not to be consulted in advance on such treaties nor given a choice of adhesion. Some adjustment was eventually made to this position, particularly with respect to Canada, on extradition and arbitration treaties. Britain did not consult any colony in advance on the first Hague peace conference of 1899. Afterwards, no policy direction was given.

1. ‘ultimate control’: Hague and Geneva conventions on the conduct of war, 1899-1908

In the first years of Australian federation, the development of international rules for the conduct of war, through multilateral treaties, faced Britain with new issues on dealing with colonies on political treaties, because of the increasing need for their domestic application.

In 1898, Britain was not enthused by the Czar’s proposal for a multilateral peace conference but, under public pressure, driven by crusading journalist, W. T. Stead (who, earlier, had led the campaign against ‘white slave’ trafficking), agreed to attend, though more in support of the USA’s proposals on arbitration rather than arms limitation or rules on the conduct of war.³ On 29 July 1899 at The Hague, Britain’s senior delegate, Lord (Sir Julian) Pauncefoot, had signed only the *Final Act* of the conference and none of the three conventions or three declarations, pending review by the LO.⁴ The most significant result was the creation of the PCA. Colonies had not been informed of the conference in advance. In October, Chamberlain, directed only internal distribution of the treaty texts.⁵ On 4 September 1900, Britain joined sixteen of the original signatories in depositing its ratifications of the three conventions (eight more original signatories ratified over the next four years) but not the three declarations.⁶

² Ingo Hueck, ‘Peace, security and international organisations: the German international lawyers and the Hague Conferences’, in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History: from the late Middle Ages to World War One*, CUP, Cambridge, 2004, pp. 254-69. Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*, OUP, Oxford, 2016, chapter 4; & Maartje Abbenhuis, Christopher Ernest Barber & Annalise R. Higgins (eds.), *War, Peace and International Order: The Legacies of the Hague Conferences of 1899 and 1907*, Routledge, London, 2017; Maartje Abbenhuis, *The Hague Peace Conferences and International Order, 1898-1915*, Bloomsbury, London, 2018 & *An Age of Neutrals: Neutrality and Great Power Politics, 1814-1914*, CUP, Cambridge, 2014.

³ Stephen Barcroft, ‘The Hague Peace Conference of 1899’, *ISIA*, 3(1), 1989, pp. 55-68; W. T. Stead, *The United States of Europe on the Eve of the Parliament of Peace*, George N. Morang & Company, Toronto, 1899; Frederic Whyte, *Life of W. T. Stead*, vol. 1, Cape, London, 1925.

⁴ Minute, Round, 30 October 1899, CO323/449/139, TNA. Age, 1 August 1899. The treaties were: *International Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*; *International Convention for the Pacific Settlement of International Disputes*; *International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of August 22, 1864* (all parties agreed before ratification to Article X); *Declaration concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases*; *Declaration concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations*; *Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods*, The Hague, 29 July 1899. Britain acceded to the first two declarations on 30 August 1907.

⁵ Minute, Chamberlain to Herbert, 26 October 1899, CO323/449/143, TNA

⁶ Between 1900 and 1904, the ratifying governments were: **Europe**: Austria-Hungary, Belgium, Britain, Bulgaria, Denmark, France, Germany, Greece, Italy, Luxembourg, Montenegro, Netherlands, Portugal, Romania, Russia,

Although uninformed of this by the *FO*, the *CO*'s Francis Round argued that these were important documents, which 'ought to be in the hands' of every colonial government, because, in war, 'very important international questions might arise' and these showed which foreign powers had committed themselves to the treaties.⁷ So, the treaties were sent to all self-governing colonies on 25 January 1901 (and soon after, to all other colonies), the first weeks of the Commonwealth, which possibly was not an addressee, though only in a routine library despatch of parliamentary papers, without policy advice.⁸ When a further paper on the ratifications was tabled in the Commons in late 1901, the *CO* decided in January 1902 to send this to all colonies, now including the Commonwealth, though, again, only in a non-action library despatch.⁹ No colony was asked to respond or did so in any way.¹⁰

In the wake of this conference and growing concern over the second Boer War (1899-1902), the Australian '*voix publique*' started to become engaged with treaties on the conduct of war, for the first time.¹¹ The *Peace, Humanity and Arbitration Society*, Australasia's first of that type, was established in Victoria in 1900, nearly 100 years after Britain's largely Quaker *London Peace Society (LPS)* in 1816.¹² Irish-born John Rentoul and English-born Richard Lambley, respectively Presbyterian and Unitarian ministers, were leading figures, heading a deputation, which lobbied both Barton and, opposition leader, Reid, in mid-1901 over the new Commonwealth neither introducing conscription, creating a standing army (so, only a citizen's force) nor deploying forces overseas (so, only for Australia's defence).¹³ In early

Serbia, Sweden-Norway (jointly on two conventions but separately ratified the convention on land warfare in 1907), Serbia (with a reservation on the convention for the *Pacific Settlement of International Disputes*), Spain, Switzerland. **Americas:** Mexico, *USA*. **Asia:** China (which did not ratify the convention on land warfare), Japan, Siam. **Middle East:** Persia, Turkey (did not ratify any convention until 1907).

⁷ Minute, Round to Cox, 26 January 1901, CO323/449/139, TNA. *Parliamentary Paper, Miscellaneous No. 1, C. 9534*, CO323/448/139-43, TNA.

⁸ Minute, Round to Cox, 9 January 1905, CO323/505/26, TNA.

⁹ CO323/478/442-444; CO323/486/886, TNA.

¹⁰ The contemporary literature on this subject generally remains the most important and later works on this subject to this date have generally just summarized them rather than employ original archival sources. George B. Davis, *The Second peace conference (paragraph 2 of the programme): The rules of war on land. Working memoranda*, Washington D. C. Government Printer, 1907; James Brown Scott, 'The Work of Second Peace Conference', *AJIL*, 2(1), January 1908, pp. 1-28; A. Pearce Higgins (ed.), *The Hague peace conferences and other international conferences concerning the laws and usages of war. Texts of conventions with commentaries*, CUP, Cambridge (UK), 1909; James Brown Scott, *The Hague peace conferences of 1899 and 1907*, 2 vols., TJHP, Baltimore, 1909; James L. Tryon, 'The Hague Conferences', *YLJ*, 20(6), 1911, pp. 470-485; David J. Hill, 'The Second Peace Conference at the Hague', *AJIL*, 1(3), July 1913, pp. 671-91.

¹¹ Martin Ceadel, *Semi-detached Idealists: The British Peace Movement and International Relations, 1845-1945*, OUP, Oxford, 2000; Paul Laity *The British Peace Movement, 1870-1914*, CUP, Cambridge, 2001; Malcolm Saunders and Ralph Summy, *The Australian peace movement: a short history*, Peace Research Centre, ANU, Canberra, 1986.

¹² The title, as reported, varied, including the *Peace and Humanity Society*. *Daily Telegraph & Barrier Miner*, 21 July 1901; *National Advocate*, 14 August 1901; *Register*, 24 August 1901. Originally entitled the *Society for the Promotion of Permanent and Universal Peace*, the Society established a Ladies Peace Association, which in 1882 left to affiliate with the *International Arbitration and Peace Society*, formed in 1880.

¹³ Atlee Hunt mistook the deputation as being from the Society of Friends. See 1901/81/1, CRS A8, NAA. *Daily Telegraph*, 23 July 1901; *Leader*, 27 July 1901; *National Advocate*, 14 August 1901; *Herald*, 14 August 1901; *Register*, 24 August 1901; *Illawarra Mercury*, 13 November 1901; *Age*, 8 February 1902. Stuart Macintyre,

1902, English-born history professor, George Arnold Wood, rising Labour politician William Holman and leading feminist, Rose Scott, formed the *Anti-War League* in Sydney, soon petitioning Britain over the Boer War.¹⁴ (A peace society was soon formed in Wellington, NZ.) These movements faded after the peace settlement in June 1902 but revived in late 1904.

Amid the Russo-Japanese War, 1904-05, the *LPS* held its first National Peace Congress and, at the 13th *International Peace Congress* in Boston, Denmark's peace society proposed governments forming a 'peace-making union', in association with the *PCA*. This idea received added emphasis soon after, with the dangerous Dogger Bank incident, in which Britain might have been drawn into war against Russia, through its defensive alliance with Japan.¹⁵ In late 1905, an 'Australasian' branch of the *LPS* was formed in Melbourne (later renamed Melbourne Peace Society, *MPS*), under Scottish-born Charles Strong, a controversial Presbyterian minister.¹⁶ Maverick Liberal Protectionist, Henry Bourne Higgins, himself the son of an Irish Methodist minister, was a publicly prominent member. He served as Labour's attorney-general, on the *HCA* from late 1906 and, from 1907, as president of the *Commonwealth Court of Conciliation and Arbitration*.¹⁷ He often made public statements, such as hailing the creation of the Hague Tribunal, as 'very promising'. Deakin kept his own membership more discreet.¹⁸ The society attracted support from Quakers (in whose Friends' Meeting House the *MPS* met), Baptists, Unitarians, Presbyterians, Congregationalists, Orthodox Greeks, Christian Hebrews and Methodists. Anglican Archbishop of Melbourne, (Henry) Lowther Clarke, by contrast, mocked the society. The Catholic hierarchy was silent.¹⁹

In December 1904, again at The Hague, led by France, nineteen governments signed (as did another five later that year) the *Convention and Final Act for the Exemption of Hospital Ships from Harbour Dues*, which supplemented the 1899 Hague convention adapting the principles

'Rentoul, John Laurence (1846-1926)', *ADB*, vol. 11, NCB:ANU, MUP, Melbourne, 1988, <http://adb.anu.edu.au/biography/rentoul-john-laurence-8184/text14311>.

¹⁴ *Daily Telegraph*, 28 & 31 January, 1 & 7 February 1902. Judith Allen, 'Scott, Rose (1847-1925)', *ADB*, Vol. 11, NCB:ANU, MUP, Melbourne, 1988, <http://adb.anu.edu.au/biography/scott-rose-8370/text14689>; R. M. Crawford, 'Wood, George Arnold (1865-1928)', *ADB*, Vol. 12, NCB:ANU, MUP, Melbourne, 1990, <http://adb.anu.edu.au/biography/wood-george-arnold-9170/text16193>; Bede Nairn, 'Holman, William Arthur (1871-1934)', *ADB*, Vol. 9, NCB:ANU, MUP, Melbourne, 1983, <http://adb.anu.edu.au/biography/holman-william-arthur-6713/text11589>.

¹⁵ *Age*, 11 October 1904; *Examiner*, 12 October 1904; *Chronicle*, 15 October 1904.

¹⁶ *Age*, 5 December 1905, 21 June 1906; *Australasian*, 5 May 1906. C. R. Badger, 'Strong, Charles (1844-1942)', *ADB*, vol. 6, NCB:ANU, MUP, Melbourne, 1976, <http://adb.anu.edu.au/biography/strong-charles-4658/text7697>; Malcolm Saunders, 'An Australian Pacifist: The Reverend Charles Strong, 1844-1942', *Biography*, 18(3), Summer 1995, pp. 241-53; *Mercury*, 5 March 1906. Prominent anti-opium campaigner, Presbyterian minister, Cheong Cheok Hong, was also a member. *Bendigo Independent*, 10 November 1906.

¹⁷ John Rickard, *H. B. Higgins, the Rebel as Judge*, Allen and Unwin, Sydney, 1984.

¹⁸ *Age*, 21 June 1906, 13 June 1907; *Argus*, 27 September & 29 November 1906; *Examiner*, 4 October 1906.

¹⁹ *Register*, 5 January 1905; *Age*, 5 December 1905, 21 June & 19 December 1906, 13 June, 5 July & 15 November 1907, 21 March & 24 September 1908, 24 March, 6 April, 7 & 26 July 1909, 25, 30 March & 21 May 1912, 27 August 1913, 3 April 1914; *Argus*, 29 November 1906.

of the 1864 Geneva Convention to maritime warfare.²⁰ Britain neither attended nor signed.²¹ The *FO* did not advise the *CO* until afterwards.

The *CO*'s chief legal adviser, Bertram Cox, however, impressed with the width of international support (especially, the adhesion of the *USA*), advised Ommaney, the *CO*'s head, that Britain 'must' eventually sign and, so, it was 'desirable' that colonies be informed so, that once Britain ratified it, they could 'join' and 'pledge' themselves to appropriate legislation.²² This was the first time a conduct of war treaty required domestic legislation, which the *CO* clearly thought could not be done simply by applying imperial laws, at least to self-governing colonies. There is one indication that the *CO* considered but thought not 'advisable', separate colonial adhesion, even if Britain did not sign, which would have been an even more remarkable precedent.²³ The *BoT*, however, while conceding that, it 'cannot fail to sympathise with the [convention's] human object', was 'inclined to deprecate' signing, arguing that hospital ships were already exempt from light dues in British ports, all but two of which were in private hands, with one of those unsuitable for such ships. So, without new legislation, the convention could not be enforced.²⁴ The *CO*'s John Green, '[s]urprised' that the *FO* simply accepted this, told Cox that it would be 'certainly misinterpreted abroad' and feed the 'Anglophobe press'.²⁵ Cox agreed: 'I don't think our attitude is a very nice one.'²⁶ Ommaney shrugged that it was not the *CO*'s concern but, in January 1906, informed all colonies with seaboard that Britain had found it not 'desirable' to sign the convention. At the *FO*'s suggestion, the *CO* sent a second despatch to governors in self-governing colonies only, for their 'confidential information and guidance', to 'explain' Britain's refusal to ministers.²⁷

Within six months, in July 1906, Britain's new Liberal government did join an unprecedented number of 35 governments from five continents in signing a new *Geneva Convention*.²⁸ (Switzerland had been pushing for revision from 1903, after reports of the misuse of the *Red Cross* emblem during the *Boer War*.²⁹) Britain signed with reservations on three clauses,

²⁰ *Convention for the Exemption of Hospital Ships from Harbour Dues*, The Hague, 21 December 1904. **Europe**: Austria, Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Montenegro, Netherlands, Portugal, Romania, Russia, Spain and Serbia. **America**: Mexico, Peru and *USA* (Guatemala, not a signatory, ratified in 1906). **Asia**: China, Japan, Korea and Siam. Norway, after independence, ratified in 1907, followed by Sweden and Persia (1908), Danzig and Poland (1921), Turkey (1932) and Cuba (1965). *Times*, 13 September 1904.

²¹ CO323/495/661-76, 708-12; CO323/505/26-35, 487-8, TNA.

²² Minute, Cox to Ommaney, 26 January 1905, CO323/506/26, TNA. Ommaney was permanent under-secretary of state for the colonies.

²³ Minute, Green to Cox, 26 September 1905, CO323/508/383, TNA.

²⁴ Letter, *BoT* to *FO*, 7 November 1905 & letter, *FO* to *CO*, 13 November 1905, CO323/508/340-2, TNA. .

²⁵ Minute, Green to Cox, 14 November 1905, CO323/507/339, TNA.

²⁶ Minute, Cox to Ommaney, 14 November 1905, with notation by Ommaney, CO323/507/339, TNA.

²⁷ Minute by Ommaney & circular despatch, 17 January 1906, CO323/507/343-5, 465-77; CO323/519/3-8, TNA. The Commonwealth's copy is in vol. 32, CRS A11816, NAA.

²⁸ WO106/44; CO323/519/580-90, TNA.

²⁹ *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 6 July 1906. **Europe**: Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Greece, Italy,

concerning obligations to legislate, not only against that misuse by both civilian and military persons and organisations but also on individual acts of pillage or mistreatment of armies' wounded and sick in war.³⁰ The colonies had not been notified prior and the *FO*, only in early 1907, prior to ratification in April, first informed the *CO*, while the *WO* provided the conference minutes, without advice. As legislation, allowing Britain's removal of reservations and ratification, was not immediately planned, the *CO* considered whether a 'special' circular should be sent to the colonies or, again, was it 'sufficient' only to send library despatch containing the parliamentary paper, buried among others. Risley pronounced, that this 'will do'.³¹ So, no action or views were requested. The Commonwealth noted receipt of the treaty but Britain took no further policy action, probably because it intended to enforce the convention imperially, not with colonial but imperial legislation, which was not yet planned.³² In fact, Britain took no further action for nearly five years, until legislation for the second Hague peace conference was being considered.

Although the first Hague peace conference anticipated a second, defeat in the war with Japan (1904-05) sped Russia's call for it, to take forward the original treaties. Ommaney dismissed, as a 'ghastly farce', a peace conference with Russia as the 'moving spirit' and the 'unreality' of international disarmament.³³ Nonetheless, Britain's neutral shipping trade had suffered during that war at the hands of both belligerents and, so, in early 1906, Britain agreed to attend and began preparations, focussing on protection of private property from seizure at sea during war.³⁴ Risley--who had published a book on the laws of war a decade prior and was the *CO*'s representative for the inter-departmental committee on the conference--advised Ommaney that there were two major colonial issues. First was naval disarmament, which was of 'vital concern' to the colonies, 'especially a large & more or less defenceless' Australia, given the unfavourable relative sizes of the empire and its navy. Second, was immunity of private property from capture at sea in war, to which he was certain Britain would never agree and would 'by no means be in a minority of one'.³⁵ Overall, on the first issue, he 'venture[d] to submit that the great self-governing colonies are entitled to be heard', prior to the conference, especially as, all but Canada, were making some financial contribution to the

Luxembourg, Montenegro, Netherlands, Norway, Portugal, Romania, Russia, Serbia, Spain, Sweden, and Switzerland. **America:** Argentina, Brazil, Chile, Guatemala, Honduras, Mexico, Peru, Uruguay and *USA*. **Asia:** China, Korea, Japan and Siam. **Middle East:** Persia. **Africa:** Congo.

³⁰ Articles, 23, 27 & 28. CO323/530/116-34, TNA.

³¹ Minutes, Green to Risley 7 February and Risley to Lucas, 9 February 1907, CO323/530/116-134; WO3107/07Gen, 25 January 1907, CO378/18, TNA.

³² A file was opened in 1907 and note on its rear cover records that *DEA* noted this paper as arriving in the *CO*'s library dispatch; 1919/446, CRS A1, NAA.

³³ Minute, Ommaney to secretary of state, 28 July 1906, CO323/519/354, TNA.

³⁴ FO4699Gen, 8 February, FO12989Secret, 12 April & FO13762Secret, 19 April 1906, CO694/27; CAB38/11/17-23, TNA.

³⁵ Minute, Risley to Cox, 24 July 1906, CO323/519/353-4, TNA.

Royal Navy. On the second issue, while conceding that the colonies were ‘entitled’ to assume they would enjoy ‘undiminished’ naval protection, he argued that, they ‘must be content to have their shipping exposed to the same risks’ as Britain’s, and, on this, they need not be consulted: it ‘is naval policy to be settled by HM Govt. & the Admiralty’.³⁶ Before the Hague conference, he advised Sir Francis Hopwood, deputy colonial secretary, that the committee’s report on the peace conference did not contain ‘any matters of peculiar colonial interest’.³⁷ Hopwood expressed agreement to Lord Elgin.³⁸ So, no advance notice, let alone invitation to attend or make observations, was sent to colonies or, even, raised with the visiting premiers.

In June 1907, at the second colonial conference since Australian federation, neither the *Hospital Ships* or *Geneva* conventions, nor the coming Hague conference, were discussed. As in 1902, there was again only brief discussion of treaties, also again largely confined to bilateral commercial treaties. Deakin secured two unanimous resolutions, with support from Laurier. (That year Canada negotiated its first commercial treaty without imperial supervision.³⁹) Firstly, Britain was to prepare, for these colonies’ information, privileges conferred and obligations imposed on them by existing commercial treaties and examine how to make these more ‘uniform’ throughout the empire. Secondly and more assertively, Britain was to remove ‘all doubts’, as to the ‘rights of the self-governing colonies to make reciprocal and preferential fiscal arrangements’ with each other and Britain, ‘[un]fettered’ by imperial treaties concluded without their concurrence. Even more controversially, Deakin proposed, without securing conference approval, that Britain ‘take the necessary steps for revision of any commercial Treaties which prevent preferential treatment being accorded to British goods carried in British ships.’⁴⁰ The Commonwealth or, at least Deakin, was beginning to become more assertive about those treaties, which restricted Australian policy.

Britain recognised that these colonies were becoming desirous of being treated on a more equitable basis, while not demanding complete independence. So, Britain agreed here to re-name the next such conference, ‘imperial’ not ‘colonial’, and to a NZ official petition, shortly afterwards, to change, by *OiC*, the formal title of NZ from ‘Colony’ to ‘Dominion’, which it also did for Newfoundland, from September 1907. The term was thereafter applied formally,

³⁶ Minute, Risley to Hopwood, 24 April 1907, CO537/349/1, TNA.

³⁷ *ibid.*

³⁸ Minute, Hopwood to Elgin, 26 April 1907, CO537/349/1, TNA. Edward James Bruce, 10th Earl of Elgin, 14th Earl of Kincardine.

³⁹ In 1907, Canadian officials directly negotiated, without British supervision, for the first time, but with approval, a commercial agreement with France, which Britain signed ratified as a treaty, with France. *Convention regulating the commercial relations between Canada and France*, Paris, 19 September 1907. A *Supplementary Convention* was also signed.

⁴⁰ *Minutes of the Proceedings of the Colonial Conference*, Eyre & Spottiswoode, London, 1907, pp. viii, 467-8, Item 3, AA1967/203. NAA. The colonies represented were Australia, Canada, Cape Colony, NZ, Natal and Transvaal. Orange River Colony, which was not yet self-governing, and Newfoundland did not attend.

but without legislation, to all self-governing colonies.⁴¹ A Dominions Department (*DD*) was created in the *CO*, separate from the General Department (*GD*), which retained supervision of crown colonies and protectorates (*CC&P*). That year, *Orange River Colony* (*ORC*), following Transvaal, was made the eighth self-governing colony. Despite all this, the second Hague peace conference opened only four weeks after the colonial conference closed, where it was unmentioned. Separate colonial representation at or prior consultation about The Hague conference was neither contemplated, requested nor accorded.

The 2nd Hague peace conference ran from June to October 1907.⁴² During this, when discussing the treatment of neutral aliens in war, the *CO* considered consulting the self-governing colonies, which would have to legislate, if this was put into a treaty. The ultimate decision, however, was to await the final conference results.⁴³ Colonial secretary, Lord Elgin, in discussion with Cox, did surprisingly hold that the separate colonial adhesion clause, employed in commercial treaties, should be included in all conventions, arising from this conference. Ultimately, Britain's delegation did not seek this, which did not raise any apparent concern in the *CO*.⁴⁴ Risley told Cox that the 'main principle' was that, for the

*purpose of War and all its consequences the British Empire is one indivisible whole and we cannot raise small objections of detail from the possible colonial point of view.*⁴⁵

He doubted that there was anything in the conventions, which 'hits any Colony so vitally thereby to prejudice the Empire as a whole', and that was the *CO*'s only 'legitimate' interest in them.⁴⁶ His colleague, Henry Lambert, with Cox's concurrence, then affirmed to the *DD*'s head, Charles Lucas. 'I agree! I see nothing that specially affects a Colony.'⁴⁷ Accordingly, Elgin approved that the only advice to be passed to the colonies, with Canada given priority, after the conference closed, was a parliamentary paper in a routine library despatch. During the conference, Britain also signed a multilateral protocol to permit accession of original non-signatories to the 1899 convention on pacific settlement of international dispute, and separately acceded to two of the three 1899 declarations, those on prohibiting use of expanding bullets and asphyxiating gases, all without specific advice to the colonies.⁴⁸

⁴¹ CO418/53/366-7, 370-4, 396-406, 417-23; 532/2/223-4, TNA. Apparently, Newfoundland still preferred 'Colony', proud of its status as Britain's first, at least in name.

⁴² For the relevant secondary sources, see at footnote 2 & 10.

⁴³ CO323/531/144-57, 353-69, 500-21, 560-75, 607-18, TNA.

⁴⁴ CO323/531/361-70, TNA.

⁴⁵ Minute, Risley to Johnson and Cox, 15 January 1908, CO323/542/37, TNA.

⁴⁶ *ibid.*

⁴⁷ Minutes, Lambert to Johnson, 17 January & Cox to Lucas, 18 January 1908, CO323/542/37, TNA.

⁴⁸ Minute, Johnson, 15, 17 and 18 January 1908, with initials by Lord Elgin 23 January 1908, CO323/542/37-40; CO323/543/40-55, TNA. 52 & 53 Vict., *An Act for Consolidating relating to the Construction of Acts of Parliament and for further shortening the Language used in Acts of Parliament*, 1889, c. 63.

The Commonwealth's direct source of information from London, besides press reports, had improved from March 1906, when former Department of Defence (*DoD*) secretary, naval captain Robert Collins, was appointed official secretary there.⁴⁹ Principally or ostensibly assigned for oversight of defence procurement contracts, he, inadvertently or otherwise, soon became involved in many other policy issues, providing more immediate reports to the Commonwealth, which had not hitherto enjoyed sources like the states' London-based agent-generals. In January 1908, he forwarded the parliamentary paper on The Hague conference.⁵⁰

News of the coming peace conference had stimulated greater interest and activity among Australia's public. Strong travelled Australia promoting the peace cause.⁵¹ Subsequently, in Quaker-strong Hobart (due to the Cadbury's factory), a *LPS* branch was formed in January and the local *National Council of Women (NCW)* formed a peace sub-committee.⁵² *LPS* branches were formed in Sydney in September at a Friends' Meeting House and in Adelaide, two months later.⁵³ (In Auckland, an *International Arbitration Society* was formed.) After the conference, the *LPS* organised, empire-wide, including in Australia, a 'peace Sunday', for 22 December, with sermons on the 'Universal Peace Society'. After the Archbishop of Westminster voiced his support, Melbourne's Archbishop Clarke adopted a new stance.⁵⁴ Australia's Presbyterian assembly did commend, through the Commonwealth, support for the conference to the British government but the Commonwealth itself remained passive, making no such representations.⁵⁵ Over the next four to five years, after The Hague, despite regular international peace society congresses, which Australian representatives attended, Australia's peace and arbitration movement lost momentum. The *MPS* lobbied against compulsory military training and school cadets but there was not yet an international event to generate greater interest and activity.⁵⁶ By 1913-14, this would change.

2. 'no separate interests': colonial consultation over political treaties, 1908-10

⁴⁹ Chris Cunneen and Ann G. Smith, 'Collins, Sir Robert Henry Muirhead (1852-1927)', *ADB: NCB*, Vol. 8, ANU, Canberra, 1981, <http://adb.anu.edu.au/biography/collins-sir-robert-henry-muirhead-5741/text9719>.

⁵⁰ *Correspondence respecting the Second Peace Conference, held at The Hague in 1907*, Harrison, London, 1908. Vol. 28, CRS A1108 & 1954/1/73, CRS MP84/1, NAA.

⁵¹ *Argus*, 27 April 1907; *Daily Telegraph*, 1 June 1907; *Age*, 5 & 6 July 1907.

⁵² *Examiner*, 4 & 13 March 1907; *Mercury*, 26 June & 22, 24, 26 August 1907, 24 January, 28 February & 21 March 1908; *SMH*, 9 October 1907. Ann-Mari Jordens, 'Harwood, Marian Fleming (1846-1934)', *ADB*, Vol. Supplementary, NCB:ANU, MUP, Melbourne, 2005, <http://adb.anu.edu.au/biography/harwood-marian-fleming-12969/text23437>.

⁵³ *Evening News*, 30 September 1907; *SMH*, 9 October & 21 December 1907; *Daily Telegraph*, 23 November & 20 December 1907; *Telegraph*, 27 November 1907; *Advertiser*, 29 November & 3 December 1907; *Register*, 4, 17 & 23 December 1907.

⁵⁴ *Register*, 23 December 1907; *Argus*, 23 December 1907.

⁵⁵ CO418/52/333-7, TNA; 8 July 1907, CRS CP78/8; 997, CRS A6662, NAA.

⁵⁶ *Age*, 24 September 1908, 24 March & 6 April 1909, 15 August 1910. *SMH*, 26 July 1909, 10 August & 7 & 21 September, 29 November 1910.

The need for domestic application of some of the Hague conventions compelled Britain to consider whether its ultimately unitary conception of the empire could continue in an era where the self-governing colonies were increasing their demand to be exactly that.

In mid-1908, the imperial government considered the legal instruments drafted at The Hague. Risley continued to represent the *CO* in this process, advising that he did not see any points of “colonial” interest except, perhaps, the compulsory arbitration provision in the first convention.⁵⁷ Hopwood, in somewhat convoluted language, prevaricated. ‘I don’t feel altogether certain that we ought not let’ the main colonies know. Nevertheless, he was ‘inclined’ to think Britain must ‘run the risk’ of ‘strong protests’, for example, from Australia over, ‘rightly or wrongly’, Britain’s adoption of the convention on bombardment of undefended ports, without giving it ‘a say’.

*Deakin will probably write an insulting despatch but I am afraid we must make the best of it. To consult the Federal Gov[ernment] it would certainly mean delay & perhaps or probably worse!*⁵⁸

Risley agreed that he could not see any grounds for Australian complaints, reiterating that there was ‘nothing’ in that convention which made it ‘necessary or desirable’ to consult ‘any’ colonies.⁵⁹ John ‘Jack’ Seely, who had succeeded Winston Churchill, as under secretary, endorsed this view, in the ‘present instance’, but insisted that the colonies ‘certainly’ should be informed, including on the reasons behind Britain’s decisions. Inclining to Lucas’ concerns, he mused.

*The moral of it all seems to be that we should always have a Colonial Representative as one of our delegates at such conferences.*⁶⁰

Colonial secretary, Lord Crewe settled the debate, if not the issue, by ruling that the colonies ‘should certainly received formal intimation.’⁶¹ Nothing, however, was sent at this stage, but after Risley stressed the importance of advising the colonies over the convention on rights and duties of neutrals in war,⁶² Hopwood, with Seely and Crewe’s approval, recommended that colonies be advised over necessary legislation, once the conventions were signed.⁶³

In fact, no such communication was sent after 18 June 1908, when Britain’s plenipotentiaries signed thirteen of the fourteen instruments (two with reservations), but not that on an international prize court.⁶⁴ The drafting of the imperial *Second Peace Conference*

⁵⁷ Minute, Hopwood to Risley, Just & Lucas, 2 May 1908, CO537/351/2, TNA.

⁵⁸ Minute, Risley to Just, Antrobus, Cox, Lucas & Hopwood, 11 April 1908, CO537/351/1, TNA.

⁵⁹ Minute, Risley, 4 May 1908, CO537/351/2, TNA.

⁶⁰ Minute, Seely, 12 May 1908, CO537/351/3, TNA.

⁶¹ Minute, Crewe, 25 May 1908, CO537/351/3, TNA.

⁶² Minutes, Risley, 11 April & 4 May 1908, CO537/352/1-2, TNA.

⁶³ Minute, Hopwood to Risley, Just & Lucas, 2 May 1908, CO537/352/2, TNA.

⁶⁴ CO323/548/398-421, TNA. Britain signed the conventions on the *Limitation of the Employment of Force for Recovery of Contract Debts* (2), *Opening of Hostilities* (3), *Laws and Customs of War on Land* (4), *Legal Position of Enemy Merchant Ships at the Start of Hostilities* (6), *Conversion of Merchant Ships into War-ships* (7), *Laying of Automatic Submarine Contact Mines* (8), *Bombardment by Naval Forces in Time of War* (9), *Certain*

(*Conventions*) or *Hague Conventions* bill, which would put some of the conventions' provisions into force, then proceeded without any notice to or consultation with the colonies. In late 1908, the *FO* forwarded to the *CO* this bill, drafted by the parliamentary (second, later, first) counsel, Frederick Liddell. He would shortly advise on the annual *Army Act* (also imperial legislation), that under the *Interpretation Act 1889*, the

self-governing Dominions continue to be colonies within the meaning of an Act of Parliament notwithstanding [that, at the imperial conference of 1907] they [we]re styled "Dominions"'.⁶⁵

His bill, which was to be read with other important imperial legislation—the *Foreign Enlistment Act 1870* and *Merchant Shipping Act 1894*—provided that it 'shall extend to the whole of His Majesty's dominions'.⁶⁶ Early in 1909, the *FO* also forwarded his draft of an amendment, in relation to one of The Hague conventions, to the former *Act*, but it was shelved until late 1912.⁶⁷ For now, attention focused on *The Hague Conventions* bill, which the *CO*'s legal advisers examined closely, advising some changes.

The *CO*'s highly erudite Arthur Berriedale Keith held, apart from his humanities qualifications, a bachelor and doctorate of law. He immediately noticed provisions for executive authority, seemingly granted to the colonial secretary and colonial governors. He suggested that the former needed procedural explanation and the latter amended to read 'Gov[ernor]-in-Council', in 'recognition of the Constitutional position', as governors could 'do nothing save' through ministers.⁶⁸ Risley disagreed, arguing that they were already so empowered, as agents to exercise the 'war prerogative of the Crown'.⁶⁹ (In 1897, the imperial government tried but failed to vest the Commonwealth armed forces' command in the Queen not governor-general.⁷⁰) His senior, Henry Lambert, with Cox's agreement, stressed that 'we must not on any account send it to the Colonies before we have settled it among ourselves.'⁷¹

In early 1909, this debate continued, when the *FO* returned the bill unamended, noting that, as the first date for the ratifications had already passed, there was a pressing need for final agreement, so that the bill could be adopted and conventions ratified. So, the *FO* wanted to

Restrictions with regard to the Exercise of the Right of Capture in Naval War (11) and the *Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons* (14) but did not sign the conventions for the *Pacific Settlement of International Disputes* (1), *Rights and Duties of Neutral Powers and Persons in case of War on Land* (5), *Adaptation to Maritime Warfare of the Principles of the Geneva Convention* and *Rights and Duties of Neutral Powers in Naval War* (13).

⁶⁵ File note, Liddell, 12 December 1910, WO32/910/5, TNA. His sister was Alice, of 'Alice in Wonderland'.

⁶⁶ *Foreign Enlistment Act, 1870*, 33 & 34 Vict. c. 90; *Merchant Shipping Act, 1894*, 57 & 58 Vict. c. 60.

⁶⁷ The *CO* recommended further amendment, making the principal *Act* applicable to 'all' British possessions, including those acquired since that *Act*. CO532/14/181-6, CO323/555/95-101, TNA.

⁶⁸ Minute, Keith to Cox and Risley, 4 January 1909, CO323/548/398, TNA.

⁶⁹ Minute, Risley, 4 January 1909, CO323/548/398-9, TNA. He made this claim on a related matter in 1911; minute, Risley to Lambert, 2 March 1911, CO532/33/119, TNA.

⁷⁰ Marginal note, Bramston, 3 November 1897, CO418/4/318-20, TNA.

⁷¹ Minute, Lambert to Johnson, 2 January 1909, CO323/548/398-9, TNA.

know if the self-governing colonies needed to be consulted prior. Risley advised that, throughout this process, the *CO* had always taken the 'line' that the colonies had

*no separate interests from those of the mother country. The Conventions have to apply to the whole Empire as one unit . . . just as the Foreign Enlistment Act does.*⁷²

The contentious sections of this bill were based on that *Act* and Risley seemed unconcerned that much had changed in imperial relations in the succeeding four decades. Colonial 'suggestions or objections', he asserted, would 'certainly' be 'impossible to accept' and 'merely' an 'embarrassment'. So, the bill should be sent 'for information only' and not for observations.⁷³ Lambert agreed that this was 'clearly right', elaborating that colonial choice of adhesion had long been allowed for commercial but, 'never', 'international political' agreements. If allowed, it would reduce Britain to the 'seat of importance' on which the *Holy Roman Empire* 'suffered', 'ceas[ing] to carry weight' in the world because of the 'inoperable difficulty' of securing 'united action' by its 'component states'.

*The Empire must show a united front to the world in these matters & there is no authority but HMG who can judge & decide how this should be done.*⁷⁴

This persuaded Sir Hartmann Just, Cox, Lucas and Hopwood but not all in the *CO*.

Berriedale Keith cautioned that whether or not the colonies were consulted was a 'very important question', although conceding that political treaties had never been submitted to them for prior approval, unless a colony was 'particularly' concerned. He agreed that the time was 'not yet ripe' to grant this choice, as Britain still bore the 'burden of imposition of rationality' upon these colonies. So, Britain should proceed to legislate and defend any colonial objections on that principle. To do otherwise, would 'represent a development of our const[itutional] relations with the Colonies beyond precedent.'⁷⁵ When Johnson and Just, however, supported Risley's objection, that this amendment should not be made, Keith returned to the charge, claiming that Lord Crewe, who had succeeded Elgin, was anxious to show these colonies 'all possible consideration'. So, empowering governors to act without ministerial advice in self-governing, as opposed to crown, colonies was 'out of the question'. (He also thought that the Commonwealth would insist on 'governor-general' being specified, so not as to empower state governors.) With the power of the secretary of state to act independently of ministers—a 'very improbable' necessity--'secured', he concluded that it would be a 'graceful concession' to insert 'in-Council', after 'Governors', to 'alleviate any indignation' that the colonies felt by having the bill 'passed over their heads'.⁷⁶

⁷² Minute, Risley, 4 January 1909, CO323/548/398-9, TNA.

⁷³ *ibid.*; minute, Risley to Lambert and Johnson, 30 January 1909, CO323/556/38, TNA.

⁷⁴ Minute, Lambert, 1 February 1909, CO323/556/38-9, TNA.

⁷⁵ Minute, Keith to Risley & Cox, 30 January 1909, CO532/14/60, TNA.

⁷⁶ Minute, Keith to Cox, 9 February 1909, CO532/14/61-2, TNA. Robert Offley Ashburton Crewe-Milnes, 1st Marquess of Crewe.

Harold Dale, also legally-trained, supported Berriedale Keith, adding that the bill empowered Britain's executive to legislate directly in those colonies, not by parliament on general questions of treaty obligations but, 'whenever it chooses', by an executive *OiC* on matters of local detail. He expected these colonies to respond that it was their governments, which should be so empowered. They were also likely to protest that this new power should not be granted or exercised without prior consultation. He did hold that Britain 'must retain the ultimate power' in such matters but the bill should allow the colonies, within limits, to exercise the powers which the *FO* wanted conferred on Britain's executive. Certainly, the bill should be sent to them, as Lord Crewe had instructed, but not asking for their views and only advising that it would shortly be introduced into parliament.⁷⁷

Risley, Lambert, Johnson and Cox still disagreed, the former claiming Berriedale Keith's 'enthusiasm for constitutional principles' had led him into error. He argued that the powers granted to the secretary of state to act unilaterally within the colonies was 'extremely limited', only being to make an order on the application of the proposed international tribunals (e.g., on dispute settlement). He also did not 'concur' with any 'agitation now in Australia' to add 'Council', as he presumed governors would act in accordance with constitutional practice. He also supported the third main question, which Lambert emphasised was the most important, of Britain applying the conventions by *OiC*'s under the proposed *Act*. He agreed with Dale that the need for 'immediate' action was 'imperative', for it would 'obviously' be 'impossible' to consult or ask for the colonies' concurrence. The *FO* would 'never' accept the colonies having 'concurrent' powers.⁷⁸ Lambert 'entirely' agreed that Britain 'cannot in any respect afford to let go the full & ultimate control of these international questions'. If concessions were now made, the *FO* would insist in war on hastily resuming full control, which might cause 'much friction and irritation'. To 'carry them with us', colonies should be allowed now to act for themselves, as much as possible, while 'reserving the ultimate decision firmly in our hands', by providing that Britain could amend or repeal any governor's orders. So, he finished, the bill should be introduced to parliament, 'just after it has reached the most distant colony.'⁷⁹

Cox then closed the debate by invoking his great experience, which included the Spanish-American, Russo-Japanese and Boer wars. Allowing colonies to issue their own orders on matters of self-defence or neutrality obligations would be 'disastrous' and 'unworkable', when it was 'essential' for the imperial government to act with 'promptness & finality'. Britain could 'not risk', for the sake of colonial '*armour propre*', delays in awaiting their *OiC*s, which might involve Britain in a war or something like the *Alabama* claims. Perhaps,

⁷⁷ Minute, Dale to Johnson, Just and Lucas, 10 February 1909, CO532/14/62-3, TNA.

⁷⁸ Memorandum, Risley, 11 February 1909, CO532/14/63-6, TNA.

⁷⁹ Memoranda, Lambert & Johnson, 12 February 1909, CO532/14/66-7, TNA.

he continued, when the colonies contributed to imperial defence, they might demand a voice but, for now, Britain must 'stand firm'.⁸⁰ So, Lucas warned that they had 'better not say anything' to the colonies by way of explanation, as it might encourage objections.⁸¹

While Berriedale Keith persuaded Seely over inserting 'in Council', Lucas, Johnson and Just convinced Lord Crewe not to seek amendment of the bill, which Crewe affirmed must have 'full application' to all colonies.⁸² Crewe held that on non-commercial 'international questions', Britain must be able to act, without prior colonial consultation. Nor should these colonies be offered separate representation at future peace conferences, as none of their leaders could speak on other than 'local interests'. He did, instead, suggest, which the *FO* deprecated (and *CO* officials did not fully support), attendance of their London representatives at inter-departmental meetings for drafting such treaty-related legislation (forgetting that agent-generals represented their state not the Commonwealth).⁸³ So, Crewe sent the bill to colonies in April 1909, 'for information' only.⁸⁴ A separate semi-official letter, for governors alone, instructed them not to raise procedural questions but that, if ministers did raise the objection that, the 'more proper mode' would be for colonies to legislate for the convention themselves, they were to respond 'in a friendly way to remove any feeling of dissatisfaction'. Britain's 'responsibility for foreign affairs and Imperial defence from foreign attack' was a 'sufficient justification' for retaining power over such 'ultimate decision[s]'.⁸⁵

Only two weeks after the colonies were sent the bill, the *FO* further amended it, including making some class of breaches of it, offences under the *Foreign Enlistment Act*. Berriedale Keith warned that the bill now empowered colonial legislatures to amend one of its section, 'exactly what we do not want it to do'. He thought it not 'beyond the ingenuity of man to avoid this somewhat absurd situation'.⁸⁶ Risley explained that he had raised this in the interdepartmental drafting committee but its general view was that, given the limited scope of the section in question (on hospital ships) and the 'more than ordinary "sanctity" of the Geneva convention . . . compared with that of most international obligations', colonial legislatures were very unlikely to so act.⁸⁷ They agreed it was too late to do anything and, so,

⁸⁰ Minute, Cox to Lucas and Hopwood, 12 February 1909, CO532/14/67-8, TNA.

⁸¹ Minute, Lucas, 15 February 1909, CO532/14/68, TNA

⁸² Minute, Seely, 15 February 1909, CO532/14/68, TNA

⁸³ Letter, Hopwood to *FO*, 20 February 1909, CO532/14/78-81; letter *FO* to *CO*, 31 March 1909, CO532/14/175-7; minutes, Keith to Lambert, Johnson and Dale, 5 April and to Lambert and Johnson, 7 April 1909, CO532/14/173, TNA.

⁸⁴ Circular despatch, Crewe to governors (of self-governing colonies only), 15 April 1909, CO532/14/180, TNA

⁸⁵ Semi-official circular despatch, Crewe to governors (of self-governing colonies), 15 April 1909, CO532/14/178-9, TNA

⁸⁶ Minute, Keith to Risley and Johnson, 6 May 1909, CO532/14/230, TNA.

⁸⁷ Minute, Risley and Johnson, 6 May 1909, CO532/14/230, TNA.

the new bill was sent to the eight colonies in a second despatch.⁸⁸ Unusually (and, possibly, significantly, for Canada), only three responded.⁸⁹ NZ's governor replied that his ministers had made no comment.⁹⁰ ORC's governor did not find it necessary to 'smooth down' any objections, as ministers had not, 'in any way', queried the procedure, though the prime minister was with his three South African peers in London, finalising the act of union,⁹¹ which would create, what the CO termed, 'the four great Dominions and . . . Newfoundland'.⁹²

In Australia, the second CO despatch arrived two weeks after Deakin had returned to office. Atlee Hunt 'invited' the attention of his new minister, Ernest Littleton Groom, 'to the fact that the new law will extend to Australia'.⁹³ So, Groom referred it to attorney-general, Patrick Glynn (who, in the convention of 1898, had tried unsuccessfully to re-insert the original 'and treaties' provision into the *Constitution Act*'s s.51xxix). Glynn noted five clauses, the last of which applied the *Act* to the whole empire. The first, gave the secretary of state concurrent powers, exercisable throughout the empire and, in Australia's case, with the governor-general. Second, the Crown was empowered to issue *OiC*'s enforcing specific obligations of neutrality. Third, the *Act* would prohibit false representation of hospital ships. Fourth, British ships would be required to surrender rescued combatants to belligerents. He added that

*the measure is one which appears advisable as an aid to the maintenance of treaty obligations and to development of the principle of international arbitration.*⁹⁴

He could not see 'any objection in principle or detail', in terms of its application to Australia, and, so, any need for representations to the CO. The colonies had been given so little official information, that Deakin was unsure if this bill related to the *Declaration of London*, to which his attention had also been drawn by Collins, not yet the CO. After Atlee Hunt clarified this, Deakin advised Lord Dudley, employing Glynn's words, that there did not 'appear any objections in principle or detail'.⁹⁵ His attitude to the *Declaration* would be very different.

In the CO, Dale deemed this response 'very satisfactory'.⁹⁶ For whatever reasons, five of the eight colonies did not respond. In any case, the FO did not wait for their replies, deciding, even before the Commonwealth's arrived, to join the other parties in ratifying, on 27 November 1909, nine of the Hague conventions and the one declaration, none of which

⁸⁸ Circular despatch, Crewe to governors (of self-governing colonies), 12 May 1909, CO532/14/235-6; CO323/556/122-4, TNA.

⁸⁹ CO 323/556/122-4; CO532/14/230-5, TNA.

⁹⁰ CO532/12/268-9, TNA.

⁹¹ Despatch, governor to Crewe, 9 August 1909, CO532/12/371-4, TNA.

⁹² Berriedale Keith's quote is at CO532/36/76, TNA.

⁹³ Circular despatches no. 144 & 184, Crewe to governor-general, 15 April & 12 May 1909, 1171, CRS A6661; minute, Atlee Hunt to Groom, 25 June 1919, vol. 28, CRS A1108, NAA.

⁹⁴ Attorney-generals' (Glynn) opinion to Deakin, 3 August 1909, vol. 28, CRS A1108, NAA.

⁹⁵ Letter, Deakin to Dudley, 13 October 1909, vol. 28, CRS A1108, NAA.

⁹⁶ Minute, Dale to Lambert and Johnson, CO532/12/451-2, TNA.

required legislation.⁹⁷ Risley also saw no need to advise the eight colonies, before the resulting bill was passed, though it was decided to send a despatch, listing the conventions to be ratified but without their text, which arrived a week after.⁹⁸ Possibly, due to Deakin's September objection over the *Declaration*, Lord Crewe had advised these colonies (Australia's states were expressly excluded) in advance of Britain's imminent ratification and, later, details of the first nine of ultimately 44 foreign ratifications.⁹⁹ Risley later thought it unnecessary to provide the other colonies with these conventions' texts but Cox insisted that they were 'very important', so the *CO* 'ought to', which was done.¹⁰⁰ Meanwhile, The *Hague Conventions* bill was amended, yet again, but the *CO* felt that, as the changes were insubstantial, there was no need to advise the colonies.¹⁰¹ Ultimately, the bill was not introduced into parliament until mid-1911.

Meanwhile, in early 1910, Atlee Hunt advised Littleton Groom that the conventions' texts were in a *CO Bluebook*, after which Garran at AGs was also informed, although he offered no advice.¹⁰² The Australian public, however, now began to show interest in these treaties for the first time. In June 1910, a deputation from the socialist *May Day Committee*, meeting Labour prime minister Andrew Fisher over domestic issues, asked for the Commonwealth to send a representative to the next Hague peace conference.¹⁰³ Atlee Hunt replied that, as the Commonwealth had not been invited, this was not being considered. (There are grounds to believe Fisher was partially bypassing Atlee Hunt, due to the latter's long association with the Liberals, especially Barton and Deakin.) Fisher, however, had just created a separate prime minister's office under his private secretary and Atlee Hunt's former junior, Maurice Shepherd, who replied that this was, indeed, 'under consideration'.¹⁰⁴ For, despite the Commonwealth's 'very satisfactory' response on this matter, the *CO* would soon learn that it was becoming, like Canada, far from satisfied with Britain's traditional approach towards dealing with the self-governing colonies on political treaties on the conduct of war.

3. 'unfavourable fighting ground': objections to imperial treaty legislation, 1911-14

⁹⁷ Britain signed the *Convention on Laying of Automatic Submarine Contact Mines* and the *Declaration Prohibiting the Discharge of projectiles and Explosives from Balloons*, with reservations.

⁹⁸ Despatches, no. 377 & 437, Crewe to Dudley, 30 October & 10 December 1909, CO532/12/451-2; CO532/14/565-9, 664-8, TNA; vol. 28, CRS A1108 & 1171, CRS A6661, NAA.

⁹⁹ The ratifications in 1909 were **Europe**: Austria-Hungary, Denmark, Germany, Netherlands, Russia and Sweden. **Americas**: Mexico, Salvador and USA. **Asia**: China.

¹⁰⁰ Minute, Cox, 26 April 1910, CO323/567/384-7, 481-7 TNA.

¹⁰¹ CO532/21/328-31, TNA.

¹⁰² *Bluebooks* were printed formal documents tabled in parliament, containing no policy advice.

¹⁰³ D. J. Murphy, 'Fisher, Andrew (1862-1928)', *ADB* vol. 8, NCB: ANU, MUP, Canberra, 1981, <http://adb.anu.edu.au/biography/fisher-andrew-378/text10613>. David Day, *Andrew Fisher: Prime Minister of Australia*, Fourth Estate, Pymble, NSW, 2008; Edward W. Humphreys, *Andrew Fisher: the forgotten man*, Sports and Editorial Services Australia, Teesdale, Vic., 2008; Peter Bastian, *Andrew Fisher: an underestimated man*, UNSW Press, Sydney, 2009.

¹⁰⁴ For the deputation see *Age*, *Argus* and *Daily Telegraph*, 15 June 1910. Letter, Shepherd to Thompson, 8 July 1910, vol. 28, CRS A1108, NAA.

The various assertions by Canada and Australia of the right of domestic application of the Geneva and Hague conventions marked a changed era in imperial treaty procedure, which would reach its culmination at Versailles in 1919.

Herbert Asquith's Liberal government had long planned, even before the imperial conference of 1911, to introduce three bills, which would apply imperially the obligations accepted under the Geneva and some of the Hague conventions, all of which it had signed and, except one, ratified. Late in the imperial conference, on 14 June, foreign secretary, Sir Edward Grey, supported by the attorney-general and solicitor-general, introduced in the Commons the *Naval Prize* and *Hague Conventions* bills.¹⁰⁵ On 26 June, six and four days, respectively, after closure of the imperial conference and coronation, when those bills were to be read for a second time, Seely introduced the *Geneva Convention* bill, Britain having decided to withdraw its reservations.¹⁰⁶ Four colonial prime ministers (not Laurier) were still in London but apparently not informed. The *WO* saw no need to consult the colonies but Berriedale Keith advised the *DD*'s Sir Hartmann Just that, as the *Geneva Convention* 'shall extend' to possessions outside Britain, 'subject to necessary adaptations', through *OiCs*, it would be 'very undesirable' to enact it without informing them.¹⁰⁷

So, the *Hague Conventions* bill was sent to colonies on 29 June, but only with a one-sentence despatch, merely saying it had been revised.¹⁰⁸ In Melbourne, Garran had the two versions compared but offered no advice.¹⁰⁹ The *CO* sent the *Geneva Conventions* bill to the four prime ministers in London and, then, to Laurier and the *CD*. Harcourt reassured them that he 'hope[d] that this procedure will be satisfactory to you', while deliberately not mentioning the possible need for imperial *OiCs*.¹¹⁰ The only background information provided was two parliamentary papers in later, routine library despatches.¹¹¹

While none of the five colonies responded on The *Hague Conventions* bill, Laurier did, over the *Geneva Convention* bill. He had been pressed earlier that year in Canada's Commons to assert an independent treaty-making authority in commercial matters. Moreover, the

¹⁰⁵ *HCD*, 1911, vol. 21, 8 & 9 February, pp. 413; 416-8; 447; Vol. 23, 21 March, pp. 213-5, 28 March, pp. 1117-9, 30 March, pp. 1488-91; vol. 26, 14 June, pp. 1525-6; vol. 27, 19 June, pp. 39-41, 20 June, pp. 145-61, 26 June, pp. 236-7, 28 June, pp. 424, 434-458, 29 June, pp. 574-696, 3 July, pp. 814-933, 4 July, pp. 974-5, 5 July, pp. 1126-7, 1132-3, 1135-6, 6 July, pp. 1330-2; Vol. 28, 10 July, pp. 20, 377; vol. 29, 3 August, p. 557, 15 August, p. 1136.

¹⁰⁶ *HCD*, 1911, 26 June, vol. 27, p. 226; Vol. 29, 16 August, p. 2049. *JHC*, vol. 166, pp. 286, 294, 421, 427. Commercial businesses currently employing 'red cross'-like emblems, which would be offences under the *Act*, were granted four years grace (originally, until 17 August 1915), to stop so doing.

¹⁰⁷ Minute, Keith to Robinson and Just, 5 July 1911, CO532/34/247, TNA. Apparently, only Transvaal's Louis Botha had discussed the matter with the *CO* before leaving.

¹⁰⁸ Despatch no. 262, Harcourt to Dudley, 29 June 1911, Vol. 68, CRS A11816; vol. 28, CRS A1108, NAA; CO19929Doms, 15 June 1911, CO708/2, TNA.

¹⁰⁹ Memorandum, Garran, 15 August 1911, vol. 28, CRS1108, NAA.

¹¹⁰ Circular dispatch, Harcourt to Fisher, Ward, Botha and Morris, 7 July 1911, CO532/34/247-53, TNA.

¹¹¹ CO323/584/2-6; CO23011Doms, 13 July 1911, CO708/2, TNA.

Canadian Red Cross, which had reassembled in 1907, had just successfully petitioned for incorporation through an *Act*, based on the *USA*'s legislation, which had established its *Red Cross Society*. So, Laurier now cabled that Canada had 'already passed into law' the provisions of *Article 27*, just six days before the overarching imperial *Act* received royal assent on 18 August.¹¹² Perhaps startled, the *CO*'s Arthur Robinson discussed the predicament with Lucas, saying that Canada's *Act* had 'no precedent' in the empire and had material differences with the imperial *Act*, which an *OiC* may not overcome. Since the *WO* was responsible, the *CO* was unaware if the prime ministers had been asked, let alone, agreed to the imperial bill, while in London. So, Robinson said that the *CO* should return the problem to the *WO*, asking if the colonies had agreed, while pointing out, 'very clearly', that it 'must not' introduce legislation in future, extending to these colonies, 'without prior consultation'.¹¹³ The *WO*, which also doubted that Canada's *Act* satisfied the convention's obligations, took a very different view arguing, that as the imperial legislation was in fulfilment of adherence to an international convention, it was not 'necessary' to consult the colonies.¹¹⁴

Berriedale Keith jumped up at this: the *CO* 'must' tell the *WO* that these colonies 'must' be consulted in such cases, citing the 1911 imperial conference resolution (see below). On the 'difficulty' of Canada's response, he counselled that the 'prudent course [was] to ignore theoretical irregularities': the imperial *Act* provided for adaption to each of these colonies through an *OiC*, which could specify, as in that *Act*, that no action could be taken without the consent of each colonies' attorney-general. This would allow each to 'evade', if they chose, the imperial *Act*, thus obviating any colonial complaints on constitutional grounds. Canada could proceed with its *Act*, which was in 'no wise repugnant'.¹¹⁵

Risley conceded that this method of 'duplicate legislation', whereby an imperial act 'co-exists' as a 'dead letter' in a colony, without a suspending *OiC* for colonial legislation (which had been done much earlier for Canada, over extradition) had been employed for the *Official Secrets* legislation.¹¹⁶ Here, however, he warned that the 'trouble' was that the Canadian and imperial acts were not substantially similar, with the former arguably, as the *WO* claimed, not carrying out *Article 27* of the convention. The legally correct path was for Canada to repeal and re-enact its legislation to make it fully compliant. If that were politically unacceptable,

¹¹² Gov26339Canada & Gov27774Canada, 12 & 14 August 1911, CO708/12; CO532/32/584-98; CO42/935/410-11; CO42/937/508-10, TNA. *Act to Incorporate the Canadian Red Cross Society, 1909*, 8 & 9, Ed VII, c. 68; *Geneva Convention Act 1911*, 1 & 2 Geo. 5, c. 20.

¹¹³ Minute, Robinson to Lambert and Lucas, 6 September 1911, CO532/35/321-3; CO532/32/584-98; CO42/935/410-11; CO42/937/508-10, TNA.

¹¹⁴ CO532/32/587-98, TNA.

¹¹⁵ Minute, Keith to Risley, Robinson, Lambert and Johnson, 21 October 1911, CO532/32/584, TNA.

¹¹⁶ Minute, Risley to Lambert, 31 October; CO532/32/584-5, TNA. *An Act to prevent the Disclosure of Official Documents and Information 1889*, 52 & 53 Vict., c. 52.

Robinson's suggested alternative, of passing an *OiC* under the imperial *Act*, not to apply but displace it, in favour of the non-complying colonial *Act*, would be 'unconstitutional and grotesque'. Berriedale Keith's proposal of an *OiC*, displacing the imperial *Act*, in practice but not expressly, was 'less objectionable'.¹¹⁷

Ultimately, Lambert decided that the imperial *Act* should be sent to the other self-governing colonies, without explanation, as they had already seen the draft. Canada, which had created 'trouble' by legislating on an inappropriate subject for a colony, 'without saying a word to us', should be told that its *Act* appeared 'inconsistent' with the convention and 'void to the extent of its repugnancy' with the imperial *Act*. Nonetheless, he held it unimportant whether or not Canada amended its *Act*, as the imperial *Act* 'overrides' in law the local *Act*.¹¹⁸ Ultimately, none of this was done, for the moment.

Lambert had also complained that the *WO* 'should have kept us informed', only to learn soon afterwards, that Britain's reservations over the convention would not be withdrawn, until the *WO* had completed an appropriately (for the convention) amended version of the annual *Army Act*, which would be passed until the next year. This afforded more time to consider how to deal with this 'trouble'.¹¹⁹ Davis thought that they should not be 'too eager to invoke the doctrine of repugnancy', with self-governing colonies, especially Canada, which might 'retort by rejecting the doctrine altogether' and this was a 'very unfavourable fighting ground'. He saw no reason why the imperial *Act* had been applied to them when, 'surely', they should have been 'invited' to legislate for themselves. He accepted Canada's *Act* was 'defective' (as was the imperial *Act*), based on an incorrect understanding of the *USA*'s legislation, but doubted the subject came under the 'exclusive primacy' of the imperial parliament. So, he concluded that they should 'emphatically' tell the *WO* that the 'usual' method of Britain carrying out treaty obligations in those colonies was by 'local' legislation.¹²⁰

Risley now agreed that the *WO* had acted with 'needless hurry' in framing the imperial *Act*, which also had problems but, on the main point, he thought Davis had been 'rather too sweeping' and the rebuke of the *WO* should be limited to this case, alone. For, he argued, in

*the case of treaties, as a class, relating to war (for the purposes of which the Empire is one indivisible unit) it is convenient if not absolutely necessary that such treaties should in general be carried into effect, where any legislation is necessary, by a supreme Imperial enactment rather than by a series of coordinate enactments.*¹²¹

¹¹⁷ Minute, Risley to Lambert, 31 October 1911, CO532/32/584-5, TNA.

¹¹⁸ Minute, Lambert to Just, 2 November 1911, CO532/32/584-5, TNA.

¹¹⁹ *ibid.*

¹²⁰ Minute, Davis, CO532/32/586-8, TNA.

¹²¹ Minute, Risley, 29 November 1911, CO532/32/588-9, TNA.

He cited the *Hague Conventions* bill as such an example but, then, distinguished it here, arguing that, whenever a treaty ‘of this class’ affects in peace commercial rights of persons resident in self-governing colonies, there was a ‘good deal to be said’ for ‘local’ legislation.¹²²

Before Just acted on Risley’s advice, one anticipated problem arose, when the *WO* asked for the *CO*’s concurrence for the *Army Council* (*AC*) to decide on a usage of red cross emblems by a private business in South Africa. Berriedale Keith ‘did not like at all’, this ‘new difficulty’, arising from the imperial *Act*, that of the *AC* ‘adjudicat[ing]’ on such matters.¹²³ Nonetheless, as it, was perhaps, ‘less objectionable’, because there were still imperial troops in South Africa, he and Robinson thought the *CO* should ‘simply agree’. Davis, however, thought the *CO* should address the *WO* on the overall issue.

*It is clearly unconstitutional for the Imperial Parliament in such a matter as this to impose on the self-governing Dominions restrictions in excess of HM’s Treaty obligations, the only ground for the intervention of the Imperial Parliament being ex hypothesis the undertaking of those obligations.*¹²⁴

He also thought that they should ask the *WO* to substitute in the *OiC*, which would apply the *Act* to these colonies, ‘Governor or Governor-General in Council’, for *AC*.¹²⁵ His concern about the colonial reaction to this provision soon proved justified.

Within a few days, the Commonwealth’s response to the *Act* arrived in the *CO*. Typically, Britain encountered no problems with Newfoundland and *NZ*.¹²⁶ The Commonwealth was, however, increasingly like Canada, starting to insist on a greater degree of legislative autonomy. As with all these colonies, it had known nothing about the proposed imperial legislation, until Fisher had been informed in London. (Possibly, earlier press reports about the convention itself had been noted.¹²⁷) On return to Australia in 1911, Fisher, clearly not satisfied with how the imperial legislation gave authority to the *AC* over colonial residents, sought advice from attorney-general, William Hughes. (There had been several procedural issues, also in Canada, over such direct imperial control since, at least, the *Boer War*.) So, in November 1911, when Fisher advised Lord Denman, for Harcourt, he did not, perhaps deliberately, answer whether he was ‘satisfied’ with the procedure adopted, as Harcourt had asked (perhaps rhetorically). Fisher did say that it would ‘be necessary’ for an *OiC* to adapt

¹²² *ibid.*

¹²³ Minute, Keith to Robinson, Davis, Risley and Lambert, 13 December; and minute, Robinson, 14 December 1911, CO532/32/600, TNA.

¹²⁴ Minute, Davis, 14 December 1911, CO532/32/609-10, TNA.

¹²⁵ *ibid.*

¹²⁶ Gov35202Newfoundland, 18 October 1911 & Gov38979NZ, 27 October 1911, CO708/2, TNA.

¹²⁷ In fact, the Commonwealth’s first policy issue on the convention had arisen in early 1910, when the *USA*’s vice-consul, as part of a world-wide survey conducted on behalf of its *RCS*, had asked about existing national legislation on the convention. After confirming with the *Patents Office* there was no applicable trade marks restriction, Atlee Hunt replied there was no such legislation in Australia. 1919/446, CRS A1, NAA.

the imperial *Act*, so that ‘some local authority in the Commonwealth’, such as the minister for defence, not the AC, was empowered to act under the legislation.¹²⁸

In the *CO*, Berriedale Keith generally welcomed that Fisher took ‘no exception’ to the *Act* overall, given Canada’s response. So, he urged that the *WO* be induced to accept this and another minor amendment, arguing the former was consistent with criminal proceedings in Australia, as he understood them. In the same spirit, he suggested that the Commonwealth’s attorney-general should be substituted for the AC, in the provision for initiating legal proceedings for infringements of the *Act*. He ‘hope[d]’ that the AC would accept the changes without ‘difficulty’, as it was ‘perfectly clear’ that, if refused, there would be ‘serious trouble’ with Australia, which would be ‘ridiculous’ over such a ‘small matter’.¹²⁹ Davis agreed, except that he held that the other three colonies should also be offered such a local adaptation, even though they had not so asked. He added that this approach could help ‘settle’ the difference with Canada, which would still have to be treated separately, for the present.¹³⁰

So, three days after receiving the Commonwealth’s response, on Boxing Day, Just wrote strongly to the *WO* that it would be ‘open’ to the self-governing colonies to ‘take exception’ to the procedure, which had been employed. First, under the imperial conference resolution of 1911, they should have been consulted--there had been ample time--before Britain decided to withdraw reservations on the convention, which had created ‘fresh’ treaty obligations. Second, these colonies should have been allowed to apply the convention through their own legislation, given it concerned the commercial rights of their residents in peacetime. Third, if it was the case that imperial legislation was essential, then it should not have been introduced into parliament before these colonies had seen the draft.¹³¹ Shortly, he also told the *WO* that ‘relieved’ the Commonwealth had not totally objected, Harcourt could not ‘too strongly press’ the importance of agreeing to this alteration and that the Commonwealth’s (and Newfoundland and *NZ*’s) attorney-general, not the AC be the *OiC*’s nominated authority.¹³²

The AC was ‘glad’ to ‘readily accede’ to granting the Commonwealth ‘absolute power’ over restricting the use of *Red Cross* emblems and words but wanted Commonwealth assurances that only recognised societies would be allowed this usage and that, as required under the convention, their names would be supplied, for conveyance to other signatory powers.¹³³ The *WO* response over Canada was far less satisfactory, with Berriedale Keith observing on the

¹²⁸ Letter, Fisher to Lord Denman, 17 November 1911, 1878, CRS A6662, NAA.

¹²⁹ Minute, Keith to Robinson and Davis, 1 January 1912, CO532/27/178, TNA.

¹³⁰ Minute, Davis to Robinson and Lambert, 6 January 1912, CO532/27/178, TNA.

¹³¹ Letter, Just to *WO*, 26 December 1911, CO532/32/614-5, TNA.

¹³² Letter, Just to *WO*, 9 January 1912, CO532/27/181-2, TNA.

¹³³ Letter, *WO* to *CO*, 26 January 1912, CO532/47/68, TNA.

'agreeable perversity' by which it ignored the constitutional questions, raised by the *CO*. In view of the difference with the imperial *Act*, or, in fact, the 'defect' in the Canadian *Act* in relation to the convention, he held that the proper procedure was to ask Canada to amend the latter. Politically, however, the *CO* preferred an imperial *OiC*, adapting the imperial *Act*, as was being provided to Australia, and, as an enticement, the same empowerment of Canadian local authorities. Conservative prime minister, Robert Borden, had taken office since Canada's original response to the issue and Berriedale Keith thought it 'quite possible', he would not be as 'keen', as Laurier, 'on asserting the independent character of Canada', allowing Britain to 'get out without further difficulty'.¹³⁴ Lambert and Johnson approved this course, adding that, if Canada 'kick[ed]', the *CO* would have to 'hammer' the *WO* into accommodating it.¹³⁵ So, in February 1912, the *CO* offered both Canada and Australia this path but expressly did not so do to the non-self-governing dependencies.¹³⁶

Through 1912, the *CO* pushed Australia and Canada for a response. The Commonwealth identified the need for a further amendment, extending to Papua, the attorney-generals' authority. In September, Fisher advised his agreement to all the *CO*'s proposals.¹³⁷ Canada's response was more equivocal. Minister for Justice, Charles Doherty, 'would have preferred' that the convention 'should have been enacted independently' by Canada's parliament. As, however, the imperial *Act* had already been passed and his predecessor had not explicitly 'take[n] exception' to the procedure, which Britain earlier had advised, he 'acquiesced'.¹³⁸ Canada now asked for the same empowerment of local authorities, as had the Commonwealth. Berriedale Keith sighed that it was 'lucky for us that the Minister has not decided to press the protest which he normally would have made. We have no doubt to thank his predecessor's action for that.'¹³⁹

From that point, the bill completion went relatively smoothly. Berriedale Keith doubted whether the other three colonies should be offered the *OiC* path but decided not to so do could produce 'more inconvenience'. So, the offer was extended to all, including the adoption of their own *OiCs*, each fixing their own date when the amended *Act* came into operation. Britain adopted the *OiC* on 11 February 1913, amending the operation of the *Act*.¹⁴⁰ South Africa, NZ and Newfoundland all took up the offer to follow Australia's lead on empowering

¹³⁴ Minute, Keith to Johnson, Lambert and Just, 8 February 1912, CO532/47/80, TNA.

¹³⁵ Minutes, Lambert, 3 February and Just, 5 February 1912, CO532/47/80-1, TNA.

¹³⁶ Despatch no. 70, Harcourt to Lord Denman, 14 February 1912, 1912/157, CRS A11804, NAA. CO323/584/2-5, TNA.

¹³⁷ CO532/42/347-52; CO532/47/92-3; Gov35414, 28 September 1912, CO708/3, TNA. Letter, Fisher to Lord Denman, 26 September 1912, 1912/157, CRS A11804; 1919/446, CRS A1, NAA.

¹³⁸ Minute of the Privy Council, 21 December 1912, CO532/40/283-4, TNA.

¹³⁹ Minute, Keith to Davis, 9 January 1913, CO532/40/281, TNA.

¹⁴⁰ The Convention came into force with the enactment of 18 August 1911, with a four period of grace, ending in August 1915, so that businesses, in particular, would not suffer from being denied the use of the emblems.

local authorities. Canada led with an *OiC*, taking effect on 1 May, followed by Australia for 1 June 1913 and, thereafter, NZ (1913), South Africa (August 1914) and Newfoundland (January 1915). The *CO* concluded that this was ‘quite satisfactory’. A relatively minor legal issue arose over South Africa’s application of the *Act*, which was eventually resolved. Britain finally withdrew its reservations over the convention on 8 July 1914, four weeks before declaring war on Germany, and advised the colonies accordingly.¹⁴¹

4. ‘new precedents in International law’: colonial representation at political congresses

Within Australia, there was an emerging public call for the Commonwealth to be separately represented at political conferences, with which government officials initially did not actively embrace. By 1914, there were just some signs the latter’s attitude was beginning to change.

There was one further bill arising from the Hague conventions. In May 1912, the *FO* had given the *CO* an amending bill for the *Foreign Enlistment Act 1870*. Britain had decided to ‘adapt’ the principal *Act* to Article 8 of the convention, respecting the ‘*Rights and Duties of Neutral Powers in Naval War*’. The provisions in that *Act*, British officials adjudged, went ‘considerably beyond’ the latter’s requirements and, thereby, operated ‘detrimentally to the interests of British shipping’. (The *Act* forbade the sale or despatch of British merchant ships from British territory for service with a belligerent, which the ‘leniency’ of other powers’ municipal laws did not.)¹⁴² In this case, even Grey suggested that the bill should be sent to the main colonies before being introduced into parliament. So, it was, five months later.

Berriedale Keith, surprisingly, told Risley that he could see ‘no good reason’ but, equally, ‘no possible ground for objecting’ to this. He suggested including a ‘few words’ of explanation and emphasised not sending it to the Australia states, this being a ‘matter of international politics’. In another new step, the despatch asked for any ‘observations’.¹⁴³ The *CC&P* were not to be so advised until after enactment. Ultimately, the bill was introduced into the Commons from the Lords in December but did not progress, as it was withdrawn for amendment, to provide for breaches of neutrality by aircraft, a new issue.¹⁴⁴

In early 1914, the *FO* had revived the issue, planning on introducing an amended bill into parliament in that current session. Reflecting the new approach now taken to such matters, the bill confined summary prosecution of offences to Britain. By *OiC*, this provision could be

¹⁴¹ CO532/62/25-7, 122-3, 127-9; CO532/52/20-2, 291-5, 352-3, 375-9; CO532/55/27-35, 86-91, 171-3; CO532/54/322-6; CO532/70/144-50; CO532/71/213-6, 430-4; CO532/72/321-6; CO532/74/60-3; Gov32264Newfoundland, 11 September & Gov32024NZ, 31 October 1913; CO708/3; Gov33525South Africa, 12 August & FO50981Doms, 31 December 1914, CO708/4, TNA. These despatches to the Commonwealth are also on 1912/157 & 1915/4, CRS A11804; 1919/446, CRS A1, NAA.

¹⁴² Circular despatch, *CO* to governors (of self-governing colonies only), 31 May 1912, CO532/47/351-2, TNA.

¹⁴³ Minute, Keith to Robinson and Risley, 23 May 1912, CO532/47/347, TNA.

¹⁴⁴ *HLD*, Vol. 12, 7 November 1912, p. 879; *HCD*, Vol. 44, 2 December 1912, pp. 1876, 1903. CO532/42/347-353; CO532/45/125-32, TNA.

extended, with necessary adaptations, to 'any other' British territory, except to the five self-governing colonies, unless 'with the consent' of their governors 'in Council'.¹⁴⁵ The *CO* welcomed this change but asked for further amendment to 'avoid' using the legally incorrect term 'dominion' by using the each colonies' specific name, to avoid using the correct collective term 'colony'.¹⁴⁶ In early July 1914, the *CO* asked the five to cable any 'observations' on the bill 'in its present form', to allow sufficient time for them to be 'taken into consideration', before the bill was introduced into parliament.¹⁴⁷ All five readily accepted the bill without comment.¹⁴⁸ With the outbreak of war, one month later, the bill was shelved, as it only had relevance to a war, in which Britain was a neutral not a belligerent.¹⁴⁹

Meanwhile, the Hague peace conference had revived as a public issue within the Commonwealth as well as the empire.¹⁵⁰ Australia's several peace societies had continued to conduct their meetings but lacked a focus for greater action. They had welcomed the 1911 imperial conference's support for the ratification of the *Declaration of London* (on which Australia abstained). A resolution of the Congregational Union of Victoria, in November 1911, recommending international arbitration to Britain, through the Commonwealth, was a rare action.¹⁵¹ In 1912, the societies campaigned against the reception of the new cruiser, *Australia*, advocating, instead, a greater commitment to arbitration. Fisher responded publicly, that dreadnoughts were 'regrettable necessities'. The celebration on 18 May 1912, for the thirteenth anniversary of the opening of the first Hague peace conference, provided an occasion for greater re-vitalisation of the movement.¹⁵² The *MPS* wrote to the Commonwealth, urging its official support for the creation of a 'permanent International Court of Justice', 'simultaneous reduction of armaments' and Australian representation at the 3rd Hague peace conference, scheduled for 1915.¹⁵³ When, apparently, no response was given, the *MPS* wrote again in early 1913, with Atlee Hunt replying that this last proposal would be 'considered later'.¹⁵⁴ In May that year, the *MPS* organised another celebration of the 1st Hague

¹⁴⁵ Minute, Risley to Herbert and Anderson, 21 February 1914, CO323/633/292-8, TNA.

¹⁴⁶ Letter, Lambert to *FO*, 2 March 1914, CO323/633/299-300, 431-4, TNA.

¹⁴⁷ Circular despatch, *CO* to governors (of self-governing colonies) 3 July 1914, CO532/71/398-404, TNA.

¹⁴⁸ All original replies were destroyed, leaving only their registration numbers: Gov27958Newfoundland, 30 July 1914, Gov28624Canada, 22 July 1914, Gov31620NZ, 21 July 1914, Gov33417Canada, 2 September 1914, Gov33517South Africa, 11 August & Gov34140South Africa, 8 September 1914, TNA.

¹⁴⁹ CO323/634/433-7; CO532/77/52-6, TNA.

¹⁵⁰ See question in the House of Commons, 23 February 1914, *HCD*, vol. 58, pp. 1374-6. Editorial, 'The Dominions and the Hague Conference', *Review of Reviews*, September 1913.

¹⁵¹ Vol. 9, CP78/8 & 1912/79A, CRS A11084, NAA.

¹⁵² *SMH*, 19 June, 10 July, 7 November, 1 December 1911, 12 March, 7, 22, 27 May, 27 & 28 November 1912; *Age*, 25 & 30 March, 21 May 1912; *Sun*, 6 May 12; *Mercury*, 6 & 8 May, 9 August 1912; *Advertiser*, 6, 21 & 22 May 1912; *Australasian*, 18 May 1912; *Argus*, 21 & 22 May 1912; *Daily Herald*, 21 May 1912; *Daily Telegraph*, 22 May, 11 June & 27 July 1912; *Register*, 25 May 1912; *Herald*, 13 July 1912; *Daily Post*, 9 August 1912; *Evening News*, 14 August 1912; *Mail*, 31 August 1912.

¹⁵³ Extract of letter, *MPS* (E. E. Dillon) to prime minister, undated (1912), vol. 28, CRS A1108, NAA.

¹⁵⁴ Extracts of letters, *MPS* to prime minister, 8 January & reply 28 January 1913, vol. 28, CRS A1108, NAA.

conference, reiterating its call for Commonwealth representation at the next, while also asking for support for the ‘substitution’ of arbitration for armaments, professorial and student exchanges with India, China and Japan and Australian representation on the *PCA*, on which, it noted, sat Sir Charles Fitzpatrick, a Canadian judge.¹⁵⁵

In late September 1913 the *MPS* had been granted an audience with Glynn, now minister for external affairs, in Joseph Cook’s Liberal government. Joseph Carrodus, one of Atlee Hunt’s juniors, had been recently assigned to the growing subject of treaty matters, as he was schooled in French (in which many treaty texts were written). In preparation, he briefed Glynn on the Hague conferences and the *PCA*. Strong led the presentation, with the others essentially echoing his sentiments. He explained that the main aim of the society was to substitute arbitration for war. He asked for the creation of a ‘peace department’, as he thought the *USA* and France had done, which would link with others throughout the world, ultimately creating a sort of ‘world bureau’ and extending ‘imperial friendship’ to ‘international friendship’. Above all, he asked for Australian representation on the relevant international bodies, at peace conferences and permanent international organisations. He emphasised.

*We are becoming an important nation or branch of the British Commonwealth and it is only right that our voice should be heard at such an assembly as this conference. We have given a lead to other nations in settling, by arbitration, the war of classes—strikes etc. . . It seems to us we might be able to promote the great principle of international arbitration.*¹⁵⁶ As to representation on the *PCA*, he asked, ‘why Australia should be behind other nations’?¹⁵⁷

Glynn responded mainly with platitudes, without any commitments. He said that he was ‘very glad’ to hear them and that the government was ‘thoroughly at one with you’, in supporting any ‘reasonable effort’ to promote ‘amity among nations’. He was ‘not quite sure’ if the Commonwealth could be represented, as asked, but would ‘consider’ whether it could be done. Perhaps, he continued, Britain was limited to one representative at both such conferences and the tribunal, which he emphasised, was ‘an international one’. He conceded a Canadian judge had sat on the tribunal and thought that, while not each self-governing colony could be separately represented, each might be given an ‘equal chance’ to be the British appointment.¹⁵⁸ Glynn’s instructions afterwards, to Atlee Hunt, suggest that he did take the matter seriously. Carrodus observed that Australian representation at the next peace conference could only be as an imperial delegate. When he asked whether there was ‘any

¹⁵⁵ Extract of resolution of public meeting, 28 May 1913, 1913/17377, CRS A1, NAA.

¹⁵⁶ Notes of deputation for meeting, 9 October 1913 & letter, Glynn to Dillon, 11 November 1913, 1913/17377, CRS A1, NAA.

¹⁵⁷ *ibid.*

¹⁵⁸ Notes of deputation for meeting, 9 October 1913 & letter, Glynn to Dillon, 11 November 1913, 1913/17377, CRS A1, NAA. *Age*, 10 October 1913, has an account of the meeting, clearly based on a briefing by Glynn.

necessity' to raise with the imperial government, such representation or that on the *PCA*, Atlee Hunt replied, presumably on Glynn's authority, with one word: 'No.'¹⁵⁹

The *MPS* did have one more sympathetic official—surprisingly—in the *CO*. For, in early 1914, after learning that the *USA* had asked the Netherlands to convene the third Hague peace conference in 1915, Berriedale Keith told Anderson and Lambert that the *FO* 'must remember the Dominions'. He argued it was 'increasingly clear' that, they should not be automatically bound by any future treaties, even the 'great political treaties', as there was a growing feeling both there and in Britain that all treaties should be freely approved or otherwise by the respective parliaments before ratification. He also supported their separate representation at the next Hague conference, if so desired, though inclusion of 'small' Newfoundland would probably be 'absurd'. Such gestures could overcome any difficulties in Britain's colonial application of any resulting treaties.¹⁶⁰

A few days later, on his own initiative, he formally made this 'completely new' proposal, which 'undoubtedly' would represent a 'precedent of great importance' and

*unquestionably give [these colonies] a status from the point of view of International law which they have not hitherto enjoyed.*¹⁶¹

Citing the discussion and resolution at the imperial conference over the *Declaration of London* and consultation over treaties, generally, which affected these colonies, he argued that it was 'perfectly logical' for them to seek and be granted such representation. He said they were not so invited to London or, before that, The Hague, simply because 'it did not occur to anyone that it was desirable'. (This was incorrect. Lord Crewe had specifically ruled out separate representation.) In addition, he asserted that, when Britain committed 'even to the great political treaties', such as at The Hague, these colonies should not be included automatically but allowed to 'accept or reject as they think fit,' although he saw three possible objections.¹⁶²

First, he admitted the *USA* had 'absolutely no right' to invite Britain's colonies but, being 'fond of making new precedents in International law', it had invited Canada to the treaty conference on protection of industrial property. Arguably, this was a commercial not political conference, though he conceded that was a distinction 'impossible' to define. More importantly, these colonies were separately represented in negotiations for the 'much more than a merely commercial' radio-telegraphic convention of 1912. He dismissed the second objection, that such representation, even at a peace conference, would weaken the 'unity of the Empire'. True, Britain may not see 'eye to eye' with them sometimes, such as with Australia

¹⁵⁹ Annotation by Atlee Hunt on note by Carrodus, undated but c. 18 November 1913, *ibid*.

¹⁶⁰ Minute, Keith to Lambert and Anderson, 29 January 1914, CO532/75/188, TNA. He would soon take up a professorship in Sanskrit at Edinburgh University, where he also lectured on constitutional law.

¹⁶¹ Minute, Keith to Davis, Lambert and Anderson, 6 February 1914, CO532/75/28-35, TNA.

¹⁶² Minute, Keith to Davis, Lambert and Anderson, 6 February 1914, CO532/75/28-35, TNA.

over the capture of private property at sea but, overall, Britain's position would be strengthened by the support at such conferences of accredited representatives of such considerable populations. He acknowledged that the 'more serious' concern was that such representation would expose to foreign states, 'the remarkable legal constitution' of the empire, making it more difficult for Britain to convince them of its 'unity'. This might lead them to treat these colonies as 'independent units' and, even, open diplomatic relations with them. In commercial matters Canada, 'notorious[ly]', was already bypassing formal treaty making, by informal negotiations with consul-generals to conclude agreements, which might turn into treaties one day. Yet, this did not worry him, thinking it undoubtable that:

*the tendency of the Empire is more and more steadily to become a body of independent states, united only by a common sovereignty and by the common ties of interest, kinship, race, speech, the form of government and political ideals.*¹⁶³

Thirdly, he thought 'mistake[n]', Sir John Anderson's argument that these colonies' status was now constitutionally analogous to that formerly occupied by Hanover, which had not normally been invited to the 'great European conferences'. Their relationship to Britain, he countered, was of greater importance and, so, 'they should be treated on the most favourable footing'. Finally, he recommended that the *CO* discuss all this, consult the colonies the *FO* and, then, foreign powers, perhaps at the next Hague conference.¹⁶⁴

Davis responded that there were no prospects of a conference before 1917, as the correct procedure was not to hold one, until two years after a preparatory committee. So, an answer to Keith's proposal was not urgent. He did, however, remind everyone that Grey had made several commitments at the imperial conference on consulting these colonies, in detail, before another conference and allowing colonial representatives on interdepartmental committees drafting the British delegates instructions. This raised the problem of Britain possibly having to settle possible disagreements between these representatives and their governments. Also possible was that these colonies would request inclusion of the 'colony' clause in resulting conventions, as in some arbitration treaties. Britain, however, had decided this should not be done for treaties under which the empire must be treated as a 'single unit'. 'Clearly', he continued, colonial choice could not have been allowed for the Hague conventions of 1907. This, 'by implication' ruled out them being '*specially* represented' at the next conference, with full powers to speak, on Britain's behalf, for their own territory. Treating these parts of the empire as 'separate units' went against the 'whole object' of the agreement at the imperial conference, which was for British delegations to be able to speak with authority 'for the whole empire'. In any case, added, it was 'obvious' that these colonies had no one who could speak on military and naval matters. He also doubted whether even they would contend that

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

they had any officers, 'whose experience of international law & practice' equalled that of Sir Eyre Crowe and Sir Cecil Hurst. If they did find such a man, he added, he should jointly represent the empire not just his colony. The only concessions that he thought necessary, in order not to 'seriously diminish' Grey's undertakings in 1911, was first, to ask these colonies, well in advance, for concurrence in the nomination of British delegates, and, second, on the immediate issue of the preparatory conference, Britain could ask these colonies for agenda items but, then, tell them which subjects Britain preferred.¹⁶⁵

Lambert also emphatically opposed Keith's proposal, conceding only that there could be greater consultation on peace conferences. Separate representation at postal conferences and 'such matters', were 'no parallel'. Allowing this at international conferences on issues affecting the whole empire would be 'paralyzing' and 'reduce' the empire to a federation. Whatever benefits federalism brought to the *USA* or Australia, which 'cannot achieve a unitary government', they 'most assuredly' did not extend to foreign and military policy, in which a single front should be shown to a foreigner. One day, he mused, the empire may go that way but it was 'little short of madness' for it spontaneously to become like the *Holy Roman Empire*, under which 'prompt and united action of any sort' had been 'impossible'.¹⁶⁶

These conflicting views were assessed by the under secretary, Lord (Alfred) Emmott, with advice from the experienced Sir John Anderson, who clarified that they had never taken 'the trouble' to explain Britain's foreign policy to the colonies and, certainly, had never asked for their consent. He explained that much had been written about the constitution of the empire which, if current facts were looked in the face, was certainly not unitary nor, even, a federation; much more would be written before this question was settled. (Berriedale Keith would later oblige.) For the present, the two agreed, with Harcourt's subsequent approval, that the issue of separate colonial representation at the next peace conference not be raised. At the same time, they affirmed that Grey's commitment of 1911 must be 'strictly observed' and 'faithfully performed'. Emmott pointed out that these colonies had very much appreciated being consulted on some aspects of foreign policy and, more than anything, that helped remove from their minds any feeling that they were made jointly liable for a foreign policy, of which they knew nothing and may not approve. The empire's 'smooth relations' were 'vitally important'. If 'some day', he finished, these colonies could produce statesmen or jurists, who could represent the empire at the Hague, then Britain should make 'good use' of them. This,

¹⁶⁵ Minute, Davis, 6 March 1914, CO532/75/35-41, TNA.

¹⁶⁶ Minute, Lambert, 15 March 1914, CO532/75/41-2, TNA.

however, was not the case now nor, would be as early as 1917. So, Harcourt decided to advise the colonies in detail about the next conference, without offering separate representation.¹⁶⁷

Britain now took other small steps to consult the five colonies more extensively on political treaties, including advising them of subsequent foreign accessions to the Hague conventions.¹⁶⁸ Then, in early April 1914, Grey, supported by Churchill, Francis Acland (the *FO*'s undersecretary), the attorney-general and solicitor-general re-introduced into the Commons the bill to 'make such amendments in the law with respect to international tribunals, neutrality, and other matters', so as to bring certain provisions of the Hague conventions into effect.¹⁶⁹ The bill was scheduled for its second reading on 14 April and, three days later, the *CO* sent the bill to the five main colonies with a very brief covering despatch, after noting the colonies had already been sent the bill in 1911, possibly as an excuse for again not consulting prior.¹⁷⁰ Fortunately, for Britain, four of the colonies seemed to take little notice with only one, Canada, replying.

Sir Cecil Hurst had earlier reported Washington rumours that Borden had instigated an investigation into the question of capture of private property at sea, such as Deakin had raised in 1909. Doherty, predictably given his earlier attitude, was considering 'some alteration' to the bill and Canada cabled on 4 June, asking that it not be advanced in parliament until its representations were shortly received. With the bill's second reading due, this could have been awkward. The *FO* and *CO*, however, accepted this request without demur, with a deferral of the bill allowing time for Canada's views to be 'considered' for amendments, 'if necessary'.¹⁷¹ This was the first time a colony had called on the imperial government to pause and consider amendment of imperial legislation already in parliament. This despatch arrived in Melbourne on 19 May, after which Carrodus completed a very brief summary of its more important provisions, as they related to the conventions.¹⁷² The *DoD* wondered whether there was a need for incorporating legislation by the Commonwealth but Glynn took no further action. The Commonwealth was now under Liberal, Joseph Cook, a former child-coal miner (and Labour party member), who was relatively inexperienced and nowhere as assertive, as Deakin and Fisher had, on occasions, been. Ultimately, the Commonwealth did not act.¹⁷³

¹⁶⁷ Minutes, Anderson & Emmott, 18 & 20 March; Harcourt's approval, 25 March 1914, CO532/75/42-3, TNA.

¹⁶⁸ CO532/69/490-3; FO9980Doms, 16 March 1914, CO708/4, TNA. vol. 28, CRS A1108 & 1914/55, CRS A11804, NAA.

¹⁶⁹ *HCD*, vol. 60, 6 April 1914, p. 1651.

¹⁷⁰ CO532/75/63-69, TNA; vol. 28, CRS A1108, NAA.

¹⁷¹ Gov20425Canada, 4 June 1914, CO708/4; CO532/67/215-22; CO532/71/357-61, TNA. Vol. 28, CRS A1108, NAA.

¹⁷² Vol. 29, CRS A1108, NAA.

¹⁷³ F. K. Crowley, 'Cook, Sir Joseph (1860–1947)', *ADB*, vol. 8, NCB:ANU, MUP, 1981, <http://adb.anu.edu.au/biography/cook-sir-joseph-5763/text9765>.

Canada's response was very different. Doherty had earlier 'preferred' that the *Geneva Convention* should have been enacted locally.¹⁷⁴ Now, in the middle of the 'July crisis', he again argued that this bill called 'for some representations in the interest of local autonomy.' Citing the 'treaty power' in s.132 of the Dominion's constitutional *Act*, Doherty could not see 'any reason why' the various legislative measures in the bill, which he detailed at length and adjudged 'upon the merits unobjectionable', could not be enacted for Canada by its own parliament. He noted that the proposed 'imperial enactment' would confer on Britain's secretary of state (not specifying whether for foreign affairs or colonies) or other officers, including 'any person' who, 'for the time being', acts as Canada's governor-general, powers to act 'in any place', including Canada, to where the act extended. Thereby, this would confer

an additional jurisdiction upon the Superior Courts of Canada affecting the rights and liberties of the subject, and impos[e] upon Canadians obligation to comply with the requirements of such orders under pain of attachment by the local courts.

...

*[it was] not compatible with the constitution, that the legislative authority of the Imperial parliament should be independently exercised in a manner to affect the Dominion of Canada in relation to matters within the local powers.*¹⁷⁵

So, ministers agreed with his conclusion that the imperial bill 'should not be extended' to Canada. Borden added that his government would be 'pleased' to enact the necessary measures, whose 'sanction' it 'apprehend[ed]', the imperial government would 'promote'. This response was sent on 24 July, four days after the imperial bill was withdrawn from parliament, and arrived in London on 3 August, the day before Britain declared war on Germany. Understandably, the whole question was overtaken by the war.¹⁷⁶

There was one small sign of concern over autonomy in Australia. Former Labour defence minister, George Pearce, had somehow immediately learnt of the arrival of the *CO* despatch on the Hague conventions bill. Two days later, in the senate, he asked what action had the government taken or prepared to take 'to secure the representation of the Commonwealth' at the next peace conference. Minister for Defence, English-born Edward Millen, replied.

*As the Commonwealth is part of the British Empire, and not a separate nation, it is not entitled to separate representation.*¹⁷⁷

Pearce responded: 'We asked for it', which was probably an inaccurate characterisation of Fisher's complaint at the imperial conference in 1911 over the *Declaration of London*.¹⁷⁸ On reading this, a month later, Atlee Hunt asked Carrodus whether there was any record of the Commonwealth being invited, and when advised 'no', he saw no need to inform Pearce.

¹⁷⁴ He would represent Canada at the Versailles peace conference and, later, the League of Nations.

¹⁷⁵ Minute of the Committee of the Privy Council [of Canada], 15 July 1914, CO532/67/215-22, TNA. *An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for Purposes connected therewith*, 1867, 30 & 31 Vict. c. 3.

¹⁷⁶ Minute of the Committee of the Privy Council [of Canada], 15 July 1914, CO532/67/215-22, TNA.

¹⁷⁷ *CPD (Senate)*, vol. 21, 21 May 1914, pp. 1192-3; vol. 28, CRS A1108, NAA.

¹⁷⁸ *ibid.*

Towards the very end of the 'July crisis', a week before Britain declared war on Germany, Glynn, for some reason, sought information over the next conference, which he expected to be in 1915 or 1916. He asked if representatives of all 'sovereign' nations, would be invited, for confirmation of the names of Britain's representatives and, opaquely, whether 'an ambassador [could] be appointed in any capacity?' His motives are unclear and, in any case, the prospects of the conference ended with the outbreak of war.¹⁷⁹

Harcourt's mid-July despatch on the proposed 1915 peace conference arrived in Melbourne, nearly three weeks after war began. This explained that Britain had told the *USA* that 1915 was too early for the next peace conference and that date would be against the 'deliberate decision' of the 1907 conference. Harcourt asked for 'any observation's on the list of fourteen subjects, which Britain intended to raise. He was silent on separate representation. Citing Grey's commitment in 1911, he instead invited the five colonies to send representatives to sit on the *CID*, after 'technical' advisers had completed the preliminary drafting and their reports sent to the colonies. This was not quite the involvement Grey had originally promised. (The aversion was to separate colonial representatives at international political conferences.) Harcourt envisaged that there might be an imperial conference in 1915, where all this could be discussed.¹⁸⁰ *NZ's* prime minister, William Massey, was the only one of the five to respond. He assumed, correctly, that with the war, it was no longer necessary to consider the matter, until Britain advised further.¹⁸¹ The despatch arrived in Melbourne in late August, where Atlee Hunt told Carrodus that, it 'may perhaps be well' to examine the matter, 'not that the Conference can be held for a long time to come', but so 'we can be ready', after the 'interrupt[ion]' of the war. Glynn, on noting the despatch, replied to Atlee Hunt, that 'we can discuss', but nothing more was done.¹⁸² The war stalled international and imperial progress.

* * *

Between 1899 and the First World War, the international legal system underwent significant development on the rules for the conduct of war. The conferences at The Hague of 1899, 1904 and 1907, and Geneva in 1906 led to numerous important international agreements, most of which ultimately attracted wide support. Arising from 1899 Hague conference, there was a surge in bilateral arbitration treaties, which in turn, led to a *USA*-led push for complementary or rival 'peace commission' treaties, many of which were with governments of the Americas. Most but not all of these developments were only stalled by war.

¹⁷⁹ Handwritten and undated note by Glynn, c. July 1914, vol. 28, CRS A1108, NAA.

¹⁸⁰ Despatch, Harcourt to Munro-Ferguson, 17 July 1914, CO532/71/439-49, TNA; 1914/55, CRS A11804.

¹⁸¹ CO532/67/358-9, TNA.

¹⁸² Glynn's notation on the dispatch and undated handwritten notes, Atlee Hunt to Carrodus and Glynn to Atlee Hunt, vol. 28, CRS A1108, NAA.

Then, in 1921, in the light of war experiences, the *ICRC* drafted an international convention to augment not replace the Geneva convention of 1864 and some of the Hague conventions of 1907. This was submitted to a *LoN* sponsored international conference at Geneva in 1929, after which, over 50 governments signed and/or ratified the resulting *Convention relative to the Treatment of Prisoners of War*. In 1949, at Geneva, four successor conventions amending the earlier conventions, with respect to treatment of wounded, sick, prisoners of war, shipwrecked service persons and civilians, were concluded, which nearly 200 governments have since signed and/or ratified.

Britain was generally supportive of the pre-First World War developments, although it did not initially sign the three *Declarations* at The Hague in 1899. Britain ultimately did accede in 1907, just before the second peace conference, to the two on prohibiting the use of, respectively, *Expanding Bullets* and *Asphyxiating Gases* but not the third. Although Britain did sign and was only one of three to ratify the new convention of 1907, prohibiting the *Discharge of Projectiles and Explosives from Balloons*, this did not extend, unlike in 1899, to ‘or by other New or Analogous Methods’.¹⁸³ Presumably, Britain did not want to prohibit bombing by aircraft. Britain, although sympathetic, also did not sign the *Hospital Ships* convention (1904), due to concerns over its domestic application. The British Liberal government led on the *Declaration of London* (1909) but powerful sections of its ‘public voice’ opposed it and, with international disagreement also, it never entered into force. Finally, Britain signed but did not ratify the Hague convention on the *Pacific Settlement of International Disputes* (1907), until 1970!¹⁸⁴ (Australia ratified separately in 1996.)

Initially, Britain deemed all such treaties to be ‘political’ and, so, not matters, on which even the self-governing colonies had a right of prior consultation, separate conference representation or choice of separate adhesion. The new need, for domestic application of such treaties, raised new issues for the imperial constitution. Initially, all colonies generally, accepted Britain’s method of domestic application imperial legislation. Canada, though, soon asserted a right to legislate locally on the Geneva (1906) and some Hague treaties (1907), in place of imperial legislation.

The Commonwealth was, initially, less assertive, accepting imperial legislation without protest. Eventually, the Commonwealth echoed some of Canada’s concerns, not asserting a similar right of local legislation but insisting that, at least, the imperial *OiC*, applying the *Geneva Convention Act* to Australia, should provide for a Commonwealth minister not the

¹⁸³ The other two ratifications were by the *USA* and *China*.

¹⁸⁴ Ratification dates for the main colonies were Canada, 1994; Australia, 1996; South Africa, 1998; *NZ*, 2010.

AC, to exercise local authority under the *Act*. In 1914, the Commonwealth rejected separate representation at future peace conferences but, after the war, the self-governing colonies were granted separate representation at Versailles, where they also signed the treaties separately. In 1929, the Commonwealth would sign separately (with a reservation) the new *Geneva Convention*, which was brought into effect in Australia by Commonwealth legislation.¹⁸⁵ This growing demand for greater autonomy can be traced back to Deakin and, then, Fisher's protests, over the *Declaration of London* (1909).

¹⁸⁵ *International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 29 July 1929; *Geneva Convention Act 1938*, No. 14 of 1938. See also *Geneva Conventions Act 1957*, No. 103 of 1957 & *Geneva Conventions Amendment Act 1991*, No. 27 of 1991.

Chapter 3

‘the voice of the empire’: the Declaration of London, 1909

From federation in 1901, the Commonwealth had remained passively accepting of imperial leadership over the conclusion of political treaties concerning, both on the multilateral rules for the conduct of war, dating from 1899 and the new series of bilateral general arbitration treaties, which had started for Britain in 1897. This was also generally true of the other self-governing colonies, except Canada, over extradition, arbitration and related political treaties with the USA. The Commonwealth’s attitude changed from late 1909, when, for the first time, led by Deakin, on Atlee Hunt’s advice, Australia awoke, from what the CO termed its ‘slumber’, to challenge the imperial government over a major multi-party political treaty—the *Declaration concerning the Laws of Naval War (Declaration of London)* of February 1909.

In late 1909, Deakin, sought to have the *Declaration* amended, only to be firmly rebuffed by foreign secretary, Sir Edward Grey. Deakin did not pursue the matter but this revived colonial concerns over the imperial government’s lack of prior consultation of the major colonies on treaties, which Barton and Deakin, respectively, had raised, though, hitherto, over commercial treaties only, at the 1902 and 1907 colonial conferences. The *Declaration* was, however, a multi-party political treaty, over which the imperial government had never before faced a colonial challenge. When ratification of the *Declaration* was delayed, William Hughes, as Labour’s acting prime minister, possibly moved by External Affairs minister, (Egerton) Lee Batchelor, on Atlee Hunt’s advice, proposed this as an item for the imperial conference of 1911. There, prime minister, Andrew Fisher, supported by Batchelor, spoke strongly on the issue, with mixed reactions from colonial colleagues. Australia opposed, firstly and specifically, the limitation of the immunity of neutral cargoes and shipping and, secondly and generally, the lack of prior colonial consultation over political treaties. The whole episode provoked a major discussion within the CO over the colonies and treaty making. The final result, a relatively unqualified commitment from Grey, to prior consultation of the main colonies before finalising political treaties, which affected them, was a landmark development in the imperial constitution, akin to that of 1877-78, which had allowed colonies a choice of adhesion to non-political treaties. Thereafter, Britain admitted to ‘turning over a new leaf’, with respect to how it dealt with these colonies on such treaty matters.

1. ‘one huge anomaly’: Britain and the Declaration of London, 1907-9

For the first time since federation, the Commonwealth was moved to challenge Britain’s paramountcy with respect to multilateral political treaties, demanding to be heard.

The *Declaration concerning the Laws of Naval War (Declaration of London, 1909)* arose from the failure, at The Hague in 1907, to agree on the German-proposed convention for the

Establishment of an International Prize Court (IPC). The convention was concerned with creating a court, akin to the PCA, to hear appeals from national prize courts, over cases of seizure or destruction of shipping and cargoes of neutrals, in war. Britain's Liberal government's partial acceptance of the Continental approach, in some matters, reversing a century of British naval policy, in some respects, provoked a storm of controversy there.

Customary international (and Britain's associated domestic) prize law developed during the American and French revolutionary wars, reflecting the emergence both of global maritime wars and the growing influence of commercial interests, seeking to limit the impact on trade of these larger wars.¹ Merchant ships captured in war were termed 'prizes' and the resulting 'bounty', distributed among the capturing crew, was once an important inducement, due to the, then, harsh nature of their engagement. Expenses for wrongful capture were then limited, as ships and, thus, cargoes were small and there were no mail lines. By the mid-19th century, this had very much changed, including with growing customary rights of neutral shipping.

The *Treaty of Paris* of 1856 expressed this new customary international law in multi-party treaty form. Moreover, the treaty's abolition of privateering meant captures were only legitimate, if made by naval officers, thus placing all liability for wrongful capture exclusively, in Britain's case, on the Crown: 'legalized piracy', quipped one British minister in 1910.² Thereafter, neutral ships captured in war, allegedly either carrying enemy contraband or otherwise assisting an enemy, had their case decided by the capturer's own prize court, inevitably guided by that party's own interpretation of customary international law (or interests). Such interpretations varied widely, leading some to seek a clearer exposition of international law on this subject.³ Important commercial interests were at stake, in terms of detriment to governments' shipping trade in war. Britain, as the major maritime power, was much affected, as it was, especially during the *Russo-Japanese War* of 1904-5.

¹ *Prize Act 1801*, 41 Geo. 3, c. 10 & *Prize Act 1801*, c. 96; *Prize Goods Act 1803*, 43 Geo. 3, c. 134; *East India Prize Goods Act, 1804*, 44 Geo. 3, c. 72; *Prize Act 1807*, 46 Geo. 3, c. 47; *Prize Act 1808*, 48 Geo. 3, c. 100 & *Prize Goods Act 1808*, 48 Geo. 3, c. 99; *Prize Act 1809*, 49 Geo. 3, c. 34, *Wages and Prize Money, etc. in the Navy Act 1809*, c. 108. & *Prize Money Act 1809*, c. 123; 50 Geo. 3, *Admiralty and Prize Courts Act 1810*, c. 118; 51 Geo. 3, *Prize Goods Act 1811*, c. 74 & *Forfeited and Unclaimed Prize Money Act 1811*, c. 104; 52 Geo. 3, *Unclaimed Prize Money, etc. Act 1812*, c. 132; 53 Geo. 3, *American Prizes Act 1813*, c. 63; 54 Geo. 3, *Army Prize Money Act, 1814*, c. 86 & *Navy Prize Money Act 1814*, c. 93; 55 Geo. 3, *Prize Vessels, etc. (Ireland) Act 1815*, c. 44 & *Prize, etc. Act 1815*, c. 160; 57 Geo. 3, *Army Prize Money, etc. Act 1817*, c. 77 & *Naval Prize Money, Act 1817*, c. 118 & *Prize Money, etc. Act 1817*, c. 127; 58 Geo. 3, *Naval Prize Money, Act 1818*, c. 64; 58 Geo. 3, *Navy Prize Orders Act 1819*, c. 56; 1 Geo. 4, *Army Prize Money Act, 1820*, c. 84 & *Naval Prize Money Act, 1820*, c. 85; 4 Geo. 4, *Distribution of Prize Money Act, 1823*, c. 65; 9 Geo. 4, *East India Company, Prize Money Act 1828*, c. 50; 2 & 3 Will. 4, *Army Prize Money Act 1832*, c. 53; 27 & 28 Vict., *Naval Prize Acts Repeal Acts 1864*, c. 23 & *Naval Prize Act 1864*, c. 25

² Under secretary of state for the colonies, John 'Jack' Edward Bernard Seely. Minute, Seely to Crewe, 2 February 1910, CO532/19/224-7, TNA. More generally, see Frei, (2020), *op. cit.*

³ James Brown Scott, 'The Declaration of London of February, 1909', *AJIL*, 8(2), April 1914, pp. 274-349; C. H. Stockton, 'The International Naval Conference of London, 1908-1909', *AJIL*, 3(3), July 1909, pp. 596-618; Natalie Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff Publishers, Dordrecht, 1988, pp. 257-76. *Examiner* (Hobart), 30 April 1909.

Then, neutral Britain was frustrated by having to submit claims to Russian courts over the sinking of British merchant ships, unless it decided to enforce its rights by war.

At The Hague peace conference of 1907, one convention was on codifying the relevant customary law, as to neutral shipping and, another, proposed by Germany, was to establish a permanent international tribunal, similar to the *PCA*, to apply that law in appeals against national courts' prize judgements.⁴ These treaties encountered greater disagreement there than any of the others. Risley observed that the 'most important and certainly the most "controversial"' convention, was that on the rights and duties of neutrals in naval war. A 'compromise' result, from 'weeks [of] wrangling', this included provisions on disposal of prizes, on which Britain, then, intended to reserve agreement. Risley ventured that it would 'probably be thorny but desirable' to inform the main colonies of the legislation arising from adopting the convention.⁵ Such action was delayed, when this was the only one of The Hague conventions, which Britain refused to sign in June 1908.

So, in late 1908, a year before the planned ratifications, Britain hosted a conference of the major maritime powers to consider codification of the laws of maritime warfare, so as to clear up confusion arising from differing customary practices.⁶ There, all agreed to the creation of an *IPC*. Britain was surprised by the lack of support for the immunity of neutral shipping, which Britain's Liberals, conscious of the losses in the Russo-Japanese War, wished to uphold. (The traditional Royal Navy view was the opposite, long seeing this as the way to starve Continental enemies.) Some Continental powers differed and Britain, relenting partly, agreed to a restricted right of sinking neutral ships. Compromise appeased neither side of the debate. On 26 February 1909, all parties signed the *Declaration of London*, drafted mainly by French lawyer, Louis Renault. The *Admiralty*, working with Frederick Liddell, second parliamentary counsel, began drafting the necessary legislation—primarily, the *Naval Prize* bill—to accompany the *Second Peace Conference (Conventions)* or *Hague Conventions* bill.⁷

Before proceeding with this legislation, there were three important domestic steps for the empire: first, abolishing the remaining colonial vice-admiralty courts, which had been established during the American Civil War;⁸ second, creating a *Supreme Prize Court (SPC)*, akin to the *Judicial Committee of the Privy Council (JCPC)*, for the empire's naval prize

⁴ The two were the *Convention (XII) Relative to the Establishment of an International Prize Court* and *Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War*, The Hague, 18 October 1907.

⁵ Minutes, Risley, 11 April & 4 May 1908, CO537/352/1-2, TNA.

⁶ They were Austria-Hungary, France, Germany, Italy, Japan, Netherlands, Russia, Spain and the USA.

⁷ CO323/542/37-40, TNA. *Times*, 22 & 23 March 1909. Henry B. Brown, 'The Proposed International Prize Court', *AJIL*, 2(3), July 1908, pp. 476-89; Charles Noble Gregory, 'The Proposed International Prize Court and Some of its Difficulties', *AJIL*, 2(3), July 1908, pp. 458-75; Elihu Root, 'The Real Significance of the Declaration of London', *AJIL*, 6(3), July 1912, pp. 583-94.

⁸ *Vice-Admiralty Courts Act, 1863*, 26 & 27 Vict. c. 24.

appeals; third, deciding on the liability for expenses of unauthorised captures. The first had particular relevance to Australia, as all but four vice-admiralty courts (those in NSW, Victoria, St. Helena and British Honduras) had been effectively converted in 1890 into colonial courts of the Admiralty, with appeals directly to the *Crown-in-Council*.⁹ The imperial conference in 1907 had agreed on greater unification and centralisation of the empire's judicial system. This now meshed with the proposed changes for naval prize courts. In March 1909, the *CO* asked those colonies for their agreement to the proposed changes to admiralty courts, without linking this to the *Declaration*, of which the latter, as yet, knew nothing, unless they had read the sparse press reports.¹⁰ The only official notice sent to all colonies, in April 1909, was just the parliamentary paper in a library not policy despatch.¹¹

The *Declaration* was, to that date, little reported in Australia, though one editorial highlighted its importance to Australia as an exporter.¹² Then, in mid-1909, from London, Collins, as he had in 1908 over The Hague conference, alerted Deakin, the incoming (since 2 June) prime minister, as to the furore in Britain and sent a copy of the relevant parliamentary paper. The *CO* only sent this later, in April and, as Atlee Hunt later complained, in 'the ordinary way, without covering letter intimating' British intentions or 'asking for any expression of opinion' by ministers, 'as to the affect of the proposed agreement on this country.'¹³ (As neither the *FO* nor Admiralty had yet briefed the *CO*, it had no such details to provide.) Meanwhile, Queensland parliamentarian, Justin 'Colonel' Foxton, had arrived in London, as honorary minister representing the Commonwealth at the imperial naval conference, which was coordinating greater naval cooperation within the empire.

In early August, soon after Foxton's arrival, Sir John MacDonnell, professor of comparative law at the *London School of Economics (LSE)*, 'strongly' counseled him that the Commonwealth should 'closely scrutinise' the *Declaration*, claiming the provisions on contraband were 'inimical' to Australian interests, and have it discussed at this conference, before ratification.¹⁴ Deakin, understandably, was initially unsure of the issue, until Atlee Hunt found the treaty text in a *Bluebook* and advised Deakin that, it was quite separate from (though related to one of) The Hague conventions.¹⁵ Deakin, then, requested advice from

⁹ CO323/552/285-91; CO532/13/248-53, TNA. *Colonial Courts of the Admiralty Act 1890*, 53 & 54 Vict., c. 27.

¹⁰ CO854/26/33-48, TNA.

¹¹ CD4554 & CD 4555, in library despatch, *CO* to governor-general, 2 April 1909, vol. 55, CRS A11816, NAA.

¹² *SMH*, 1 March & 8, 9 July 1909; *Examiner*, 30 April 1909; *Herald*, 1 May & 23 August 1909; *Argus*, 8 July & 14 August 1909.

¹³ Undated and unsigned memorandum, c. March 1911, 1916/18601, CRS A1, NAA. The typeface and document form are of the type exclusively used by Atlee Hunt.

¹⁴ Handwritten decoded cables, Foxton to Deakin, 3 & 5 August 1909, 1912/984, CRA A2, NAA. MacDonnell spoke on the subject at the *ILA* conference in 1910. *Advertiser*, 17 September 1910.

¹⁵ 7/1911, CRS A2911; 1914/4060, CRS A2, NAA. *Bluebook Miscellaneous*, nos. 1 & 6 of 1908.

Garran, as to 'how far Australian trade interests are likely to be affected'.¹⁶ Not awaiting a reply, he cabled Foxton, saying he wished to raise several points with the imperial authorities.

*Are Dominions to be consulted before ratification . . . if [not] . . . [you are to] represent strong feeling [of the Commonwealth] against being committed . . . without consultation on matters of great importance to Australia[?]*¹⁷

Foxton quickly agreed to comply, while reassuring him that British officials had intimated already that there was 'no likelihood' of ratification in the current parliamentary session.¹⁸

Before Foxton relayed this, Deakin read Glynn's AG's opinion on the contentious articles of the *Declaration*. Glynn advised, first, that the acceptance of the items therein specified as absolute contraband, was 'not prejudicial to the interests of the Commonwealth'. Secondly, on the 'vexed' question of 'conditional contraband' (that is, cargoes not bound for a belligerent's armed forces), he agreed an international agreement was desirable but should exclude foodstuffs, as the terms favoured the Continental powers (France and Germany) over Britain's oceanic empire, including both its exporters and importers, such as, respectively, Australia and Britain. Thirdly, he argued the provision, proposed by Germany and Russia, for destruction of captured neutral vessels was contrary to Britain's new policy, which now favoured neutrals over belligerents, and, thus, not in the empire's interests. Finally, he added that, although only mentioned in conference records (and at The Hague in 1907) and not the *Declaration* itself, conceding unconditionally the right to convert merchantmen into warships, might be 'dangerous', as it was something other nations could easily do and, so, could 'do serious injury to our commerce.'¹⁹ (Glynn, five months later and in Opposition, defensively briefed the Adelaide press on how Deakin's government had been 'deeply interested' in the subject and he, personally, had 'assiduous[ly] considered it.'²⁰)

The *FO*, however, was not interested in allowing colonies to have a voice on such political treaties and told the *CO* that, Britain was planning to ratify that month (September), for which legislation was already prepared for early 1910 and was pressing non-signatories to accede. As the terms of the agreement were satisfactory to the *Admiralty*, Grey said that he could not 'withhold ratification, as it would be quite impossible to introduce any amendments at this stage.'²¹ Deakin considered protesting further but, in view of Foxton's report of the blunt *FO* response, decided to let the matter go.²² Within weeks, as detailed in the previous chapter, he signified to the *CO* that he held no objection, in contrast, to *The Hague Conventions* bill.

¹⁶ Minutes by Atlee Hunt, 12 & 13 August 1909, 1914/4060, CRS A2, NAA. This seems an unusual request, as it appears to go beyond mere constitutional questions.

¹⁷ Cable, Deakin to Foxton, 23 August 1909, 1912/478/1 & 1912/984, CRS A2, NAA.

¹⁸ Cable, Foxton to Deakin, 24 August 1909, 1912/478/1 & 1912/984, CRS A2, NAA. CO418/77/161-4, TNA.

¹⁹ Opinion, Glynn, 10 September 1909, vol. 1/7, CRS A1497 & 1914/4060, CRS A2, NAA.

²⁰ *Advertiser*, 9 January 1910.

²¹ Letter, Francis Campbell (*FO*) to *CO*, 15 September 1909, CO418/76/343-5, TNA.

²² Letter, Foxton to Deakin, 24 September 1909, 1912/478/1, CRS A2, NAA.

The Admiralty, unlike the *FO* and *WO*, thought it important to consult the colonies on the resulting proposed prize legislation. The *CO* agreed but also concurred with the *FO* that the main colonies' agent-generals should not sit on the inter-departmental committees, which were drafting *The Hague Conventions* and *Naval Prize* bills. (Berriedale Keith pointed out correctly that they were not officials of the Commonwealth.) Cox suggested, instead, the *CO* being represented on the committee by someone 'au courant with the feeling & sentiment of Australia [and, later, inserted] '& the other Dom[inion]s', nominating Lucas, who had just returned from Australia and 'an exhaustive inquiry into Colonial sentiment'.²³ (Ultimately, Cox attended.) Lambert thought, however, that the *CO* would 'certainly' have to consult them, once the bill was finalised, though Johnson thought it a 'pity', to delay enactment.²⁴

Ultimately, ratification of the *Declaration* was again also postponed. In early 1910, the *CO* extensively discussed the committee's interim report, which assumed that the legislation would be 'enacted by the Imperial parliament alone and . . . operate throughout the British Empire'. Vice-admiralty courts, such as in *NSW* and *Victoria*, would be abolished so that, as required by the Hague convention, there would be only one court of appeal, the *SPC* in Britain, and no 'local' appeals.²⁵ Berriedale Keith conceded that the proposed measures were reasonable, given prizes were 'very much' an 'Imperial matter' but thought it 'decidedly awkward' to abolish appeals from the colonial admiralty courts to colonial supreme courts, such as the *HCA*. He held it 'very doubtful' the Commonwealth would 'enjoy' it, nor Canada or South Africa, given the former two were developing their own navies, making it 'natural that they should wish to their Supreme Courts to have a share in this prize business.'²⁶ Furthermore, if Britain did bypass colonial courts, even though it allowed colonial judges on the *SPC*, as with the *JCPC* and *PCA*, it must accept all liability for damages. Dale agreed that appointing colonial judges would help gain acquiescence. So, Britain should also accept all damages' liability, even if it meant colonies making 'profits' from invalid captures.²⁷

Lambert, then, advised on this question at length: making two points. First, on judicial procedure, he pointed out that colonial prize courts only had jurisdiction under imperial legislation and that admiralty jurisdiction was 'necessarily' of an imperial 'character', as it dealt with acts on the high seas and those affecting relations with foreign governments. So, the unity offered by a single appeal court was 'indispensable'; it would be 'unreasonable' for

²³ The phrase '& the other Dom[inion]s' was inserted into Cox's original note; minute, Cox, 18 December 1912, CO532/13/185-95, TNA.

²⁴ Minute, Lambert, 17 December 1912, CO532/13/185-95; minute, Johnson to Lambert and Cox, 3 January 1910, CO532/16/412-28, TNA.

²⁵ Naval Prize Court Committee, Interim Report, 21 December 1909, CO532/19/257, TNA.

²⁶ Minute, Keith to Lambert and Johnson, 12 January 1910, CO532/19/216, TNA.

²⁷ Minute, Dale, 13 January 1910, CO532/19/217, TNA.

Australia to object. So, once the bill's final form was settled, they should inform the colonies. He intimated that the notice could be sweetened by claiming that the bill would actually increase the jurisdiction of *NSW* and Victoria's existing vice-admiralty courts. On the second point, liability for unlawful captures, he conceded that colonial warships would ultimately be under Admiralty authority but did not think that was sufficient grounds for 'saddling' Britain with the 'very expensive consequences of the vagaries of colonial captains'--specifying Australian ships operating in the Pacific--who would be of a 'lower standard of knowledge and discipline'. Colonial ministers might also instruct their warships without Britain's knowledge. Such failings could prove 'very expensive and troublesome', especially with neutrals, with whom more 'difficulties' would arise than with belligerents. So, he thought it 'prudent' to let colonies keep the returns from prizes, while bearing some liability for unlawful captures, though limited to cases heard by the proposed *SPC*, and not those where the Hague tribunal held the latter's judgements invalid. He could not see why the colonies should not 'take some risk' or that 'British taxpayers' should bear the whole burden. Finally, though only one of the 'small matters', to make the bill more 'pleasing' to the colonies, without 'bind[ing] us', he recommended Britain should allow colonial judges on the *SPC*.²⁸

Risley proposed an alternative path to the 'one object in view', which was the elimination of appeals to colonial higher courts. He suggested re-establishing in all maritime colonies vice-admiralty courts, such as still existed in both *NSW* and Victoria, which had rejected (initially) the request for their abolition. Although a return to an older imperial judicial model, he doubted there would be objections, as these courts would still use the same colonial judges and be limited to prize cases. So, essentially, it was just a change in name.²⁹ Cox thought either method was sound legally but, 'politically', he wondered: 'will the Colonies like it'.³⁰ Lucas thought the whole issue a 'difficult matter' and Hopwood, 'complicated'.³¹ Seely anticipated difficulties, especially with Australia, which attached the 'greatest importance' to its *HCA*, and might object to its courts getting 'no look-in', especially in war. He unexpectedly also raised the novel idea that the 'legalized piracy' of prizes should either be abolished or all bounties pooled for the whole navy. Otherwise, colonial ships in remote areas might gain the greater share of this 'profitable business', while British ships were doing the actual fighting.³²

²⁸ Minute, Lambert, 18 January 1910, CO532/19/218-20, TNA.

²⁹ Minute, Risley, 19 January 1910, CO532/19/220-1, TNA. In the middle of this policy discussion, on 4 July, Victoria reiterated its earlier refusals, its attorney-general, J. Drysdale Brown, arguing that that s.76(iii) of the Commonwealth constitution empowered the Commonwealth parliament to 'make laws' giving the *HCA* 'original jurisdiction' in 'any matter' of 'Admiralty and maritime jurisdiction'.

³⁰ Marginal note on Risley's minute & minute, Cox, 23 January 1910, CO532/19/221, TNA. CO532/17/226-TNA.

³¹ Minutes, Lucas, 25 January & Hopwood, 31 January 1910, CO532/19/222-3, TNA.

³² Minute, Seely, 2 February 1910, CO532/19/224-7, TNA.

In the end, Lord Crewe ‘entirely agree[d]’ on the need for ‘uniform jurisdiction’ for the ‘whole empire’, achieved by either method, as he doubted whether Risley’s proposal was any ‘less wounding’ to the colonies than Lambert’s, which ‘skip[ped] over’ colonial high courts to the *SPC*, due to the Hague convention. He deemed the whole matter ‘delicate’, requiring the *CO* to ‘proceed very carefully’, making it ‘essential’ that colonial judges be allowed to sit on a *SPC* and to limit colonial liability, as Lambert had proposed (on this Risley was silent), to judgements of the *PCA*. More brightly, he was sure that, ultimately, the colonies, through ‘good sense and patriotism’, would concur.³³

All this transpired during a fraught year for Britain’s Liberal government, which only held office narrowly, through support from a minor party, after the January 1910 elections. Internationally, Britain, as Lucas put it, was ‘so far pledged’ to ratifying the contentious *Declaration* on 30 June that, it had to pass quickly the requisite *Naval Prize* bill. The Admiralty’s slowness in finalising the bill for cabinet was squeezing the time left to consult the main colonies. Moreover, despite *CO* requests, the bill, as at late April, made no provision for colonial judges on the *SPC*. In early May, Berriedale Keith urged sending the bill, as it stood, immediately, and asking the colonies to reply only by cable, whether or not they accepted it, anticipating (perhaps, hoping) none would answer.³⁴ Lucas felt that there was no time to consult. He recommended that the *CO* ‘do nothing at all’, let the bill pass and, then, ‘send it out without any elaborate explanations hoping that it will find acceptance or escape notice’, whether those colonies ‘like it or not’.³⁵ Hopwood ‘fear[ed] there is no alternative.’³⁶

Shortly, however, the Admiralty learnt that the ratification date had been postponed, yet again, to February 1911, due to the *USA*’s concern over a procedural issue, thus reducing the urgency of legislation and, so, providing ample time for colonial consultation. Grey, however, vigorously differed, aware of the political complexities (the likelihood of another election that year), which might afford no time for enactment before the new ratification deadline or parliament adjourned (on 3 August). He insisted on immediate introduction of the bill—which he did, supported by the under secretary, Thomas MacKinnon Wood, the solicitor-general and attorney-general in the Commons on 23 June.³⁷

Lucas thought about waiting until the bill was passed, which he expected to be soon, but the scheduled reading for 5 July was deferred. Indications were that it would not be read until a newly scheduled autumn session. So, he decided the bill, as introduced, should be sent ‘at

³³ Minute, Crewe, 10 February 1910, CO532/19/223, TNA.

³⁴ Minute, Keith to Risley, Lambert and Johnson, 26 April 1910, CO532/19/298, TNA.

³⁵ Minute, Lucas, 11 June 1910, CO532/19/303, TNA.

³⁶ Minute, Hopwood, 16 June 1910, CO532/19/342, TNA.

³⁷ *JHC*, vol. 165, p. 192.

once', with a despatch, 'not inviting any comments'. Lambert echoed his direction: 'we should of course minimize the importance' of the bill, so that the colonies did not think that they should have been consulted earlier. With Seely and Crewe's endorsement, in mid-July, he sent a very brief 'for information' despatch--which could not have been less informative.³⁸

The despatch arrived in Melbourne in mid-August, where Fisher, three months prior, had succeeded Deakin, who may have reacted differently.³⁹ Fisher may well have not known about Deakin's complaint over the *Declaration*, though that was somewhat of a separate issue. He did have the bill immediately referred to AGs, with Atlee Hunt asking Garran whether there was anything in it, 'to limit or affect the Commonwealth's rights of autonomy.' Garran replied quickly and very briefly that there was 'nothing in it', which did, it being 'similar to existing law.'⁴⁰ Garran had, apparently, missed or did not consider significant the scope of law changes contained in the bill and the sidelining of the *HCA* on prize court appeals. Although policy questions were outside the scope of his legal advice, there was very little in Australia's press to alert him to the issues being vigorously debated in London.⁴¹

By late 1910, the *Declaration* had started to whip up a storm in Britain.⁴² Over 100 retired admirals, almost every maritime and business centre (including the chambers of commerce of London, Birmingham, Leeds, Bristol, Liverpool, Glasgow, Plymouth, Portsmouth, Sunderland, Swansea and Belfast), most underwriters, including Lloyds, and many legal scholars (including John Westlake, Thomas Holland, Thomas Baty, John MacDonnell and Alfred Thayer Mahan) formed, what one critic called, an 'absolute consensus' against ratification.⁴³ There was a prolonged parliamentary debate.⁴⁴ Many attacked supposed concessions to Continental demands, which could not be denounced for twelve years after ratification, meaning that Britain would relinquish its maritime supremacy to what prominent

³⁸ Minute, Lucas to Hopwood, 11 July 1910, CO532/19/269-74, 342-7, 388-389; CO10689Doms, 24 April 1910, CO708/2, TNA.

³⁹ Circular despatch, CO (Crewe) to governors, 14 July 1910, vol. 62, CRS A11816, NAA.

⁴⁰ Opinion, Garran, 23 August 1910, vol. 1/8, CRS A1497, NAA. Atlee Hunt's memorandum to Garran, which has not survived, is quoted in the opinion.

⁴¹ For example, see *Daily News* (Perth), 23 February 1910 and *Advertiser*, 20 April 1910.

⁴² Julian S. Corbett, 'The capture of private property at sea', in Captain A. T. Mahan, *Some neglected aspects of war*, Little, Brown, and Company, Boston, 1907; Norman Bentwich, *The Declaration of London: with an Introduction and notes and appendices*, E. Wilson, London, 1909; Thomas Gibson Bowles, *Sea Law and Sea Power: As they would be affected by recent proposals; with reasons against those proposals*, John Murray, London, 1910; B. Eyres Monsell, *The Declaration of London: A Simple Explanation*, Wyman & Sons, Limited, London, 1911; John Pawley Bate, *An Elementary Account of the Declaration of London, 1909, and Some Kindred Matters*, Longmans, London, 1911; Nathaniel Dunlop, *A British Shipowner and the Declaration of London*, McCorquodale, Glasgow, 1911; F. E. Bray, *British Rights at Sea under the Declaration of London*, P. S. King & Son, London, 1911; Arthur Cohen, *The Declaration of London*, Hodder & Stoughton for the ULP, London, 1911. *Times*, 25 October, 15, 16, 17, 18, 19, 21, 22 November & 1, 3, 10, 17, 27 & 31 December 1910; 2, 3, 12, 19, 24, 25, 26, 28 & 31 January, 3, 4, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25 & 27 February, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 18, 18, 21, 22, 24, 25, 28, 29, 30 & 31 March, 1, 5, 6, 7, 8, 10, 11, 13, 15, 19, 20, 21, 24, 27, 29 April, 2, 5, 12, 23, 26, 27, 29, 30 May 1911.

⁴³ Samuel Butcher, *HCD*, Vol. 27, 28 June 1911, p. 500.

Conservative critic, Sir John Butcher, later described as a ‘foreign tribunal’ on which, his supporting colleague, William Peel, added, would sit fifteen men ‘of every colour . . . white men, black men, yellow men, half-coloured men . . . men of all colours of the rainbow’, of which only one would be from Britain, despite [it] owning half the world’s shipping.⁴⁵

2. ‘growth of national consciousness’: Australia’s challenge to the *Declaration*, 1910-11

The imperial government’s initial position was to resist the Australian challenge over the *Declaration of London*, while recognizing that the empire was moving into a new era.

Through late 1910, Britain was preparing for the coming ‘imperial’ conference. This title-change from ‘colonial’, signified Britain’s recognition and accommodation, albeit more symbolic than real, of evolving political sentiment in its self-governing colonies, also reflected in the creation of the *DD* within the *CO*. Lambert, therefore, cautioned others to avoid using the ‘correct’ term, ‘Colony’ and use ‘Dominion, to meet Australian ideas’.⁴⁶ In addition, the *CO* supported the Commonwealth, by again bluntly ruling out the states’ attendance at the conference, as some had requested.⁴⁷ In 1907, Deakin, alone, had raised commercial treaties, though only in terms of being informed, as to what obligations were imposed on these colonies. As a result, the *FO* had compiled for colonial distribution, a list of such treaties, to and from which, the colonies had either adhered or withdrawn.⁴⁸ Between 1907 and 1909, Canada had directly negotiated with France, resulting in two commercial treaties, ratified by Britain, and in 1910 concluded non-treaty commercial agreements with Germany, Italy, Belgium and the Netherlands, under *OiCs*, plus had ongoing negotiations with the *USA*, preparatory to an imperially ratified treaty.⁴⁹ These developments prompted several questions in the Commons, including over imperial constitutional issues and whether the same autonomy would be extended to the other four main colonies.⁵⁰ (The *CO* view was that it would be.) Britain was also working through the complexities arising from providing, in recent commercial treaties, for these colonies’ treaty withdrawals.⁵¹ So, it was likely that treaties would again be an issue at the imperial conference, possibly involving unwelcome discussion of the *Declaration*.

The colonies’ initial proposals for conference agenda items were generally amenable to the *CO*. Laurier, perhaps, weary in the last year of his long premiership or satisfied with Canada’s existing commercial treaty procedure, did not propose discussion of treaty issues of any kind.

⁴⁵ *Times*, 4 November 1911.

⁴⁶ Minute, Lambert, 16 February 1910, CO532/21/74-75, TNA.

⁴⁷ CO532/25/136-50, 355-6, 411-2, TNA.

⁴⁸ CO532/21/74-75, 202-3, TNA.

⁴⁹ Britain had also approved Transvaal’s non-treaty arrangement with Mozambique on labour recruitment in 1909.

⁵⁰ *HCD*, 1910, vol. 16, p. 1216; CO532/20/328-31, 334-52; CO532/21/273-5, TNA.

⁵¹ CO532/21/563-83, TNA.

The only subject he thought of ‘sufficient urgency’ was imperial legislation on naturalisation and treatment of aliens.⁵² This was also the sole focus of Newfoundland and, to some extent, the newly created Union of South Africa.⁵³ The latter also called for the affairs of these five colonies to be placed directly under Britain’s prime minister, along with a new permanent secretariat of the imperial conference, not under the colonial secretary.⁵⁴ NZ’s ‘staggering’ list of proposals reflected a similar sentiment, claiming that, in view of the ‘modern’ development of these colonies, it was essential the title of the secretary of state be changed from ‘colonies’ to ‘imperial affairs’ and that the ‘Dominions’ should be administered in the *CO* separately from the *CC&P* (apparently unaware this had been done), with a permanent under-secretary for each. The sole channel of communication should be through high commissioners, who would be provided with the same information, which the *CO* sent to governors. (Berriedale Keith observed that Australia would be ‘extremely unwilling’ to accept NZ’s proposal for an ‘imperial council’, which would ‘diminish their importance and independence’ and similar South African and Canadian response was predicted.⁵⁵) On international questions, affecting these colonies, high commissioners should be allowed to attend *Committee of Imperial Defence* (*CID*) meetings and communicate directly with the foreign secretary on international industrial, commercial and social (but not political) issues.⁵⁶ NZ, seemingly prompted by its review of Britain’s parliamentary paper, also proposed discussion of the ‘power of the self-governing Dominions to negotiate commercial treaties with foreign powers’.⁵⁷ Later, Robinson hailed, as ‘a good thing’, the withdrawal of this proposal, because no ‘further concessions’ to these colonies ‘can [nor] will be made’.⁵⁸

On the *Naval Prize* bill, the *CO* was relieved that, by November 1910, no responses had been received from the five colonies to the notice of July, Lambert quipping, ‘it is to be hoped that none will be’.⁵⁹ (In fact, NZ had just briefly indicated it had taken note of the bill, without commenting further.) Other good news was, that *NSW* indicated that it now agreed to bring its vice-admiralty court under the 1890 imperial legislation, leading the *CO* to press the last concerned colony, Victoria, again.⁶⁰ Less pleasing for Britain’s government was the reviving public debate. The *Liverpool Chamber of Commerce* called for the *Declaration* not to be

⁵² Minute of Privy Council (Canada), 10 January 1911, CO532/25/33-6, TNA.

⁵³ For Canada, see CO532/25/33-42, 390-2. For Newfoundland see CO532/18/199-200, 220-3, 362-7; for South Africa, CO532/18/155-9; CO532/25/65-6, 75-8, TNA.

⁵⁴ CO532/25/65-6, 151-5, TNA.

⁵⁵ Minute, Keith to Lambert, Johnson and Just, 16 November 1911, CO532/18/38, TNA.

⁵⁶ The ‘staggering’ comment was made by Berriedale Keith. Minute, Keith to Robinson, Lambert and Johnson, 14 October 1911, CO532/18/443-7, 478-89; CO532/19/8-13, 25-35, TNA.

⁵⁷ Gov31630NZ, 9 September & Gov29632NZ, 17 August 1910 & CO708/2; CO532/18/61-73, TNA.

⁵⁸ Minute, Robinson, 28 November 1911, CO532/18/431-2, TNA.

⁵⁹ Minute, Lambert to Johnson, Just and Lucas, 16 November 1910, CO532/20/390, TNA.

⁶⁰ CO532/18/161-6, TNA.

ratified until it was amended, as critics desired.⁶¹ The *British Empire League* insisted parliamentary assent be obtained and the question discussed at the imperial conference.⁶² In the Commons, Liberal Arthur Lee and Thomas Gibson Bowles, who had just published a book on the furore, pressed Grey to require parliamentary approval for ratification. Under this pressure and with an election now scheduled in three weeks, Grey withdrew the bill on 23 November, five days before the session ended.⁶³ Before that, Frederick Leverton Harris, also a partner in a shipping business, asked whether the self-governing colonies would be consulted. Harcourt agreed with his advisers that the *FO*'s proposed parliamentary answer for Grey, a blunt dismissal of any such necessity, could be interpreted by the colonies as a 'snub'.⁶⁴ So, Seely convinced Harcourt to accept Lambert's alternative and reply that the *CO* was already 'in communication' with those colonies but no further action was proposed. Seely's concern was justified, for such a snub, was already being felt by some in Australia.

Adelaide's *Advertiser*, if not the Commonwealth, had started to pick up the issues under debate in Britain and conjectured on their 'grave importance to Australian commercial and industrial interests'. The *Declaration*, if ratified, might in war 'shut out Australia from the right to supply meat, flour, or wheat, or food of any kind to any belligerent nation'. Even with Britain being 'neutral', Australian foodstuff cargoes would be liable to seizure without compensation and the carrying ships sunk.⁶⁵ In early October, days after the *Advertiser*'s strident editorial, Fisher left for a lengthy visit to South Africa, which may have been significant, as later indications are that he did not yet see the *Declaration* as an important issue. He certainly seemed uninterested about raising it at the forthcoming conference.⁶⁶ His absence meant the more dynamic, if abrasive, attorney-general, William Hughes, was acting prime minister. Obviously, he knew of Garran's earlier advice but, now, apparently, Atlee Hunt drew his, or, perhaps first, Batchelor's attention to the press reportage of the extensive discussion of the *Declaration* at the *International Law Association* conference in London that August and *Inter-parliamentary Congress* in Brussels in September, plus the stir over Gibson Bowles' book.⁶⁷ Moreover, with ratification re-scheduled, yet again, to February 1911, it was now not too late for Australia to revive the issue, which Deakin had first raised.

⁶¹ MO36263Doms, 23 November 1910, CO708/2, TNA.

⁶² MO37112Doms, 3 December 1910, CO708/2, TNA.

⁶³ *JHC*, vol. 165, p. 306.

⁶⁴ Minute, Seely to Harcourt, 17 November 1910, CO532/20/390, TNA.

⁶⁵ *Advertiser*, 17 & 30 September 1910.

⁶⁶ *Times*, 1 October 1910 & 21 January 1911.

⁶⁷ Undated and unsigned memorandum, c. March 1911, 1916/18601, CRS A1, NAA. The typeface and document form are of the type exclusively used by Atlee Hunt. *Advertiser*, 17 September 1910; *Telegraph* (Brisbane), 22 October 1910; *Age*, 9 November 1910.

So, on 25 November, in parliament, Hughes detailed the government's position on several subjects for discussion at the conference, including a strongly worded resolution that,

it is regretted that the Dominions were not consulted prior to the acceptance by the British delegates of [its] terms.

*That it is not desirable that Great Britain should adopt the inclusion in Article 24 of foodstuffs, in view of the fact that so large a part of the trade of the Empire is in those articles . . . [nor] the provisions of Articles 48-54, permitting the destruction of neutral vessels.*⁶⁸

Deakin's parliamentary response ignored this, though he addressed at length something Hughes had not mentioned--linked to the proposed *SPC*--the imperial final court of appeal for civil cases. Glynn did mention the *Declaration*, claiming that before Britain made a decision, Australia's views on German and Austrian proposals, allowing the conversion of merchant ships into warships, needed to be considered, given the absence of British warships from the southern oceans. (In fact, this was not covered by the *Declaration*, as the *CO* disparagingly noted.) He claimed that Hughes was mistaken and that Deakin's government had made such representations, which perhaps referred to Deakin's cables to Foxton.⁶⁹

The *FO* learnt of Hughes' resolution through the *Times*. Grey, while holding that it was based on 'misapprehensions' and was not 'conclusive', now thought it 'judicious' to postpone ratification yet again, until after the imperial conference.⁷⁰ The *CO* also heard of the resolution from non-official sources and, while not wanting to concede to these colonies anything like a say, let alone a veto, on international questions, was concerned, as Berriedale Keith counselled, that it was 'important' and 'desirable', that Britain 'carry' them into support for the *Declaration*.⁷¹ All offices agreed to postponement. With Fisher still at sea, Hughes had the Commonwealth's resolutions cabled. These arrived in the *CO* on Christmas Eve.⁷² Berriedale Keith quipped that they were all 'delightfully vague' and 'practically unexceptionable', despite some 'troublesome' exceptions, including that on the *Declaration*.⁷³ In fact, the *CO* soon realised this was a major challenge to traditional procedure.

The Commonwealth's protest received public British support from the *Times* in the previous week. Earlier, a week before the *Naval Prize* bill arrived in Melbourne, the *Times* had also noted that Ward was pushing the case for greater imperial unity and more inclusion of the five colonies in decision-making.⁷⁴ In opposition, Deakin had also publicly expressed dissatisfaction that the re-creation of the *DD* within the *CO*, did not really meet colonial

⁶⁸ *CPD, HoR*, vol. 47, 29 November 1910, pp. 6852-64.

⁶⁹ *CPD, HoR*, vol. 47, 29 November 1910, pp. 6852-64.

⁷⁰ Letter, Walter Langley (*FO*) to *CO*, 19 December 1910, CO532/21/607-8, TNA; *Times*, 1 December 1910.

⁷¹ Minute, Keith to Lambert & Just, 21 December 1910, CO532/21/606; CO532/20/390; TNA.

⁷² These included, which NZ prime minister Joseph Ward supported, a revival of Deakin's proposal at the 1907 conference for an imperial court of final appeal, which would include colonial judges. CO532/19/160-77, TNA.

⁷³ Minute, Keith to Lucas, 27 December 1910, CO532/19/90-3, TNA.

⁷⁴ *Times*, 1 October 1910.

desires.⁷⁵ Then, the Canadian press reported that Laurier had proposed that foreign consuls in these colonies be given 'quasi-diplomatic status', presumably, so they could negotiate commercial treaties directly. The *Times* editorial then pronounced that, while in the past, it was 'just' that the imperial government controlled foreign policy, now the 'growth of national consciousness in matters of world policy' among these colonies required change; the Commonwealth had 'very properly' called for a say on matters, such as international arbitration, and that the *Declaration* and Canada was likely to agree. Thus, there was an 'immediate necessity' to find a way, so that public opinion in these colonies could make itself felt in the conduct of foreign policy. 'The voice of the Empire' the *Times* declared, 'must be the voice of the empire, not the voice of Great Britain alone.'⁷⁶

So, the *CO* accepted that the *Declaration* must be discussed at the conference, confident that the *FO* could provide sound reasons to justify not consulting the colonies. Robinson felt, though, that the *FO* should follow the *CO*'s earlier 'lead', over both the *Hague Conventions* and *Naval Prize* bills, and allow colonial representation on inter-departmental committees dealing with international commercial agreements. In this case, he regretted that the Admiralty had not allowed enough time originally for the *CO* to arrange such consultation and only to advise the colonies for information not observation. He noted that, by agreeing to discuss the Commonwealth's resolution at the conference, before the delayed ratification, Britain, in fact, had essentially met Australia's demand. At the conference, however, it should be 'made clear' that 'international responsibility' for treaties 'must rest' with Britain which, in the 'exercise' of that responsibility, 'on occasion', may have to proceed without prior consultation and 'must expect' the colonies to 'cooperate loyally'.⁷⁷

Lambert strongly agreed, not only on the need for consultation but also for 'carry[ing]' the colonies in support. Nonetheless, he also saw the need for 'some frank speaking', like with 'the Indians', at the conference, 'without reporters of course'.

*As long as we pay for the fleets, armies & diplomatic services we, & only we, can have the ultimate responsibility for large questions of foreign policy.*⁷⁸

In addition, he scoffed, these colonies had 'little or no knowledge & experience of such matters'; Australia's *DEA* 'cannot even translate an ordinary French letter correctly', with its comment on Article 24 and probably other points, of the *Declaration* indicating that it did not know existing practice.⁷⁹ So, with the *FO* now agreeing that such consultation was better achieved by personal discussion than despatch, Lucas replied for Harcourt that the *CO* agreed

⁷⁵ *Times*, 20 July & 1 September.

⁷⁶ *Times*, 30 November 1910

⁷⁷ Minute, Robinson, 2 January 1911, CO532/19/137-46, TNA

⁷⁸ *ibid.*

⁷⁹ *ibid.*

ratification should be delayed until after the conference, while conveying the qualifying arguments of Robinson and Lambert, which stressed the need for Britain to act, sometimes without colonial consultation, for the 'interests of the Empire at large'.⁸⁰

The Canadian, NZ and, especially, Australian conference proposals incited a major discussion in the CO over treaty making. Berriedale Keith provided his colleagues with a detailed historical background, suggesting tentatively that all these colonies, not just Canada, should be empowered to conclude all but political treaties, through foreign consuls.⁸¹ Robinson greeted this proposal with 'extreme hesitation'. He made the important point that it was 'difficult if not impossible' to distinguish between 'commercial' and 'political' aspects, which were 'inextricably mixed up' in treaties. He warned that the colonies might make their own distinction between 'political' and 'commercial' treaties and virtually complete treaty negotiations before Britain knew any details or--the 'gravest risk'--agree in such treaties to discriminate against British trade. There was even, another 'grave risk', of them coming into conflict with each other, such as between Canada and Newfoundland over relations with the USA. He saw yet another 'grave risk' in allowing the colonies to conclude treaties on 'boundary matters' and 'control of waterways', as they might adopt views of international law, opposed to those of Britain's. At present, Britain retained the 'last word' on such treaties, which were 'full of political features in practice' and also involved questions of 'national interest and honour'. He asked rhetorically, what was Britain to do if a colony made a treaty with which Britain disagreed: was it to be 'backed by the whole weight of the Empire?' 'If yes', it would be 'intolerable', that Britain, with its much greater population and interests at stake, 'should be made responsible without power of control'; '[i]f no, it is separation'.⁸²

So, he saw no compelling reason to disturb the *status quo*, as not 'even Canada' had made a 'formal and categorical' request for this power. If a colony did, these arguments should be urged against it. He had an even 'wider objection'.

*We have abandoned one after another, unity of control in commercial matters, in legislation (practically if not theoretically) and in military matters. In naval matters, unity of control is, to say the least of it, most seriously threatened. It remains only in respect of the control of foreign relations, of which the treaty-making power is one aspect. If it is to be abandoned in that sphere also, it will be difficult indeed to maintain in the face of foreign powers that the Empire is a unity at all. In the sphere of international and constitutional law the bonds of sentiment have no place and what those bonds amount to in practice when the constitutional bonds are loosened, is written large over the history of the Holy Roman Empire.*⁸³

⁸⁰ Letter, Lucas to FO, 12 January 1911, CO532/19/142-44, TNA.

⁸¹ Minutes, Berriedale Keith, 21 November 1910 & 6 January 1911, CO532/18/62-72; CO532/33/43-50, TNA.

⁸² Memorandum, Keith, 6 January 1911, CO532/33/43-50; see also his earlier memorandum on the historical background to treaties and the colonies at CO532/18/61-73, TNA.

⁸³ Minute, Robinson, 18 January 1911, CO532/33/51-4, TNA.

So, a time when the colonies claimed a share in treaty-making, would be one for 'some plain speaking', facing the 'risk' of 'displeasing' those who, 'after all', know 'well enough', they 'get the best of both worlds.'⁸⁴

Lambert 'earnestly' agreed, hoping Britain would 'do nothing whatever' to 'weaken' or 'surrender' further, the already 'not too strong' control of foreign relations which, with the navy 'endangered', was the 'only effective machinery' keeping, indeed, 'protecting' the unity of the empire from forces, which 'must break it up'. The 'sentimental bond of affection for the Sovereign' was 'invaluable' but no substitute. At present, for example, the colonial secretary could 'still advise the Crown to disallow a law of Canada as he does one of B[ritish] Honduras.' As to the treaty-making power, it was

*essentially a power to assume and impose obligations. To part with it is to give small communities mostly far removed from the commercial & military centres of the world, the power to take action which will impose obligations on this country, itself lying at the centre.*⁸⁵

Australia, for example, might offend France, about whom Australia's 'Gov[ernmen]t & people understand & care nothing about', over treaties on the New Hebrides, leading to 'pressure' on Britain from France, whose support might be needed 'at Constantinople, Peking or in the North Sea'. He conceded that it was 'anomalous' that these colonies were essentially 'uncontrolled', yet 'bound' in foreign affairs, but the empire was 'one huge anomaly'. The 'logical conclusion', which would give them 'all the treaty power they can desire', must lead 'straight to separation', but it was 'wiser' not to 'take logic as a guide in politics.' Dividing power over foreign relations, a 'Cardinal administrative sin', should 'never on any consideration', be allowed, as long as it was 'possible by any means to retain' control until, 'some day', it might prove 'impossible'.⁸⁶

Ultimately, DD's head, Sir Hartmann Just, closed this debate in support of Robinson and Lambert, agreeing that the 'unity of the Empire' should formally be preserved, 'as much and as long as possible', despite the reality that, in different parts of the world, colonial views and interests were 'practically predominant'.⁸⁷

3. 'Entitled to a voice': colonies and consultation on political treaties

At the imperial conference, protests of Fisher and Batchelor, fuelled by the advice of Atlee Hunt, led the imperial government into a major concession to colonies on treaty making.

⁸⁴ *ibid.*

⁸⁵ Minutes, Lambert, 27 January 1911, CO532/33/54-5, TNA.

⁸⁶ *ibid.*

⁸⁷ Minute, Just, 28 January 1911, CO532/33/51-4, TNA.

The *Declaration of London* provided the first occasion when a colony challenged Britain over a multilateral political treaty. This came at a vulnerable time for the newly re-elected Liberal government. In parliament, critics of the *Declaration*, mainly Conservatives (Butcher, Rowland Hunt, Walter Faber, Lord Ellenborough, Lord Desborough, Bolton Eyres Monsell, John Gretton and Ernest Pollack) and Unionist, Lord Ninian Crichton-Stuart, but, also, Liberals, including lawyer, Edward Pickersgill and Arthur Lee, anticipating that the *Naval Prize* bill would be re-introduced, incessantly bombarded Asquith and Grey with implicitly critical questions, through February and March, after parliament had resumed on 31 January. The debate then moved into the Lords, where there was even greater opposition to the *Declaration*.⁸⁸ The government clearly anticipated that any dispute with the colonies, especially Australia, at the conference, would fan further public and parliamentary criticism.⁸⁹

So, Robinson greeted, as a 'welcome addition', the *FO*'s provision of Lord Desart's extensive memorandum on the issue, which was posted just in time to arrive in Melbourne before Fisher left for London.⁹⁰ A second circular despatch, covering the debate in the Lords, of early March, arrived too late. The *CO* got some welcome news. London's press reported from Ottawa that Laurier had told his Commons that Canada would not be justified in making representations on the *Declaration*, with the subject being wholly of international law and Canada not a sovereign power. He did envisage that it might be discussed informally at the conference. Relieved, Robinson observed that he 'seems to understand the constitutional position', under which, as Keith had emphasised, these colonies were not sovereign powers.⁹¹

The British press, picked up by Australia's, reported the Commonwealth's or, more correctly, Hughes' protest over the *Declaration*. With Fisher then in Hobart, Melbourne's press turned to the minister for defence, George Pearce, for an explanation, which he replied, that he was not 'at liberty' to give. Fisher, approached by the Tasmanian press, said much the same, adding that he had been absent when the resolution was adopted and was 'not sufficiently conversant' with it to answer, without first studying the detail. All this suggests that it was Hughes or Batchelor's initiative. Fisher added that it was 'not a matter of paramount importance' and he doubted Australians were 'greatly exercised over it'.⁹² With Fisher and Pearce due to leave for London in early April, four successive days of cabinet meetings were

⁸⁸ *HCD*, vol. 21, pp. 413, 416-18, 447, 674, 837-8, 870-1, 1034-5, 1207-9, 1704-5; vol. 22, pp. 805, 1005, 1031-2, 1191, 1370-2, 1738, 1836, 1838-9, 2028-9; vol. 23, pp. 189-90, 585, 873-4, 1095-6, 1117-9, 1448-9, 1479-80, 2040-3, 2028-30; *HLD*, vol. 7, pp. 83-5, 325-72, 376-420, 432-76.

⁸⁹ *HCD*, 1911, vol. 21, 8 & 9 February, pp. 413; 416-8; 447; vol. 23, 21 March, pp. 213-5, 28 March, pp. 1117-9, 30 March, pp. 1488-91.

⁹⁰ Hamilton John Agmondesham Cuffe, 5th Earl Desart; Procurator General and Treasury Solicitor (1898-1909).

⁹¹ Minute, Robinson, 28 March 1911, CO532/28/210-22; Minute, Keith to Robinson & Lambert, 15 February 1911, CO532/33/116, TNA.

⁹² *Mercury*, 20 January 1911; *Times*, 21 January 1911.

held from 31 March. (The *CO*'s despatch covering Lord Desart's memorandum reached Melbourne on 21 March.⁹³) The importance, attached to the *Declaration*, was reflected in Atlee Hunt's unusually lengthy briefing memorandum.⁹⁴

Atlee Hunt began with an historical account of the 'harmonious agreement[s]' at The Hague and a succinct explanation of international law as a 'body of treaties, conventions and other agreements, and also of a large amount of unwritten law handed down in the form of precedent.' The *Declaration* had given a single, if compromise, code for international prize judgements and Britain had prepared legislation to enforce it, whose enactment had been delayed by both the 'very remarkable and interesting controversy' in Britain (and elsewhere in the empire), plus Australia's protest, until after the imperial conference and full parliamentary debate. He explained that it was 'universally recognised' that food imports were 'vital' to Britain but 'widely different views' were held, as to whether the *Declaration*'s provisions protected or threatened trade. So, he proposed that Commonwealth ministers raise the Commonwealth's parliamentary resolution at the conference on two 'entirely' separate issues: one, on the 'merits' of the *Declaration* itself and, second, on the general principle on consulting the colonies over treaties.⁹⁵

Atlee Hunt suggested that, if ministers considered the general principle was 'too large a claim to be pressed at this juncture', it might, 'perhaps', be wise instead to focus on this particular treaty, to which the Commonwealth (under Deakin) had objected over designation of foodstuffs in neutral ships, as conditional contraband of war, and the rights of belligerents to sink neutral ships. He explained that the

new law is one affecting materially the rights of all those who do business by means of ocean highways. Now Australia is a maritime country, wreathed round by the sea, and all our trade and personal intercourse with the outside world are carried on by means of ships. We are also a country far removed from the great centres of population of the old world, which means that the voyage to and from our shores are longer than from any other country, and consequently offer greater opportunities for interference, by the enemy if we are belligerents, by countries at war if we are neutral. Our external trade is enormous, not only per head, in which respect it is greater than that of any other country in the world . . .

In addition to that overseas trade we have a valuable coasting trade, which occupies 135 steamers of over 242,000 tons. If our sea communication is cut off the life-blood of our country is drained. If anything is done to cause panics, and so increase rates of freight and insurance, all our classes, both producing and consuming, must suffer greatly.

⁹³ Confidential circular dispatch, Harcourt to Dudley, 17 February 1911 & Circular dispatch no. 140, Harcourt to Dudley, 24 March 1911, 1111, CRS A6661, NAA.

⁹⁴ No record indicates Batchelor, who was also going to London, asked for this.

⁹⁵ Undated and unsigned memorandum, c. March 1911, 1916/18601, CRS A1, NAA. The bulk of the memorandum appears to have been written prior to 17 February 1911 but an insertion was made at some point after that date, as it cites a *Times* report of that date.

*It is therefore essential for us to cut down as far as possible the opportunities for interference. If Great Britain is at war, and finds herself unable to protect the whole long line of our ocean roads, then all ships flying our flag are liable to capture by the enemy. It would then be necessary to carry on as much of our trade as possible in neutral ships. On the other hand, if Great Britain remains neutral it would be important for us to see that British ships are subjected to as little interference as possible from the belligerent powers.*⁹⁶

He also suggested the Commonwealth should take issue with the conversion of merchant ships into warships, subject of a convention at The Hague though not the *Declaration*. After this appeal to commercial interests, he finished with a moral appeal. He described the allowance of sinking of neutral ships as a 'retrogression', doubting British public opinion would support 'going back on a humane tradition' of respecting neutrality. He asserted that Australia's public were 'entitled' to an explanation.⁹⁷

On the general principle at issue, Atlee Hunt returned to the same eloquence and vigour, with which he had counselled Barton and Deakin in 1901-2 over the right and necessity of Commonwealth paramountcy over the states in treaty matters. Now, he articulated the first major challenge to the imperial government's monopoly of political treaty matters. He submitted that ministers should 'emphasis[e] the right of the Commonwealth to be consulted on matters concerning its welfare', based on the 'underlying principle' of the resolution that the Commonwealth was

*now a sufficiently important part of the Empire to be entitled to a voice before the Imperial Government concur in any treaties of importance which affect us.*⁹⁸

He argued that Grey's February answer in the Commons that, it had not been 'practicable' to consult the colonies, 'cannot be accepted as satisfactory'. If ministers detected in Grey's statement that, in normal circumstances, the colonies' views would have been sought, he continued, they should seek further explanation as to what precluded the use of cable to so do.

If we had been an independent community we should certainly be regarded as of sufficient importance to have been consulted. Why, then, should we be placed in an inferior position because we are part of the Empire? [emphasis added] *The only answer that can be made is that the British representatives at the Conference were our representatives also, but the replication to that plea is that if they were our representatives we should have had a vote in their selection, or at least an opportunity of offering an opinion in regard to their actions. Yet we were not only not told what was proposed to be done, but after the documents had been drawn up and the question of ratification was before the Imperial Government we were not notified in any way of*

⁹⁶ *ibid.* He explained that the circumstances in which conditional contraband may be captured are that it must be shown to be destined for the use of the armed forces or government department of the enemy state, by showing, open to rebuttal, that the goods were consigned to enemy authorities, a contractor established in the enemy country who as a matter of common knowledge supplies articles of this kind to the enemy, a fortified place of the enemy or a place serving as a base for the enemy's armed forces.

⁹⁷ Undated and unsigned memorandum, c. March 1911, 1916/18601, CRS A1, NAA.

⁹⁸ *ibid.*

*their intentions. Had it not been for the opportune approach of the Imperial Conference we should have had no chance of making our wants or wishes known.*⁹⁹

He concluded that his facts and arguments gave ‘an excellent case’ for a principle, to which, if ministers gained the conference’s assent, would establish ‘an important rule which it is hoped the Imperial Government must regard as binding them for the future’. There is no record of the discussion or decisions of the cabinet meetings, which ended on 3 April, three days before the ministers departed for London, but Pearce’s slightly earlier public statement indicated that ministers would be inquiring, at the conference, as to how ‘young democracies’ could have more of a voice at conferences, like that held at The Hague.¹⁰⁰

Just prior to the conference, the *CO* received ‘extremely satisfactory’ news in relation to the *Declaration*, with Berriedale Keith hailing Victoria’s governor for going to a ‘good deal of trouble’ to finally bring that state ‘into line’, by its ‘acquiesc[ing]’ under the 1890 enactment on admiralty courts; the last colony to so do.¹⁰¹ This was tempered by concerns over the Commonwealth’s protest, which the *FO*’s Walter Langley told the *CO*, ‘raise[d] constitutional questions of so far-reaching a character’. He urged consulting the other prime ministers to ascertain if they insisted it should be raised at the conference.¹⁰² Berriedale Keith told Robinson and Just that, they were of ‘so sweeping a character’, amounting to ‘nothing less than a demand to a share in the foreign policy of the Empire’, that he did not know how to respond. Yet, he felt attempts to avoid its discussion in the conference could ‘serve no useful purpose’. Perhaps, hopefully, the other prime ministers may not share such sentiments, ‘but Australia is the last place to acquiesce, if it is keen on any matter, in having it discussed otherwise than formally.’¹⁰³ Robinson was ‘inclined’ to agree that it must be discussed, given Ward’s proposal on high commissioners and Laurier’s on foreign consuls, but added that Britain must respond ‘firmly’ and ‘grapple’ with the question by taking the “no pay no play” line’, arguing that Britain’s financing of imperial defence necessitated central control of foreign policy, including on treaties.¹⁰⁴

Just detailed the strategy for explaining British policy: firstly, Harcourt speaking privately with Fisher; secondly, briefing the prime ministers in the ‘more intimate’ (that is, non-public and secret) venue of the *CID*, after which Harcourt thought it would ‘probably not be pressed’, and, finally and if necessary, by Grey in the conference, mindful that those

⁹⁹ *ibid.* He claimed Australia’s exports and imports for 1909 were £72,302,798 and £60,000,000 respectively.

¹⁰⁰ *ibid.* *West Australian*, 10 March 1911.

¹⁰¹ Minute, Keith to Robinson & Lambert, 18 March 1911, CO532/25/15-19, 485-95; CO532/28/171-7, 396-7, TNA.

¹⁰² Letter, FO (Langley) to CO, 12 May 1911, CO532/29/44-45, TNA.

¹⁰³ Minute, Keith to Robinson & Just, 15 May 1911, CO532/29/42, TNA

¹⁰⁴ Minute, Robinson, 15 May 1911, CO532/29/42, TNA

proceedings would be published *verbatim*.¹⁰⁵ Indeed, after speaking with Harcourt, the next day, Fisher asked that the Commonwealth's resolution not be circulated to the other prime ministers, which further suggests that either Hughes or Batchelor had been the driving force behind it. There is little doubt Britain had planned to take advantage of imperial sentiment, swollen by the deliberate coincidence of the imperial conference, coronation and *Festival of Empire*, to secure colonial agreement to its goals.¹⁰⁶ In London, both sides on the *Declaration* debate lobbied the colonial premiers, with the supporters clearly winning Ward and, perhaps, the others to their cause. The Australians, however, were unmoved.

On 2 June, Fisher opened the conference discussion on the *Declaration* by saying that the Commonwealth was 'strongly in favour' of 'international courts' or any bodies, which would help settle international disputes. So, he continued, Australia's objection, to which he attached 'great importance', was primarily over consultation, on which, he suggested, the colonies had never been afforded over treaties 'of this kind'. That, he argued, was a 'weak link in the chain of our common interests' and asked, rhetorically, whether, now that they were 'a family of nations', working in 'unity and amity, was this 'not the time' for these colonies to be 'informed' and, 'whenever possible, consulted', once Britain opened negotiations with foreign powers on matters affecting them. '[T]ake us into your confidence prior to committing us', he emphasised. While he did 'not desire in any way to restrict [Britain's] final arbitrary powers', it was 'not sufficient', even if it was a 'good treaty', to be informed afterwards, if it affected a colony. Opposition to the *Declaration* (implying it was not a 'good treaty') he ventured, 'fortunate[ly]' gave a 'most suitable opportunity' to discuss this general principle. For, if it had been concluded after the conference, there might be 'four years' of 'discontent, misunderstanding and . . . a little asperity', between Britain and its main colonies. So, in negotiations with foreign powers, Britain should, if not 'actually' acting in the name of these colonies, represent their views on all essential matters. On the *Declaration*, specifically, he said that the inclusion of foodstuffs, as conditional contraband, was 'hardly defensible', while provisions for sinking of neutral ships would 'seriously damage [Britain's] prestige'.¹⁰⁷

Deakin then let Batchelor present the main case. He spoke at much greater length, drawing most of his argument from the earlier submission of Atlee Hunt, who sat silently in the room. He started strongly, pointing out that for Australia, as a maritime country, relying greatly on its external commerce, these matters were of 'tremendous import', not only to the empire as a whole but also Australia, which was 'very specially affected', indeed, more so than some

¹⁰⁵ Minute, Just to Harcourt & Minute, Harcourt, 15 May 1911, CO532/29/42-3, TNA

¹⁰⁶ Gregory Pemberton, 'Players in the greatest game of all', *The Australian*, 28 May 2011.

¹⁰⁷ *Minutes of Proceedings of the Imperial Conference, 1911*, Dominions No. 7, CD5745, Eyres & Spottiswoode, Ltd., London, 1911, pp. 97-8.

other signatories to the *Declaration*. Despite that, he continued, 'We were not consulted' in the 'slightest' or in 'any shape or way'. Three times he protested that the 'first intimation' Australia had received was only 'from a Blue Book', after the 'whole thing' had been 'fixed up'. This was 'hardly satisfactory'. He cited Deakin's protest in 1909 and, then, Grey's own defensive words in response, that it had not been 'practicable' to consult these colonies. He demanded 'why?' He accepted that the empire must have 'final authority' over one foreign policy but proffered that it was not 'unreasonable' for these colonies to ask for a prior opportunity to express their views on such major treaties. Now, he regretted, while it was too late to modify the *Declaration*, it would be 'very extreme' to urge Britain not to ratify it.¹⁰⁸

Although Batchelor stated generally that Australia 'disagree[d] with the *Declaration*', he next seemed to lose his way, as he moved onto its specific aspects, surprisingly conceding that, he did not object 'at all' to the inclusion of foodstuffs as conditional contraband. This afforded an opportunity for the presiding Asquith to interject, welcoming this as 'a distinct advance'. Batchelor then condemned the conversion of merchant ships into warships, as 'practically an act of piracy', prompting Grey to object correctly that the *Declaration* was silent on this. Batchelor, though, did not think to counter that this subject was included in one of the Hague conventions, on which the colonies had also not been consulted. As Batchelor criticised the *Declaration* for vagueness in its terms, he, too, seemed to lose conviction, allowing Grey to seize the initiative, as a compliant Ward stepped aside to give him the floor.¹⁰⁹

Britain was then finalising a naval agreement with the Commonwealth and, undoubtedly, this encouraged Grey to be conciliatory. He opened with a detailed defence of the *Declaration* and the procedure, by which it had been concluded. When Grey defended the inclusion of foodstuffs as conditional contraband, Batchelor, who had already conceded that point, raised the sinking of neutral shipping and conversion of merchant ships into warships. Grey dismissed the latter, as not part of the *Declaration* though, later, admitted that German-led opposition had forced Britain into a 'small minority', opposing this, at the conference. On the former, he said Britain had had to compromise with some Continental powers, which asserted their rights in this regard. Then, Fisher broke in, accusing Britain of 'abandon[ing]' its stance. 'You obey the law—you march in line.' To this, Asquith volunteered a hope that the international law on this would improve in time. When Grey conceded that Britain had relinquished the right of seizure of conditional contraband, shipped to neutral ports, Batchelor pointed out that Australia had no access to such ports. So, Grey responded that this further compromise was, however, of value to South Africa. (He could have added Canada).¹¹⁰

¹⁰⁸ *ibid.*, pp. 98-103.

¹⁰⁹ *Minutes of Proceedings, 1911*, pp. 98-103.

¹¹⁰ *ibid.*

Eventually, Grey turned to the question of colonial consultation and awkwardly tried to explain those of his own words, which Batchelor had earlier thrown back at him: 'not practicable' to consult was 'too strong', he conceded, he should have said 'difficult and exceedingly inconvenient' to arrange consultation 'suddenly'. The colonies had not been consulted over the Hague conferences of 1899 and 1907, he pointed out, so, there was no 'arrangement' in place to consult them over London's in 1908-09. Then, he made a major concession, agreeing that these colonies should be consulted before the next Hague peace conference, both beforehand on its program and, later, its results. This was not quite enough for Fisher, who said that his 'only wish' was that, as far as practicable, Britain consulted not only just before a treaty conference but also, long before, when it was making up its mind on its stance and, again, before it carried this out and committed these colonies.¹¹¹

Grey responded that he 'thoroughly underst[oo]d', offering the colonies representation on inter-departmental committees framing instructions for Britain's conference delegates, which Robinson had earlier advocated but the *CO* and *FO* had resisted. (He did not offer them inclusion in Britain's conference delegations, although these colonies would soon be offered this—though all declined—for the Hague conference on opium in December.) He added that Britain's delegates must be allowed some latitude. Furthermore, time would not permit colonial consultation on every specific point, when answering their cabled queries during a conference. Nevertheless, the normally lengthy period between conferences and treaty ratification would allow time for consultation. If the matter was important and the treaty was yet unratified, an imperial conference could be held, to resolve differences. Then, he raised, without answering, the potential problem of what to do if the colonies disagreed among themselves or with the imperial government. Finally, he pressed for the premiers to support ratification of the *Declaration*, as a 'step forward in international agreement and arbitration', before adding, probably as an inducement for Canadian and, to a lesser extent, Newfoundland support, that Britain was 'anxious' for co-operation with the *USA* in international arbitration, as an incentive for other powers to follow. When Fisher queried if the offer of consultation applied only to future Hague peace conferences or treaties, generally, Grey assured him it was 'certainly not' meant 'in the least' to be 'exclusive', although some treaties might involve greater complications in terms of timings.¹¹²

The other premiers were lukewarm, at best, in support of the Commonwealth over consultation on treaties. Laurier, described in the press as adopting an 'aloof reserve', praised the procedure on commercial treaties, as 'very satisfactory' to Canada, which was also

¹¹¹ *Minutes of Proceedings, 1911*, pp. 96-134.

¹¹² *ibid.*

exercising, with Britain's concurrence, the additional 'liberty' and 'privilege' of negotiating its own commercial agreements. On treaties, of what he called 'amity', however, he asserted that the Australian proposal was 'very far reaching' and 'very seriously' would 'be fettering' for Britain to consult over all such treaties, for a treaty may only affect one colony or what was to be done if there was disagreement between the colonies? Any resulting public disagreement might also expose Britain's bargaining position to the foreign powers. He agreed with Fisher that the empire was now a 'family of nations' but one, in which of 'necessity', the greater burden of diplomatic responsibility rested on Britain. He said he held no doubts that if consultation were viable, Britain would 'do its duty.' Perhaps, he then betrayed what were the real motives for Canada, normally the most independent of Britain's colonies, being so apparently satisfied. He added that, if the colonies asked to be consulted on such matters as the *Declaration*, it implied that they accepted automatic involvement in a British war in Europe. When Fisher, possibly startled by this, interjected that such acceptance followed from their attendance at this conference, Laurier responded bluntly, that Canada did not accept being bound to be involved in every British war. Of the *Declaration* itself, he praised it as 'humane' and, notably, its provision on foodstuffs as a 'wise rule', thereby commending colonial support of Britain's ratification. Then, he revealed a further motive. This support would strengthen Grey's hand in ongoing negotiations with the USA for an arbitration treaty, on which Canada was the most interested colony, and, the possibility, which he greeted with 'great joy', of another with France. There could be, he finished, 'no greater step' for the 'higher civilisation of mankind'.¹¹³

Ward declared the *Declaration* to be of 'commanding importance' and, overall, after speaking to both sides in the debate, concluded, that it promised 'better' conditions for the interests of the 'British Empire'. On 'one material question', implicitly vital to a food exporter such as NZ, he equally concluded that foodstuffs would not be exposed to any greater risk; in fact, their security would be improved, by adoption of the *Declaration*. His attorney-general, Sir John Findlay, spoke at greater length on the details, before pronouncing the *Declaration* to be 'one of the best things' to happen to 'British' commerce. On consultation, Ward intimated he differed slightly with Laurier. He suggested it would have been 'very much easier' for the British government itself, if it had 'been possible' to provide these colonies with the *Declaration* beforehand, so they could have examined it fully, as he was sure they would have then given their support.¹¹⁴ Fisher seized this moment to move the acceptance of his resolution, only for South Africa's Louis Botha successfully to seek an adjournment.

¹¹³ *Minutes of Proceedings, 1911*, pp. 117-8.

¹¹⁴ *ibid.*, pp. 118-20.

The next day, Botha did 'not shrink' for expressing his 'great diffidence' over that resolution, especially the 'very greatest importance' of its first sentence, which expressed regret over the lack of consultation. Accepting Grey's explanation, Botha said supporting this would 'not be fair' or 'justified'. While, however, South Africa held no grievance from the past, he echoed Ward, even more strongly, adding his 'profound conviction' over the 'sound principle' that Britain should not bind itself by agreements with foreign powers, affecting these colonies, without first consulting. Of the *Declaration*, he said on balance he was 'greatly in favour' of ratification, with foodstuffs, while included, as conditional contraband, due to Continental insistence, had not been included as absolute contraband.¹¹⁵

Newfoundland's Edward Morris hailed the *Declaration*, as an 'improvement in every sense of the word'. He fully accepted Grey's explanation, as to why the colonies had not been consulted. Indeed, he contended that, by not raising this question over the earlier Hague conferences, they had effectively consented to not being consulted on the *Declaration*. Having said that, Morris observed that, in the 'spirit now prevailing', it would be 'only right' if these colonies were consulted in future. Nevertheless, he would not support the placing on record of the Australian resolution, which may be 'misunderstood' or 'misleading'.¹¹⁶

Fisher, recognizing this limited support, retreated somewhat. He explained that the resolution, which he called one of 'inquiry and attack', was not meant to 'hit' any government or, even the *Declaration* itself. He conceded that while adjudging certain of its provisions to be 'bad', Australia had not 'attacked' it wholly. The proposed machinery was not 'perfect' but 'valuable' and an 'advance', which Australia did not wish to 'destroy'. He did hold that the Commonwealth had felt for some time that there should be prior consultation before Britain finalised any treaty affecting the colonies. So, he welcomed Grey's 'definite, distinct and clear' commitment to a 'new condition of affairs', which would 'prevail from now, I presume'. He cited Botha's earlier 'definite' statement as support, only for the latter to insist on making 'clear', that Britain must not 'in any way' be 'handicap[ped]' but allowed 'full responsibility'. Fisher protested that he did not wish to 'handicap' Britain but for these colonies to be 'associated as far as possible' in treaty-making. So, he withdrew the 'regret' part of his resolution and moved that the conference welcome Grey's proposal that, for any future Hague peace conferences, Britain would afford these colonies an opportunity to consult over the framing of delegates' instructions and resulting conventions 'provisionally assented to', at a conference, would be circulated to the colonies for their consideration, prior to Britain signing. Fisher also included, as he had earlier pressed on Grey, that a 'similar

¹¹⁵ *Minutes of Proceedings, 1911*, pp. 125-9.

¹¹⁶ *ibid.*, pp. 15, 129-30.

procedure, where time and opportunity and the subject matter, permit, shall as far as possible' be used for other international agreements, affecting these colonies. Slightly amended, this was adopted unanimously and, later, listed as the conference's lead resolution.¹¹⁷

At this point, Ward moved, with Laurier 'very happ[il]y' in support, that the conference formally approve ratification of the *Declaration*. At once, Fisher declared that he had 'difficulty' with this. So, Asquith, sensing a possible dispute, which might encourage his government's critics, cut Fisher off, by a lengthy fulsome praise of the *Declaration* as being, despite some faults, a 'tremendous and significant step in advance' and 'milestone on this road of progress' of 'framing a code of International Law', whose ratification the conference should unanimously support. When Fisher was allowed to resume, he explained that the *Declaration* had not been brought before the conference for approval and it was an act of 'your own Government', only shown to the 'self-governing' colonies, after it was 'practically ready for signature' and beyond, they were told, amendment. The 'responsibility', thus, must 'rest with someone', implicitly Britain alone. For, the Commonwealth was now being asked to approve an agreement, which it had said it 'disapprove[d]'. He conceded that his government commended 'the whole trend of policy' behind the *Declaration*, as a 'great step in advance in international agreements', which would be 'pity' to 'throw away' over certain specific objections, but it was a 'different thing' for the Commonwealth to say it approved of the whole treaty.¹¹⁸

Asquith tried vainly to bring Fisher onside, even by misrepresenting Ward's motion as only calling for approval, 'at this stage', allowing for later 'questions' from the colonies. At this distinction, Fisher demurred, perhaps ingenuously. 'My lay mind cannot perhaps grasp it'. He continued to insist that the Commonwealth still wanted the agreement 'improve[d]' and, thus, could not give its 'full approval', though would not 'oppose' it. So, the conference carried Ward's resolution, with Australia abstaining.¹¹⁹ On the other major treaty subject at the conference, bilateral commercial treaties, Britain agreed to Laurier's motion, strongly supported by the other prime ministers, to negotiate with foreign powers to allow withdrawal of self-governing colonies, provided such did not impair any other part of the Empire.¹²⁰

4. 'the appearance of autonomy': Britain's response to Australia's challenge, 1911-14

The official debate over how the *Declaration of London* would be applied throughout the empire exposed the changes, which were developing within it. The outbreak of the war would only temporarily prevent these changes from resulting in major constitutional change.

¹¹⁷ *ibid.*, pp. 130-4.

¹¹⁸ *Minutes of Proceedings, 1911*, pp. 130-4.

¹¹⁹ *ibid.*, pp. 18, 333-9.

¹²⁰ *ibid.*

After the conference, Berriedale Keith sighed with relief that the Australian resolution was 'Disposed of'.¹²¹ This did not prove quite true. Robinson saw that Grey had promised these colonies representation on interdepartmental committees and circulation of all conventions, prior to ratification, not just of those, such as had been concluded at The Hague. So, the *CO* gained the *FO*'s agreement that both would comply with this commitment in the future.¹²² This was a significant, if unheralded step in the development of the imperial constitution.

The extensive press coverage of the conference discussion complicated, to some extent, support for the *Declaration*. British officials sought to put the best face on it. A few days later, Risley dismissed another commercial protest, this from Hong Kong, observing that the conference had been given a 'backing', which 'reinforce[d]' the government's 'determination' to ratify the *Declaration*.¹²³ Public opposition from business and related circles, however, continued unabated.¹²⁴

Late in the conference, on 14 June 1911, Grey, supported by under secretary, Thomas MacKinnon Wood, the attorney-general and solicitor-general, introduced the *Naval Prize* bill, along with the *Second Peace (Conventions)* bill, into the Commons, after which opponents, led by Butcher, continued to fire implicitly critical questions at Grey and Wood.¹²⁵ (Grey introduced the *Geneva Conventions* bill two weeks later.¹²⁶) Wood defended the *Declaration* and Hague convention in the major debate over the bills from late June, by claiming the 'extremely interesting and valuable' discussion in the conference, which 'resulted in a resolution in favour of ratification'. He skipped over the Australian objections to emphasise that Ward had deemed that the *Declaration* was 'better in the general interests of the British Empire, either as a neutral or as a belligerent, than the conditions existing at present.' Ward, he added, was supported by Finlay, who was 'extremely well qualified to speak on this subject, a trained international lawyer' who, even before arriving, had examined the *Declaration* in detail and delivered a 'very weighty and important speech' concluding that 'in every respect the Declaration of London was one of the best things that had been done for British commerce for very many years.' Laurier, continued Wood, 'welcomed' the *Declaration*, 'as a step forward in international agreement, in which Canada has a great and special interest.' Morris was 'strongly in favour', while Botha pointed out 'how these

¹²¹ Minute, Keith to Just, 5 June 1911, CO532/29/43, TNA.

¹²² CO532/34/94-7; CO532/29/404-5, TNA.

¹²³ *Times*, 2 June 1911; minute, Risley, 7 June 1911, CO129/377/121, TNA.

¹²⁴ *Times*, 1, 2, 3, 5, 6, 7, 9, 16, 17, 19 & 22 June 1911.

¹²⁵ *HCD*, 1911, vol. 26, 14 June, pp. 1525-6, 15 June, pp. 1654-6; vol. 27, 19 June, pp. 39-41, 125-6, 20 June, pp. 145-6, 149-50, 26 June, pp. 226, 237, 28 June, pp. 407-10, 424, 434-458, 29 June, pp. 574-696, 3 July, pp. 814-933, 4 July, pp. 974-5, 5 July, pp. 1126-7, 1132-3, 1135-6, 6 July, pp. 1330-2; vol. 28, 10 July, pp. 20, 377; vol. 29, 3 August, p. 557, 15 August, p. 1136. *Times*, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29 June 1911.

¹²⁶ *HCD*, 1911, vol. 27, 14 June, p. 238; *JHC*, vol. 166, 14 June 1911, p. 270.

agreements would improve the position of that Dominion in the event of war by allowing the free importation of food and, indeed, everything but conditional contraband, in neutral vessels through neutral ports, . . . [and] this great benefit to South Africa was due to the abandonment of the doctrine of continuous voyage as applied to conditional contraband.’ Only after all this, did Wood briefly mention that Fisher, while abstaining from voting, expressed a ‘clear and decided opinion on general grounds’ for ratification. ‘So, there was no dissentient’ at the conference on this.¹²⁷

Butcher gave a contrary and, arguably, more accurate view of the conference. He insisted that, ‘we know’ that Fisher and Batchelor ‘were instructed’ for the ‘express purpose’ of ‘showing the grave danger’ to Britain arising from some of the *Declaration*’s provisions and gave ‘solid grounds for their objections’, which he claimed ‘were never adequately answered, and which they never withdrew’. Gersham Stewart scoffed at the ‘great story’ of the conference passing ‘some sort of favourable resolution’ on the *Declaration*. He reminded members that Australia did not assent and claimed that South African newspapers had criticised Botha’s position. Laurier, he claimed, had indicated that when the *Declaration* was first proposed, Canada should be ‘allowed to contract out’ of a war involving Britain. Lastly, he pointed out that Britain not the colonies would bear all liability for wrongful captures.¹²⁸ The government’s narrow victory by 70 votes (out of 532) over a motion to delay ratification and referral of the *Declaration*, to a commission of experts, only fanned criticism. Outside parliament, the public campaign continued. The *Times*, which had so far supported the *Declaration*, now conceded the strength of opposition arguments.¹²⁹

After parliament resumed in late October, public opponents presented to the King a huge petition against ratification. After the *Naval Prize* bill was reported, following amendment in committee, it faced renewed attack in the Commons. Rowland Hunt and, later, Conservative Basil Peto complained that Britain would have only one representative among fifteen on the proposed tribunal, while its ‘great colonies’—citing Canada, Australia and New Zealand—had their own governments, great seaboard and commerce, but would have ‘no representation at all’, while small countries such as Haiti, Santo Domingo, Panama, Costa Rica, Luxembourg and Switzerland—some with neither seaboard nor ships—might have a vote. Hunt suggested the colonies had been induced to support the *Declaration* with a view to facilitating the USA arbitration treaty. Liberal James Grieg, sprang to the government’s defence, countering that at the imperial conference, ‘the whole’ of the colonies ‘with a single exception’ approved of the

¹²⁷ *HCD*, 1911, vol. 27, 28 June, pp. 434-6.

¹²⁸ *HCD*, 1911, vol. 27, 28 June & 3 July 1911, pp. 500, 896-7.

¹²⁹ *Times*, 1, 3, 4, 5 & 26 July, 1, 2 & 19 August, 7 & 16 October, 3, 4 & 11 November, 5 December 1911.

Declaration and, so, ‘obviously approved of the composition of the Court which is to administer that code . . . and the manner in which it was to be constituted.

Ultimately, the bill was passed by the very narrow margin of 47 votes, which did not augur well for its passage through the Lords. The Lords’ power had been curtailed in August (the same day as the *Geneva Convention Act*) by the landmark *Parliament Act*.¹³⁰ The opposition to the *Declaration* there was strong and Liberal lords Robert Reid, Thomas Brassey and Donald Mackay came to its (and the government’s) defence, citing the colonial support at the conference, though having to concede, with varying levels of accuracy, as to Australia’s abstention in the vote of support. In mid-December, the Lords voted 145-53 against a second reading. There was some private discussion of invoking the new *Parliament Act* but this electorally weak government chose not to risk that and, instead, withdrew the bill, intending to re-introduce it later.¹³¹ Shortly, *The Hague Conventions* bill was also withdrawn.¹³²

At one point, the CO’s Charles Davis reflected that Britain had turned over a ‘new leaf’, in terms of consulting the self-governing colonies on political treaties.¹³³ In this new, supposedly consultative spirit, the CO sent the slightly amended *Naval Prize* bill and associated parliamentary paper to the colonies. Previously, the CO may have waited until its adoption. These arrived in Melbourne a week after the amended *Hague Conventions* bill but, unlike with the latter, Fisher, apparently, did not refer it to AGs for an opinion.¹³⁴ In December, the CO provided these colonies with the Lords debate’s text.¹³⁵ When Britain decided at the end of 1912, to reconsider the *Naval Prize* bill, there was no suggestion that these colonies be offered committee representation, presumably, as they were now deemed to have already been consulted.¹³⁶ When the committee finished the draft of the bill six months later, Risley advised that it should be sent to the five colonies but only ‘for information and not inviting obs[ervatio]ns’, with a ‘short’ despatch, explaining the planned repeal of the current *Act* but, ‘of course’, not with the committee’s detailed report, as ‘we do not want them to raise points’, which he thought some, especially NSW and Victoria may make, over their vice-admiralty courts. On certain procedural points, concerning prize courts outside Britain, he said ‘nothing

¹³⁰ *An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament*, 1 & 2 Geo. 5, c. 13.

¹³¹ *HLD*, vol. 10, 12 December 1911, pp. 837, 851-2, 863-4; *JHC*, vol. 32, p. 2845. *Times*, 5, 6, 13 December 1911.

¹³² *JHC*, vol. 32, 16 December 1911, p. 2845.

¹³³ Minute, Davis to Johnson, 13 April 1913, CO532/29/390. TNA.

¹³⁴ CO532/32/254-71; CO23011, 13 July 1911, CO708/2, TNA.

¹³⁵ CO532/32/271-2; vol. 28, CRS A1108 & 1912/64, CRS A11804; 1115, CRS A6661, NAA.

¹³⁶ CO323/590/220-2, TNA.

sh[ou]ld be said' to the colonies 'at present'.¹³⁷ Later, associated new draft regulations were also sent, again not for consultation but because the colonies would have to implement them.

There was one other imperial legislative matter, arising from the Hague convention on the *Legal Position of Enemy Merchant Ships at the Start of Hostilities*, the associated bill and the *Declaration*. (The *Treaty of Paris* of 1856 also influenced the drafting of the legislation.¹³⁸) Britain saw it as imperative to provide, in advance, for immediate action to be taken on the policy of treatment of enemy and neutral merchant ships at the outbreak of war. The *CID* had resolved on its method in time for the arrival of the colonial premiers in mid-1911, from whom they wanted agreement to implement the measures, through issuing their own *OiCs*, as the *CID*'s draft imperial *OiC* only extended to the *CC&P*. Important issues were the number of 'days of grace' afforded enemy ships to leave British ports and the *droit or arrêt de prince* (temporary detention of neutrals). Berriedale Keith questioned how governors were to be 'empowered' for this, as they lacked the 'whole prerogative' of the Crown, in regard to making war, which was required to issue such *OiCs*, whose authority, he had no doubt, colonial courts would not uphold. Risley agreed that authority for both were 'attributes of sovereignty', which governors did not fully hold. He thought it possible governors, acting as vice-admirals, under the 1890 *Act*, did but this did not extend to the governor-general, whom the Commonwealth would undoubtedly prefer to act, 'in-Council', and not state governors.¹³⁹

For some reason, this subject was not raised in London with the colonial premiers, the Admiralty only finalising policy and a draft imperial *OiC*, after they had left. As usual, Berriedale Keith was concerned that the self-governing colonies, who knew 'nothing', must be fully informed, if only because their governors, once formally empowered by the colonial secretary, would need to issue local *OiCs* for defence in possible, later, court action. Lambert, however, strongly disagreed: 'uniformity is necessary' and 'there should be one authority'. On the outbreak of war, 'prompt' action was needed--'hours even will count'. He asked rhetorically, if the *CO* was 'seriously' expected then to 'induce' five governments to issue separate but identical *OiC*'s, with insertion in the draft's 'blanks' of the appropriate enemies and neutrals: 'delay will inevitably occur'. He suggested that there would first be a search for the draft, after which a local minister would, 'perhaps', insert 'incorrect' details. 'Surely it is a case, if ever there was one, for a simple instrument applying universally'.

¹³⁷ Minute, Risley, 14 July 1913, CO323/608/132-9. See also CO532/54/255-7, TNA. 27 & 28 Vict., *Naval Prize Act 1864*, c. 25.

¹³⁸ ODC No. 463M, 25 March 1913, CAB38/23, TNA.

¹³⁹ Minutes, Keith to Robinson and Lambert, 15 February 1911 & Risley to Lambert, 2 March 1911, CO532/33/116-26; see also CO537/361, TNA. *Colonial Courts of the Admiralty Act 1890*, 53 & 54 Vict., c. 27.

*The policy is one affecting enemy ships in time of war & the conduct of war & the policy in such matters as long as the Empire rests on its present basis rests with H.M.G. It is for them to settle the policy.*¹⁴⁰

He argued that the case for this was ‘especially strong’, more so, even, than earlier than the imperial *OiC* for The Hague convention and bill on the treatment of belligerent ships and troops, to which no colony objected, citing Deakin’s acceptance. While accepting that it was ‘essential’ to ‘carry’ these governments, which would have to implement the policy locally, he argued that it would be a ‘fatal error’ to consult them on the policy and just ‘assume that they will play the game’: ‘unity of direction is one of the greatest sources of strength in war & is already weak enough with us.’ So, there was to be no suggestion of ‘doubt’ (or, more correctly, choice) to the colonies on this. There was ‘no question’ of ‘imposing’ a policy on them without consultation, as the *OiC* would not come into force until a war, leaving it ‘fully open’ to the colonies to raise objections. He also held it ‘absolutely necessary’ for the ‘whole problem’, that Britain accept liability for their invalid actions.¹⁴¹

So, with Sir John Anderson and Just’s endorsement, Harcourt asked the Admiralty to amend the draft *OiC* accordingly, while not mentioning (so, as to ‘avoid laying emphasis’ on) governors being empowered to enforce the *arrêt de prince*. Ultimately, in early 1912, cabinet approved both the *OiC* and acceptance of liability. In May 1912, Harcourt gave the five colonies the *OiC* (without saying it was imperial), adding that the ‘success’ carrying out such ‘precise’ measures, depended largely on ‘immediate and uniform execution’, so Britain ‘trust[ed]’ that it could ‘count on’ their ‘co-operation, ‘if [they were] prepared to take the necessary measures’, similar to Britain’s.¹⁴² He did not offer a choice or ask for comments. Berriedale Keith later explained that this was ‘worded admittedly vaguely but with a deliberate intention’, leaving ‘no doubt’ and being ‘perfectly clear’, that it was an imperial *OiC*.¹⁴³ Newfoundland and NZ readily agreed to co-operate. South Africa said the matter would be ‘investigated’, which would take time, and does not seem to have ever formally responded, although, apparently, ultimately agreeing. Canada, perhaps surprisingly, seemed to accept the policy without demur.¹⁴⁴ The Commonwealth was very different.

In April 1913, six months after the last colonial response, Fisher provided the *CO* with a detailed list of measures taken to implement imperial policy. This included preparation of ‘the’ *OiC*, to which Harcourt’s earlier despatch had ‘referred’—which was a seemingly

¹⁴⁰ Minutes, Lambert, 18 September 1911 & Lambert to Just, 29 February 1912, CO532/27/468-83, 491-4, CO532/47/351, TNA

¹⁴¹ *ibid.*

¹⁴² Circular despatch, *CO* (Harcourt) to governors (of self-governing colonies), 17 May 1912, CO532/47/350-56, TNA.

¹⁴³ Minute, Keith to Davis, 29 May 1913, CO532/51/112-3, CO532/52/125, TNA.

¹⁴⁴ CO532/38/325-33; CO532/39/212-4; Gov23935Canada, 20 July & Gov25221South Africa, 22 July 1912, CO708/3, TNA.

deliberate ambiguity. Despite the absence of express intent, there seems little doubt that the Commonwealth was adopting the same stance that Canada had over the Red Cross and Hague conventions bills and for similar reasons, that is, for what Canada had termed 'autonomy'.¹⁴⁵

Berriedale Keith told Davis that this was 'rather funny' but 'rather troublesome'. He held no doubts that the Commonwealth would be 'restive', if asked to depart from this stance nor, 'equally', that the Federal Executive Council's *OiC* would follow the form of Britain's. So, he advised that it was 'best' to 'allow them to have their own' *OiCs*. In this case, he returned to his earlier expressed concern that the governor-general must be given the 'proper authority', which, for matters to do with war, could only properly be delegated by a 'sovereign authority'. This could be done secretly. He thought Harcourt should point out that he had intended an imperial *OiC*, though was 'pleased' to confer this authority, which would give the governor-general, in council, the authority to act but only after the imperial *OiC* was issued. This, 'presumably', would achieve Britain's aims.

*This will secure uniformity of practice and real Imperial control while preserving to Australia the **appearance of autonomy** [emphasis added]. . . this is the sort of plan which will work with Australia and if we commence a dispute regarding autonomy we may waste much energy for little purpose.*¹⁴⁶

Davis disagreed, as did Lambert, arguing that such a special delegation was unnecessary, as Britain's immediate adoption of the imperial *OiC*, on war's outbreak, would appropriately empower the governor-general, leaving his *OiC* merely to implement the former, to whose application to Australia, he added, the Commonwealth had not 'taken' (this is doubtful, 'expressed' might be more accurate) 'any exception'.¹⁴⁷ When the *ODC* expressed, perhaps surprisingly, marked satisfaction with the Commonwealth's measures, however, Harcourt's reply to Australia did not make any pointed reference, as Berriedale Keith had proposed, to preference for an imperial *OiC*. More importantly, it also did not include a clear expression of His Majesty being 'pleased' to confer the local authority that he had recommended. In short, the apparently deliberate vagueness was to disguise that the imperial *OiC* would be applied, without notice, to the Commonwealth, even though it had expressly not agreed to that.¹⁴⁸

While the finalisation of the *Naval Prize* bill continued through early 1914, so, too, did the public debate over the *Declaration*, although in much reduced scale. The same persons, inside and outside parliament, and organisations voiced their respective opposition and support. In 1912, both the British *Inter-Parliamentary Union* and the congress at Lugano supported

¹⁴⁵ Despatch, governor-general to CO, 19 April 1913, 1384, CRS A6661, NAA. There are no surviving Commonwealth records, apart from this governor-general's file, to indicate the thinking behind its response.

¹⁴⁶ Minutes, Keith to Davis, 29 May & Davis, 30 May 1913, CO532/52/125-6, TNA.

¹⁴⁷ Minutes, Davis and Lambert, 30 May 1913, CO532/52/126, TNA.

¹⁴⁸ Despatch, 18 July 1913, Harcourt to governor-general, 18 July 1913 & minute, *ODC* (Wilson) to Anderson, 15 July 1913, CO532/52/126-31, TNA.

ratification, as did most of the Continental powers represented at the *International Maritime* conference at Copenhagen in 1913.¹⁴⁹ Britain had still not yet completed its reform of prize court procedure, when it declared war on Germany (with whom it had just negotiated an agreement over definition of some terms in the *Declaration*) on 4 August 1914.¹⁵⁰

Immediately, Britain proclaimed a list of items, as absolute or conditional contraband, which soon was cabled to colonies. This included the contentious item ‘foodstuffs’, over which Deakin, followed by Hughes, Fisher and Batchelor, had protested. Next day, attorney-general, Sir John Simon introduced the *Prize Courts (Procedure)* bill, which was passed by both houses and given assent the same day.¹⁵¹ The text of the *Act* was promptly sent to the colonies, in an unusually long cable, because of the need for quick action. On 20 August, Britain adopted an *OiC* providing that, during the war, its navy, along with those of its main allies, France and Russia (both of which issued similar decrees), would ‘act in accordance’ with the *Declaration* with respect to neutrals and commerce, ‘so far as practicable’ and with certain modifications, including the contraband list of 4 August being substituted for that in its *Article 24*. (The *USA* soon indicated that it would informally act, as it did with the *Declaration of Paris* of 1856, in accordance with these aspects of the *Declaration*.)

The *OiC* was cabled to colonies late on 22 August, arriving in Melbourne’s post office at 3.18 pm on Sunday, 23 August. Government House remained (until 1916) the only official channel for such communications between London and the Commonwealth and, in the first days after the outbreak of war, the new governor-general, Sir Ronald Munro-Ferguson, was more active than ministers in implementing imperial war measures. Official secretary, George Steward, telephoned Shepherd, asking if the deciphered cable should be sent to Cook’s office, ‘at once’. Shepherd replied, as Steward notably recorded, that ‘the following morning would do.’¹⁵² In Britain, the proclamation briefly revived opposition to the *Declaration*, whereas, without demur, the Commonwealth gazetted the contraband lists, later modified, soon after. Another *OiC*, also gazetted in London and, then, Australia, adopted a modified aspect of the *Declaration*, with respect to treatment of neutral shipping carrying contraband. A treaty with France, to which Russia and Italy acceded, implemented much of the *Declaration*.¹⁵³ The only

¹⁴⁹ *Times*, 25 January, 14 June, 21 September, 26 November, 5 & 6 December 1912; 28 January, 5, 14, 15 & 16 May, 24 October 1913; 27 January, 9 February, 6 March, 15 April, 6, 7 & 8 May 1914.

¹⁵⁰ *Times*, 5 May 1913 & 6 May 1914.

¹⁵¹ *Prize Courts (Procedure) Act 1914*, 4 & 5 Geo. 5, c. 13; CO616/10/28-48, TNA.

¹⁵² Annotation, Steward, 23 August 1914, 1914/88/12, CRS A11803, NAA.

¹⁵³ 1914/89/33, CRS A11803; 1916/3818, CRS A2 & 1916/18601, CRS A1; W2/3, CRS A456, NAA.

Commonwealth Gazette, nos. 63 & 90, 25 August & 2 November 1914. *Times*, 8, 10, 12, 14 & 22 August, 22 September & 30 October 1914. *Convention relating to prizes captured during the present European war*, London, 9 November 1914.

dissenting voice in this wartime mood was Gibson Bowles, who crowed that the Lords had ‘saved’ Britain from the *Declaration*, returning Britain’s ‘right’ to capture neutral ships.¹⁵⁴

* * *

For international law, the *Declaration of London* of 1909 represented a significant advance, as its British supporters repeatedly claimed, especially as it applied to maritime warfare and commerce, plus associated aspects of neutrality. True, it was never ratified but was put largely into force, collectively, by four major powers and supported by the *USA* for the First World War. Perhaps, more importantly, it marked a major step forward in the codification, as some British officials acknowledged and welcomed, of customary international law, on a subject, which had been marked, in their words, by confusion and chaos. This development had started with the *Declaration of Paris* of 1856 and stalled at The Hague in 1907. The *Declaration* set an example, which pre-figured the surge in efforts at codification of international law generally, after that war, under the auspices of the League of Nations.

For Britain, the *Declaration* was a rare instance for this period when it took the initiative, in seeking to conclude a major multi-party treaty. As was usual for Britain’s treaty leadership, this was on maritime issues. The level of opposition it aroused within Britain, from naval and commercial circles, reflected the belief that the *Declaration* went too far in the interests of relatively weaker Continental maritime powers. These circles particularly opposed an international appeals tribunal, modeled on the *PCA*, for national prize judgements and enhanced immunity of neutral shipping. Britain did not consult the colonies in advance over the *Declaration*, on the long held ground that this was a political not commercial treaty, a distinction, which was increasingly difficult to make over the *Declaration* or many treaties.

For Australia, Britain’s approach led, for the first time, to strong colonial objections, from the Commonwealth, over a major multi-party, political treaty. Deakin held that this instrument threatened Australia’s—and Britain’s—commercial interests, as, respectively, major food exporters and importers. Labour’s Fisher echoed his concerns at the imperial conference of 1911, guided by the advice of Atlee Hunt. This led to Grey’s firm commitment to prior consultation of the main colonies, even over political treaty negotiations, which affected them. This was a significant advance over the commitment, given in 1902, over commercial treaties. After this, the *CO* acknowledged that Britain had ‘turned over a new leaf’ on political treaty consultation of the major colonies.¹⁵⁵ The colonial war effort ensured that his commitment was given substance over the peace treaties at the war’s end, at Versailles.

¹⁵⁴ *Times*, 8 August 1914.

¹⁵⁵ Minute, Davis to Johnson, 13 April 1913, CO532/29/390. TNA.

PART 3

TRANSNATIONAL CRIME

Chapter 4

‘suppression of the vile trade’: white slave and obscene publications traffic-I

The origins of international or transnational, as it is now called, criminal law lie in customary international law on piracy.¹ This merged with anti-slave trafficking in bilateral treaties of the early 19th century and realised multi-party treaty expression in Paris in 1856.² Slave trafficking was also later expressed in multi-treaty form from 1885.³ Earlier, on the Continent, modern bilateral extradition treaties had started to be signed from the mid-18th century, while a tardy Britain, after a single temporary provision in a wider treaty of 1794, only concluded three bilateral extradition treaties in the 1840s, before embracing this treaty subject fully from the 1870s. No government seriously proposed, yet, extradition in multilateral treaty form.

In 1913, soon after Britain ratified two multilateral treaties for the suppression, respectively, of the white slave (prostitutes) and obscene publications traffic, *LSE*’s law professor, Sir John Macdonell, spoke of long-existing ‘serious obstacles to anything like an international criminal law’. He argued that, despite ‘archaic beliefs’ and jealousies, states could no longer maintain ‘splendid isolation’. Observing that, despite there being ‘so far (except as to extradition) little co-operation’, more recently, ‘there was a remarkable advance to uniformity’.

*At the first blush there seemed neither order nor principle in the mass of unconnected criminal legislation. But closer examination seemed to show something like a plan; what looked at first like the work of chance resembled the arrangements made by one directing hand and mind for a distinct end.*⁴

These multilateral treaties provided the foundations of today’s transnational criminal law. As usual, Continental governments, in this case France’s and, later, Germany’s, led these international treaty developments. Britain’s government, despite some initial diffidence, eventually supported these efforts and, then, encouraged the adherence of its colonies.

Australian governments had generally legislated previously on prostitution and pornography, following English laws, as was usual. From 1904, the Commonwealth, although a passive party in this treaty-making, as was constitutionally necessary, responded positively if slowly, to these new treaties, feeling it must first secure the concurrence of its largely uninterested state governments, to meet treaty obligations; a cautious position which the *CO* did not

¹ At some point, well after the Second World War but before the *Statute of Rome* (1998), the original term ‘international criminal law’ came in public and scholarly discourse to refer only to those offences now within the remit of the *International Criminal Court*: war crimes, aggression, crimes against humanity and genocide, while the newer term, ‘transnational crime’, was applied to the original subjects of the then international criminal law.

² *Declaration respecting Maritime Law*, Paris, signed & EIF 16 April 1856; AABP; BFSP 46/26; CTS 115/1; ATS 124/1901.

³ *General Act of the Conference of Berlin respecting the Congo*, Berlin, 26 February 1885, EIF 19 Apr 1886; BFSP 76/4; CTS 165/485; *General Act of the Brussels conference relating to the African Slave Trade, with annex & declaration*, Brussels, 2 July 1890, EIF 31 August 1891; AABP; BFSP 82/55; CTS 173/293; *Declaration modifying paragraph 5 of the declaration annexed to the general act relative to the African Slave Trade of July 2, 1890*, Brussels, 15 June 1910, EIF 30 January 1912; AABP; BFSP 103/255; CTS 211/234.

⁴ ‘International action against crime’, *Times*, 6 June 1913.

entirely share. In Australia, there was, as yet, no great public movement for domestic law or treaties on these subjects, as there was in Britain, Europe and the USA. This would change in the years before the Great War, as the (female) ‘*la voix publique*’ there awoke.

1. ‘conscience of the country’: challenges to laws on prostitution and pornography

The campaign against slave trafficking was part of and stimulated wider campaigns over other moral issues, which by 1890 led to calls for international action through treaties, over trafficking in prostitution and pornography.

The origins in Britain and, perhaps, internationally of public campaigns, resulting law changes and, eventually, treaty making on the suppression of trafficking in females and pornography, like other trafficking suppression issues then--on arms, liquor, drugs and wildlife--lie with the campaign for the suppression of slave trafficking. Opposition to ‘lewd’ practices, including prostitution, began in the conservative reaction of the *Glorious Revolution* of 1688 (with a campaigning society formed in 1691), but was later embraced by the emerging reformist, liberal spirit of evangelical Christianity, strongest in England’s northern, western and middle regions.⁵ In 1787, the year that the First Fleet quit Portsmouth for NSW, Yorkshire’s William Wilberforce felt his god had called him to achieve two great objects—ending slave trafficking and *Reformation of Manners*.⁶ So, he formed the *Society for Effecting the Abolition of the Slave Trade* and inspired George III to issue a *Proclamation for the Discouragement of Vice*, commanding prosecution for various dissolute, immoral or disorderly practices.⁷ In 1802, he founded the *Society for the Suppression of Vice*, five years before he had parliament adopt *An Act for the Abolition of the Slave Trade*.⁸ On prostitution, as in so many other matters, the Continent went down a different path to Britain, especially in the wake of Napoleon’s European conquests: French armies but not ideas had withdrawn from Europe. Regulation rather than prohibition of prostitution was the legal approach generally adopted there.⁹ This approach was not followed, initially, in Britain, where public voices of moral outrage spoke against it.

The *Vagrancy Act 1824* made prostitution punishable by one month’s hard labour and public exposure of obscene books and prints for sale unlawful. (Publication was a common law

⁵ John D. Gay, *The Geography of Religion in England*, Duckworth, London, 1971.

⁶ Sir Reginald Coupland, *Wilberforce: A Narrative*, OUP, London, 1923; Robin Furneaux, *William Wilberforce*, H. Hamilton, London, 1974; John Pollock, *William Wilberforce*, Constable, London, 1977.

⁷ Pollock, *op. cit.*, p. 61; Abraham Flexner, *Prostitution in Europe*, Richards, Bureau of Social Hygiene, London, 1914; M. J. D. Roberts, ‘The Society for the Suppression of Vice and its early critics, 1802–1812’, *HJ*, 26, 1983, pp. 159–76 and *Making English Morals: Voluntary Association And Moral Reform In England, 1787–1886*, CUP, Cambridge, 2004; Adam Hochschild, *Bury the Chains: The British Struggle to Abolish Slavery*, Pan Books, London, 2005, especially p. 126

⁸ 47 Geo. 3, Sess. 1, c. 36; see also 5 Geo. 3, c. 23.

⁹ Later medical congresses endorsed the hygienic benefits of licensed prostitution in regulated houses, which many Continental governments embraced.

misdemeanor.)¹⁰ The *Offences Against the Person Act 1828* made felonies of rape and carnally knowing a girl under the age of ten, while post-quickening abortion was punishable by death.¹¹ Carnally knowing a girl between ten and twelve was a misdemeanor, punishable by imprisonment, with courts to decide on terms and imposition of hard labour.¹² Wilberforce criticized the *Vagrancy Act* for misunderstanding the causes of homelessness (such as the drastic reduction of the armed forces after the end of the *Napoleonic Wars*). His focus had also shifted to slavery, for which he founded the *Society for the Mitigation and Gradual Abolition of Slavery Throughout the British Dominions*, the year prior. He died three days after the adoption of the *Slavery Abolition Act 1833*.¹³

His supporters, however, continued the twin campaigns, forming *The British and Foreign Anti-Slavery Society* in 1839, to make the ban international. The year prior, they had the *Vagrancy Act* amended, to punish offences causing moral outrage, by extending penalties for public exposition of indecent prints. Sales, however, were only vaguely covered by the royal proclamation of 1787. Lord Chief Justice John Campbell noted the difficulties under common law of prosecuting such sales, which he likened to that of poison, just brought under statutory control, through the foundational *Arsenic Act 1851*. So, he introduced a bill, passed by the government of the Whig—soon Liberal—leader, Viscount Palmerston, as the *Obscene Publications Act 1857*.¹⁴ This was England's first statute making such sales unlawful and empowering courts to order search, seizure and destruction, without defining obscene.

Although prostitution and pornography greatly effected women, the legislation had hitherto been shaped entirely by men: liberalism was proving just as unconsciously gender-biased as conservatism. As women increasingly found a political voice, some criticized female exclusion from emerging, popular movements of social reform, especially the earliest and greatest, on slavery.¹⁵ Women perceived discriminatory bias in both electoral and criminal law reform: prostitution by women was illegal but not its male patronage or procurement.¹⁶ The *Offences against the Person Act 1861* consolidated legislation, preserving an 'age of responsibility [consent]' of twelve years (amended in 1875 to thirteen.) Older females had no

¹⁰ *An Act for the punishment of idle and disorderly persons, rogues and vagabonds*. 5 Geo. 3, c. 83.

¹¹ 9 Geo. 4, c. 31. *An Act for consolidating the Statutes in England relative to Offences against the Person*. The death penalty for the latter two was abolished in 1841 and 1837 respectively.

¹² 5 Geo. 5, c. 83; 9 Geo. 5, c. 31; 4 & 5 Vict. c. 56; 7 Will. 4 & 1 Vict. c.85.

¹³ 1 & 2 Vict. c. 38.

¹⁴ 14 & 15 Vict. c.13 of 1851; 20 & 21 Vict. c. 83 of 1857. Alec Craig, *The Banned Books of England*, Allen & Unwin, London, 1937; Gary D. Stark, 'Pornography, Society, and the Law in Imperial Germany', *Grand Valley State University, ScholarWorks@GVSU, Peer Reviewed Articles*, 21, 2014, pp. 200-29.

¹⁵ Elizabeth Cady Stanton (see below) later claimed that suffragetism arose after women were not allowed to speak at London's 1840 slavery conference.

¹⁶ Elisabeth Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton*, Oxford University Press, New York, 1985; Ellen Carol Dubois, *Feminism & Suffrage: The Emergence of an Independent Women's Movement in America, 1848–1869*, Cornell University Press, Ithaca, New York, 1999.

legal protection, except against rape. Yet, s.49 of the *Act* made a misdemeanor of, ‘by false Pretences, false Representations, or other fraudulent Means, procur[ing] any Woman or Girl under the Age of Twenty-one Years to have illicit carnal Connexion with any Man.’¹⁷ Thus, procurers were now also targeted. Growing female concern was galvanized by the Liberal’s passage of the *Contagious Diseases Prevention Act 1864*. This was a shift towards the Continental model of regulation not prohibition. To limit the spread of venereal disease among the armed forces, this empowered police to arrest women, suspected of being prostitutes, but not male clients, and subject them to medical examination. If declared infected, they could be confined in lock-hospitals, until recovery or completion of a three months sentence. Initially, limited to a few naval ports and army towns, an 1869 amendment extended it generally and increased confinement to twelve months.¹⁸

Josephine Butler led the campaign against these ‘noxious’ acts. In 1866, she signed an unsuccessful petition to enfranchise women with the landmark electoral reform bill of 1867. (The *National Society for Women's Suffrage*, Britain’s first such body, was created that year.) With Elizabeth Wolstenholme, a Lancashire Methodist minister’s daughter and founder of the *Manchester Schoolmistresses Association*, they organised the *Married Women’s Property Committee* (leading to the *Married Women’s Property Act 1882*) and, in 1869, *Ladies National Association for the Repeal of the Contagious Diseases Acts (LNA)*. After a public-speaking tour, Butler helped successfully organise contestation of a Liberal seat. Shocked by defeat, the Liberals convened a royal commission on prostitution, which ultimately still found women not men culpable.¹⁹

In Australasia, the original two colonies had, as usual, followed England’s legislative lead on both prostitution and pornography. NSW’s vagrancy legislation of 1835, 1849 and 1851 was based *verbatim* on England’s, as were the relevant sections of Tasmania’s *Police Act 1838*. NSW’s acts prohibited public exposure of ‘obscene print picture or other indecent exhibition’.

¹⁷ England, 24 & 25 Vict. c. 100; amended in 1866 by 38 & 39 Vict. c. 94.

¹⁸ 27 & 28 Vict., c. 85. *Contagious Diseases Prevention Act 1864*,

¹⁹ Butler’s middle-class Northumberland parents opposed slavery and treated their children equally. She remained deeply religious, despite losing belief in the Church of her Oxford scholar and minister husband. There and then at Liverpool, where he was a headmaster, she sheltered disadvantaged females, including prostitutes with venereal disease, shocked by their young age: see Josephine E. Butler, *The New Abolitionists: A Narrative of a Year’s Work, Being an Account of the Mission undertaken to the Continent of Europe by Mrs Josephine E. Butler, and of the Events Subsequent Thereupon*, Dyer Brothers, London, 1876; Josephine E. Butler, *Personal reminiscences of a great crusade*, H. Marshall & Son, London, 1896; G. W. Johnson and L. Johnson (eds.), *Josephine E. Butler*, J. W. Arrowsmith, London, 1911; Millicent Fawcett and E. M. Turner, *Josephine Butler: her work and principles, and their meaning for the twentieth century*, Association for Moral & Social Hygiene, London, 1927; E. Moberly Bell, *Josephine Butler: flame of fire*, Constable, London, 1962; Brian Harrison, ‘Underneath the Victorians’, *VS*, 10 (3), March 1967, pp. 239-62; A. van Drenth and F. de Haan, *The Rise of Caring Power. Elizabeth Fry and Josephine Butler in Britain and the Netherlands*, AUP, Amsterdam, 1999; Jane Jordan, *Josephine Butler*, John Murray, London, 2001; Petra De Vries, ‘Josephine Butler and the Making of Feminism: international abolitionism in the Netherlands (1870-1914)’, *WHR*, 17 (2), April 2008, pp. 257-77.

Tasmania's only addressed public 'obscene or indecent language', until amended eight years after England's 1857 *Act*, to include writing and objects.²⁰ In the newer colonies, WA's *Police Act 1849* (amended 1861), Victoria's *Vagrancy Act 1852*, SA's *Police Act 1863* (amended 1869-70) and NZ's *Vagrancy Act 1866*, also essentially reproduced NSW's provisions. In an additional measure, Victoria in 1852, immediately after separation from NSW, prohibited 'absolutely' the import of obscene or indecent material, without specifying if this applied specifically to inter-colonial, imperial or international trade. Tasmania followed in 1861 and also legislated in 1869 against such material's postage. SA's *Criminal Law Consolidation Act 1876* made wider provisions on obscene material.²¹ In 1880, NSW and Tasmania legislated on obscene publications.²² Only NZ followed, in 1867, with the *Offences against the Person Act 1861*.²³ Queensland (1868), NZ (1869), Victoria (1878) and Tasmania (1879) legislated on almost identical lines to England's *Contagious Diseases* acts.²⁴ NSW, SA and WA did not.

In England, in 1874, with the Conservatives back in power, the LNA conference at York decided on a new approach: to develop relations with similar bodies in Europe and coordinate their respective campaigns for reform of legislation on prostitution, including opposition to Continental governments' regulation not prohibition. Butler toured France, Switzerland and Italy, returning in 1875 to another congress, which formed at Liverpool *The British, Continental and General Federation for the Abolition of the Government (later, State) Regulation of Vice*.²⁵ Foreign delegates attended. In another European tour in 1877, Butler won influential Swiss support at Neuchâtel, where regulated prostitution had just been abolished.²⁶ A congress at Geneva, attracting nearly 500 delegates from fifteen countries, formed *L'Union internationale des amies de la jeune fille*, which held conferences in Paris in 1878 and Genoa in 1880 and, thereafter, every five-to-six years. Through 1884-6, national committees were established in Britain, France, Switzerland, Netherlands and Italy, (eventually spreading to 39 countries). An international bureau was founded in Neuchâtel.²⁷

²⁰ **NSW:** 6 Will. 4, no. 6 of 1835, amended by 13 Vic. no. 46 of 1849 and 15 Vic. no. 4 of 1851. **Tas:** 2 Vic. no. 2; 29 Vic. no. 10.

²¹ **WA:** 12 Vic. no. 20 of 1849, amended by 25 Vic. no. 15 of 1861; 25 Vic. no. 3 of 1861 and 33 Vic. no. 5 of 1869; **Vic:** 16 Vic., no. 22 of 1852 and 16 Vic. no. 23 of 1852; **SA:** 27 Vic. no. 10 of 1863, as amended by 33 Vic. no. 15 of 1869-70; **NZ:** 30 Vic. no. 10 of 1866; SA: 39 & 40 Vic. no. 38;

²² **Tas:** 44 Vic. no 25 of 1880; **NSW:** 43 Vic. no. 24 of 1880.

²³ **UK:** 24 & 25 Vic. c. 100 and 38 & 39 Vict. c. 94. **NZ:** 31 Vic. No. 5.

²⁴ **UK:** 27 & 28 Vict. c. 85; **Qld:** 31 Vic. No. 40; **NZ:** 32 & 33 Vic. no. 52; **Vic:** 42 Vic. no. 631; **Tas:** 42 Vic. no. 36 of 1879, as amended by 43 Vic. no. 36 of 1879. See E. Barclay, 'Queensland's Contagious Diseases Act, 1868- "The Act for the Encouragement of Vice"-and some Nineteenth Century Attempts to Repeal', Parts I & II, *Queensland Heritage*, 2 (10), 1974, pp. 27-34 and 3 (1), 1974, pp. 21-9.

²⁵ *Times*, 22 June 1881. This body appears to have merged with the LNA by 1887 and was re-named the *International Abolitionist Federation (IAF)* in 1898.

²⁶ F. Tacussel, *La traite des blanches*, J. Bonhourie, Paris, 1877.

²⁷ *Actes du Congrès de Genève de la Fédération Britannique, Continentale et Générale tenu le 17 au 23 septembre 1877*, Neuchâtel, 1880. Mary Ann Irwin, "'White Slavery' as Metaphor: Anatomy of a Moral panic', *Ex Post Facto: The History Journal*, V, 1996 at <https://www.walnet.org/csis/papers/irwin-wslavery.html#whiteslavery>

There was no sign, yet, that Britain's or any European government was responding to these concerns—then, something changed. In 1880, the growing conviction that there was a large trade in young females between the Continent, Britain and America for sexual purposes was given substance. A private investigation by two Quakers, Alfred Dyer and George Gillet, led to lurid press reports about young English girls being trafficked to Belgian brothels. Butler published a statement, carried by Continental, as well as British, newspapers supporting the claims. When Belgian authorities denied the allegations, she repeated them, at their insistence, under oath. Trials and convictions in Brussels followed.²⁸ The *HO* established a commission of enquiry, sending leading barrister, Thomas Snagge, to investigate. He confirmed that there was a large and long-standing trade, involving police collusion, in English girls for European brothels.²⁹ On the *HO*'s recommendation, the *House of Lords* convened a select committee on the *Protection of Young Girls*: its 1882 report proposed legislative changes to restrict procurement, as well as prostitution, including lifting the age of consent from thirteen to sixteen. European reformers at a semi-official conference in *Den Hague* took note of this and called, for the first time, for 'some international law' [emphasis added] to deal with, what was called in Europe, *le traite des blanches*.³⁰ Obviously, anti-slave trafficking treaties provided the inspiration.

William Gladstone's Liberals had introduced but not passed the bill, recommended by the Lords, before Lord Robert Cecil's Conservatives took office in 1885. Then, W. T. Stead, the *Pall Mall Gazette*'s editor, sensationalized the issue. To substantiate his published claims startlingly, he 'bought' a chimney sweep's thirteen year-old daughter, Eliza, from her mother for £5 and placed her overnight in a brothel, before giving her to *Salvation Army* care. For this

²⁸ Alfred S. Dyer, *The European Slave-Trade in English Girls: a narrative of facts*, Dyer Bros, London, 1880. For background on the affair see Auguste Joseph Lutand, *La prostitution et la traite des blanches a Londres et a Paris*, C. Marpon et E. Flammarion, Paris, 1886. More recent works are: Carine Steverlynck, 'La traite des blanches et la prostitution enfantine en belgique (1850-1950)', *PH*, 29 (3), 1993, pp. 779-820; Jean-Michel Chaumont and Christine Machiels, *Du sordide au mythe: L'affaire de la traite des blanches, Bruxelles, 1880*, Presses Universitaires de Louvain, series, Histoire, justice, sociétés, Louvain-la-Neuve, 2009. There are some interesting background details in Bridget O'Donnell, *Inspector Minahan Makes a Stand or the Missing Girls of England*, Picador, London, 2012.

²⁹ For Snagge's report see BPP, Cd. 3453, vol. 99.

³⁰ The quote was cited by the *Argus*, 15 April 1885. The term 'white slave' as part of a 'trade' or 'traffic' seems to have emerged first in Europe with reference to males serving in the Prussian army in place of another man who had his service obligation remitted: *Times*, 12 September 1870. Soon, it was next used with reference to a supposed Italian government covert scheme for paupers to migrate to the *USA* and South America: *Times*, 1 January & 26 December 1873. The first British use with reference to young females appears to be in 1881, translated from *le traite des blanches*, by visiting Belgians, meeting with fellow British activists: *Times*, 22 June, 19, 25 August, 1881; 26, 28 April 1882. The 1883 nude painting *Les Ébats*, by Paris-trained Croatian artist, Vlaho Bukovac, caused sensation when exhibited in Paris in 1884 and London in early 1885, as *The White Slave*, which seems to have popularized this usage, although it was occasionally still used to describe male factory workers or Caucasian slaves: *Times*, 2 October 1885, 2 November 1888, 5 November 1889. The few English-language works on this include Paul Reinsch, *Public Unions: Their Work and Organization: A Study in International Administrative Law*, Ginn & Company, Boston, 1911, pp. 64-66; F. S. L. Lyons, *Internationalism in Europe, 1815-1914*, A. W. Sythoff, Leyden, 1963, pp. 274-85; Stephanie A. Limoncelli, *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women*, STUP, Stanford, CA., 2010, pp. 42-69; Jean Allain, 'White Slave Traffic in International Law', *JTHE*, 1(1), 2017, pp. 1-40.

(inspiring G. B. Shaw's *Pygmalion*), he and Bramwell Booth, the *Salvation Army* founders' son, were tried, with Stead jailed.³¹ The unprecedented publicity and reaction induced Richard Cross, Lancashire-born Home Secretary, to act. He had parliament pass, within a month, the Liberal's stalled bill, drafted by Snagge, as *An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes*, better known by its short title, the *Criminal Law Amendment Act (CLAA 1885)*. This represented a fundamental legal shift in England's approach to prostitution. The age of consent for girls was lifted from thirteen, as in the 1875 *Act*, to sixteen.³²

Campaigners were gratified that the 'conscience of the country' had been stirred but, also, dissatisfied. The *Act* provided that crimes had to be reported within three, not the twelve months they desired. So Stead organized a conference 'for the protection of girls' at St James Hall, Piccadilly, immediately after the *Act's* passage. According to the *Times's* disparaging report, the hall was half-full, declining further through the evening, with only ten people in the gallery, while thirty men occupied the stage and elderly women, the seats. Yet, despite this disparagement, together they represented a formidable gathering of activist reformers, overwhelmingly Non-Conformist, though including some members of the Establishment and, even, one prominent Roman Catholic. There was some disagreement over the path to follow but, ultimately, they agreed to form the *National Vigilance Association for the Repression of Criminal Vice and Public Immorality* (usually abbreviated to *NVA*) of both men and women, uniting local committees, for the 'enforcement and improvement of the law'.³³

³¹ Frederic Whyte, *Life of W. T. Stead*, vol. 1, Cape, London, 1925, pp. 159-205; Harold Begbie, *Life of William Booth*, vol. II, Macmillan, London, 1920, pp. 39-56.

³² 48 & 49 Vict. c. 69.

³³ This account is taken from a very detailed report in the *Times*, 22 August 1885. From the Liberals, there was Newton Wallop (Viscount Lymington), Henry Broadhurst--a former stonemason, trade unionist and *Lib-Lab* (whose appointment by Gladstone as under secretary of state for Home Affairs was a first for a person of his class) and Halifax radical, Sir James Stansfeld. Those voicing support, along with Bramwell Booth and Stead--himself the son of a Northumberland Congregational minister and Yorkshire mother--included: Richard Pankhurst, a Mancunian radical liberal barrister, who had authored Britain's first suffrage legislation, notably the *Women's Disabilities Removal and Married Women's Property* bills and campaigned for the repeal of the *Contagious Diseases Act*; Hugh Price Hughes, Welsh Methodist minister and founder of the *Methodist Times*, who urged Non-Conformist Protestantism to lead the salvation of society; Percy Bunting, the prominent Mancunian Methodist editor of *The Contemporary Review*; and Unitarian minister, Henry Solly, teetotal promoter of working men's clubs, charity for London's unemployed and 'garden cities' replacing industrial slums. Establishment figures sharing their objectives included Sir George Russell, Conservative barrister and baronet, whose otherwise surprising appointment to preside, arose probably in order to enlist official support; Frederick Temple, Bishop of London, and Walsham How, Bishop of Bedford, who promoted church work among London's poor. Prominent evangelical Anglican, Hamner Webb-Peploe, and controversial contraception supporter, Montague Cookson (later, Crackenthorpe) were also there, as was Henry Manning, Catholic Cardinal of Westminster, who (as formerly an Anglican) had brought Protestantism's 'social gospel' to his new faith. Besides Butler, the women included: Catherine Booth, co-founder with her husband, William, of the *Salvation Army*; Millicent Fawcett, of the *London Society for Women's Suffrage*; writer Florence Fenwick Miller, who, would help, with Emmeline Pankhurst (Richard's wife), to found the *Women's Suffrage League (WSL)* and would be prominent in the *National Union of Women Workers of Great Britain and Ireland (NUWW)* and *National Union of Women's Suffrage Societies*; author, Ellice Hopkins, of the *Ladies Association for the Care of Friendless Girls*, whose book, *A plea for the wider action of the Church of England in the prevention of the degradation of women*, criticised the hypocrisy of blaming women for social immorality. With the Bishop of Durham in 1883, she had founded the *White Cross*

Aristocratic patronage, still an important influence, was secured with the Duke of Westminster's appointment as nominal head. Percy Bunting, the prominent *Mancunian* Methodist lawyer and editor of *The Contemporary Review*, was the functional head, with Alexander Coote, an Irish-Protestant, prominent in London's printing trade unions, the long-term secretary (until 1919). After meeting first in the *Methodist Times*' offices, annual meetings were held at Exeter Hall, home of the *Anti-Slavery Society*. Within a year, the *NVA* had notable success, for women, with repeal of the *Contagious Diseases Act*. From this promising start, the *NVA* temporarily declined in prominence, with shrinking membership, mainly female, but soon including Bunting's *Poor Law Guardian* and suffragette sister-in-law, Elizabeth Liddgett and (Laura) Ormiston Chant, of the *Women's Liberal Federation* and the *National Society for the Promotion of Women's Suffrage*.³⁴

In Australasia's press, there were sporadic references to white slavery after the dramatic London events of 1885. These were entirely British reports of the passage of the *CLAA 1885* and the *NVA*'s foundation. Almost all the same religious groups (except London's important Jewish organisations), which were behind the campaign against the traffic in Britain, were present in Australasia. In 1888, Coote prompted the *Girls' Friendly Society (GFC)* and the local *Young Women's Christian Association (YWCA)* in Melbourne to form a women's committee to ensure safe lodging of young women attending the *International Exhibition* there. In 1890, there was vigorous discussion of a local bill modeled on England's *CLAA 1885*, during which, Coote intervened by mail, counseling supporters not to repeat the shortcomings of the English *Act*. In 1892, a visiting *NVA* member helped establish a branch there and praised the local *Act*, for its age of consent of sixteen, extending the period for prosecution from three to twelve months, targeting procurers, not just prostitutes, and improving English law on indecent advertisements, while regretting its allowance, as in the English *Act*, to defendants in sexual cases, of a defence of mistaken age. *SA's Social Purity Movement*, established earlier to campaign for fairer legal treatment and protection of women, including raising the age of consent for girls to sixteen and regulating the age of young people in brothels, created a local *Women's Suffrage League*.³⁵

Army to promote social purity by protecting women from prostitution and male degradation, with branches in Canada, Australia, NZ, South Africa, Trinidad, Jamaica, some African colonies, plus the *USA*, China and Japan. The appointed head was the wealthy, philanthropic Lords' Whig, the Duke of Westminster who, despite a consuming passion with horse-breeding on his Cheshire estates, never gambled and upheld temperance (including for the 'native races') and protection of female labour.

³⁴ *Times*, 14 October 1885, 17 November 1886, 10 November and 29 July 1887 and 28 November 1888. See also, H. Wilson Harris, *Human Merchandise: A Study of the International Traffic in Women*, Ernest Benn, London, 1928; Lyons, *op. cit.*, p. 368; Paula Bartley, *Prostitution: Prevention and Reform in England, 1860-1914*, Routledge, London, 2000, pp. 156, 170-3.

³⁵ *Argus*, 15 April 1885; *Age*, 2 October 1885; *Weekly Chronicle*, 6 March 1886; *Argus*, 6 July 1888; *Age*, 2 & 3 September 1890; *Weekly Times*, 16 April 1892. The *Act* was 55 Vic. no. 1231 of 1891.

Meanwhile, the revival of the *NVA* and *LNA* led campaign was assisted by new international influences, especially American-led vigour and support. The *Women's Christian Temperance Union* (*WCTU*), originally founded in Ohio in 1874 (with Canada's branch formed the same year), had formed an international organisation from 1884, under its president, Frances Willard. In NZ in 1886, America's Mary Leavitt, with local activist Kate Sheppard (who led the 1892 campaign for enfranchisement), established a branch. Jessie Ackermann visited Australasia from 1889, establishing branches in each colony and, in 1891, serving as inaugural president of the federated Australasian *WCTU*. The initial goal was prohibition of alcohol but concerns eventually widened to other traffic, such as in tobacco and opium. Suffragettism was embraced, partly as a means of achieving the foregoing, including opposition to the white slave traffic.³⁶ In 1888, Susan B. Anthony and Elizabeth Cady Stanton, who had founded the *National Woman Suffrage Association* (1869), liaised with similar groups in Europe from 1882, forming the *International Council of Women* (*ICW*) in Washington D.C. By century's end, Argentina, Denmark, Germany, Italy, the Netherlands, Sweden and Switzerland had affiliated *NCW* branches. In Britain's empire, Canada, (1893), NSW (1896) and Tasmania (1899) each established branches. Britain's *NUWW* affiliated in 1898. Initially, hesitant over taking a strong stand on suffrage, by its 5th conference, in Geneva in 1889, (to where its office moved in 1898), the *ICW* was becoming more outspoken, including in denunciation of white slavery. The *ICW* proved more internationally effective than the *International Women's Rights Congress* which, founded in 1878, attracted only seven foreign delegates to its conference in Paris in 1889.³⁷

2. 'some mode of international action': the push for a treaty, 1891-1902

The surging international public campaign against the white slave traffic, having first recruited Continental governments, ultimately induced Britain to join the crusade for treaties.

To 1890, the new multilateral treaties had been mainly confined to commercially related subjects. Anti-slave trafficking was a notable exception, being one of several concerns of the *General Act of Berlin* (1885), whose associated declaration proclaimed that 'trading in slaves is forbidden in conformity with the principles of international law as recognized by the

³⁶ Ian Tyrrell, 'Ackermann, Jessie A. (1857–1951)', *ADB*, Supplementary vol., NCB:ANU, MUP, 2005, <http://adb.anu.edu.au/biography/ackermann-jessie-a-12764/text23023>.

³⁷ Richard Evans, *The Feminists: Women's Emancipation Movements in Europe, America and Australasia, 1840-1920*, Croom Helm, London, 1977, pp. 246-7, 250; Ian R. Tyrrell, *Woman's World/Woman's Empire: The Women's Christian Temperance Union in International perspective, 1880-1930*, UNCP, Chapel Hill, NC., 1991, especially p. 223. Melanie Nolan and Caroline Daly, 'International Feminist Perspectives on Suffrage: An Introduction', in Caroline Daly and Melanie Nolan (eds.), *Suffrage and Beyond: International Feminist Perspectives*, NYUP, NY, 1994, p. 13; Leila J. Rupp, 'Constructing Internationalism: The Case of Transnational Women's Organizations, 1888-1945', *AHR*, 99 (5), 1994, pp. 1571–1600; Nitzka Berkovitch, *From Motherhood to Citizenship: Women's Rights and International Organizations*, JHUP, Baltimore, 1999, especially chapter 2; Davies, *op. cit.*, pp. 58-60.

Signatory Powers.³⁸ At the Brussels congress of 1890, convened jointly by Britain and Belgium, the resulting *General Act*, solely on the slave trade in Africa, created the *BIMT* in Zanzibar and *BRT* in Brussels, to collect and share relevant information. That year, in Berlin, European governments signed protocols on international labour protection through legislation, thus moving the original treaty issue on international protection of individual humans—slavery—from ‘coloured’ to ‘white’ persons.³⁹ These developments inspired the possibility and necessity for expanded international cooperation on other social issues.

In 1891, the annual *NVA* conference adopted unanimously to cheers the motion that ‘**International law . . . was wanted**’ [emphasis added].⁴⁰ The long 1890s depression increased concerns that impecunious European females, especially from Germany and, even distant Russia, were increasingly being drawn into the traffic. Now the *NVA* reached out from its mainly liberal constituency to engage the emerging labour movement. At the Nottingham *Trade Union Congress (TUC)* in 1895, which established the *NUWW*, Bunting called for amendment of the *CLAA 1885*, so that charges could be laid up to twelve not just three months.⁴¹ *NUWW* support provided an additional ally, as its inaugural president, Louise, was wife of the next Bishop of London, Mandell Creighton. Establishment support was enhanced further when Frederick Temple was elevated to Archbishop of Canterbury in 1896. This may, in turn, have influenced the support of William Maclagan, Archbishop of York, and especially, Edward Talbot, Bishop of Rochester, whose wife, had founded Oxford’s first female college, before he assumed the *NVA*’s presidency. Other denominations also formed *INGOs*. *L’Association Catholique Internationale des oeuvres de protection de la jeune fille*, began at Fribourg, with Papal endorsement, in 1897, before spreading to nearly 40 countries. The *Jewish Association for the Protection of Girls and Women (JAPGW)* was formed in London. A related development, in 1893, was the creation of the *Bureau International contre Littérature Immorale* in Geneva, which held its first congress in Berne in 1896.⁴²

As the century closed, the *NVA* enjoyed new local success. In 1898, England’s *Vagrancy Act 1838* was amended to make unlawful soliciting or importuning women for immoral purposes,

³⁸ *General Act of the Conference at Berlin etc. & Declaration Relative to the Slave trade, Chapter II, Article 9*, (see Chapter 1), Berlin, 26 February 1885. Several British treaties contained provisions for ‘native’ protection. The *Convention of Defensive Alliance between Great Britain and Turkey*, Constantinople, 4 June 1878, contained provisions for reforms by Turkey for the protection of Christians in Turkey.

³⁹ *General Act of the Brussels Conference relative to the African Slave Trade*, Brussels, 2 July 1890 with an associated declaration and three protocols (1891 & 1892). For the Berlin conference see Chapter 6.

⁴⁰ *Times*, 2 January, 29 May & 5 November 1891.

⁴¹ *Times*, 7 June & 25 October 1895.

⁴² T. Fallot, *Une Noble Enterprise: L’Union Internationale des Amis de jeune fille*, A. Ducros, Valence, 1902; Annie Stora-Lamare, ‘Censorship in Republican Times: Censorship and Pornographic Novels Located in L’Enfer de la Bibliothèque Nationale, 1800-1900’ and Colette Colligan, ‘Anti-Abolition Writes Obscenity: The English Vice, Transatlantic Slavery, and England’s Obscene Print Culture’, in Lisa Z. Sigel (ed.), *International Exposure: Perspectives of Modern European Pornography*, RUP, Piscataway, NJ., 2005, especially pp. 60-1, 67-99.

so, again focusing the law on procurers, not just prostitutes.⁴³ Yet, campaigners recognized that the only effective way to suppress transnational procurement was by international agreement, whereby foreign governments adopted similar legislation. With no sign its government would lead, the NVA decided to mobilize foreign governments to call a conference, for sharing information on the traffic and to consider an international agreement.⁴⁴

Then, in January 1899, Coote witnessed a ‘Divine Vision’, which he compared to that of the 18th century Dissenting prison reformer, John Howard. So, he began his own ‘pilgrimage of mercy’ across Europe, to Paris, *Den Hague*, Brussels, Copenhagen, Stockholm, Berlin and St. Petersburg. His mission was to establish local NVA-like committees and win official support for an international congress in London. He persuaded the *Kaiserin* to send official delegates, as he did France, Austria and Sweden-Norway, whose Queen gave public support.⁴⁵ He impressed Russia’s foreign minister, Count Mikhail Muravyov who, the year prior, had persuaded the *Tsar* to convene the famous first Hague peace conference, in May 1899, a month before the NVA congress. The NVA proclaimed that twenty delegates from each participating country would attend to gather information, as preliminary steps to organising an inter-governmental conference, aiming for ‘some mode of international action.’⁴⁶

Shortly before the conference, the NVA, through Conservative political circles, informally asked for and gained Lord Salisbury’s expression, as both prime and foreign minister, of his ‘entire sympathy’, after his deputy, St John Brodrick, advised that there would ‘seem no harm’.⁴⁷ The NVA did not initially ask for ‘official recognition’ of the conference but both France and Russia soon intimated to Britain that they would send senior delegates, if Britain invited them. Days later, Coote presented a letter for Salisbury from the Duke of Westminster and two archbishops, saying, that due to the strength of foreign governmental support, the NVA now wished to make the conference official and was ‘authorised’ to advise that France, Germany, Austria, Russia and Sweden-Norway would send official delegates, if Britain invited them. Salisbury decided, however, that ‘we should not interfere any farther’ and, so, assured the NVA, that it was better that the conference be conducted ‘independently’, after which the government could give ‘most careful, attention’ to the results. Coote did secure

⁴³ 61 & 62 Vict. c. 39.

⁴⁴ *Times*, 14 July 1898.

⁴⁵ *Times*, 19 January 1899.

⁴⁶ *The Times*, 19 January, 14 & 28 April 1899. Percy W. Bunting, ‘La traite de femmes’, *Revue de morale sociale*, 3, July-September 1899, pp. 273-83. *NZ Herald*, 14 March 1899; *Evening Star*, 23 September 1899. Rachael Atwood, ‘Stopping the Traffic: the National Vigilance Association and the international fight against the ‘white slave’ trade (1899–c.1909)’, *WHR*, 24 (3), 2015, pp. 325-50.

⁴⁷ Letter, Dalbiac (Conservative M. P. and NVA member) to Brodrick, 17 March 1899; note, Brodrick to Salisbury & letter, FO to Dalbiac, 27 March 1899, initialed by Salisbury, FO83/1943, TNA. William St John Femantle Brodrick, 1st Earl of Midleton, parliamentary under secretary of state for foreign affairs.

from Salisbury permission to publish this response.⁴⁸

The NVA congress in London's Westminster Palace Hotel on 21-23 June 1899, chaired by the Duke of Westminster, attracted unofficial delegates from the above countries plus Belgium, Netherlands and USA.⁴⁹ The congress approved a German proposal for a permanent international bureau, modelled on those in Brussels and Zanzibar, for the slave trade: thus, was formed the London-based *International Bureau for the Suppression of the White Slave Traffic (IBSWT)*. This would coordinate national bodies' investigation and sharing of information on the traffic, including with governments, who were to be urged to adopt uniform penalties and 'provide by International Treaties for the extradition of the accused.'⁵⁰ The congress would meet every 3-4 years, while a government should convene an official conference to implement the resolutions, for which the NVA reserved the right to ask Britain's first. Within weeks, Coote put this proposal, through the Duke of Westminster, to Salisbury, intimating the willingness of France, Germany and Russia to act, if Britain did not. Salisbury decided, however, after his 'most careful' consideration, that this was not 'expedient'. He only agreed to forward the resolutions to European governments.⁵¹

If disappointed, the NVA was undismayed. In April 1900, various Swiss groups asked their government to convene a conference, suggesting that Britain might attend. Switzerland, however, confidentially confirmed Salisbury's unchanged opposition.⁵² After the NVA held another London congress on the same date, as the year previous, Coote set off again, this time to the more Catholic centres of Madrid, Vienna and Rome. He returned in early December, announcing the positive response of Austria's Baroness de Langenau, the establishment of national committees in nearly all European capitals and the need for 'international legislation'⁵³ Talbot, interim NVA president, who had secured for Coote FO letters of introduction, explained to Lord Lansdowne, Salisbury's recent successor, that the aim was to hold an international conference,

*to agree upon such agreement as would make it possible to prosecute an offender, of whatever nationality, in the country where he is found.*⁵⁴

⁴⁸ Letter, NVA (Duke of Westminster *et al*) to Salisbury, 4 May 1899; marginal note, Salisbury, undated, on memorandum, Grosselin, 30 April 1899; memorandum, Grosselin, 11 May 1899; letter, Salisbury to the Duke of Westminster, 19 May 1899, FO83/1943, TNA. Sir Martin Machant Hadsley Grosselin, was assistant under secretary of state for foreign affairs.

⁴⁹ *Newcastle Herald & Miners' Advocate*, 10 June 1899; *Times*, 22 & 23 June 1899, Bunting, *op. cit.*

⁵⁰ Attachment to letter, Coote to Duke of Westminster, 20 July 1899, FO83/1943, TNA.

⁵¹ Letters, Coote to Sir Thomas Sanderson, 18 July; Coote to Westminster, 29 July; Westminster to Salisbury, 31 July; Salisbury to Westminster, 9 August; all 1899, FO83/1943, TNA.

⁵² Letter, Sanderson to Swiss minister, 24 April 1900, FO83/1943, TNA.

⁵³ *Times*, 6 December 1900

⁵⁴ Letter, Talbot to Lansdowne, 15 December 1900, FO83/1943, TNA. Henry Petty-Fitzmaurice, 5th Marquess of Lansdowne.

He, perhaps, teased that France was willing to convene a conference and asked that, if enough governments attended, would Britain at least participate, stressing that it would be purely consultative and not commit governments.⁵⁵ Lansdowne was evasive, replying that no such invitation had been yet received but, if so, it would be carefully considered.⁵⁶

In 1901, Coote's labours finally bore significant fruit in France, through René Bérenger, an influential senator-for-life, deeply interested in prison reform, head of the *Académie des sciences morales et politiques* and founder of *L'Association pour la répression de la traite des blanches et la préservation de la jeune fille*. The two persuaded France to invite governments to Paris in the coming year, so as to share information on the traffic in their respective countries and decide on practical measures for its suppression. The NVA and Coote, in particular, were spinning a diplomatic web around the British government, from which it could no longer escape.

While France's ambassador was sounding out the *FO* in April, Talbot affirmed that this was a 'great step in advance' and the NVA was most anxious that other governments, especially, Britain's, should meet France, at least 'half-way'.⁵⁷ So, this time, the *FO* asked the *HO*, which thought that, although having insufficient information as to the extent of the traffic in Britain, and, thus, whether further legislation was needed, the conference might produce 'valuable results'. The *HO* was therefore 'glad' to ensure the conference's success and would consider very carefully its results, as to the feasibility and probable effect of adopting any measures, which it might recommend for extension of the government's present powers.⁵⁸

The NVA, pleased by this new response, which it announced at its 16th annual conference at Westminster, also declared that 'the suppression of the vile trade' should be made '**a matter of public international law**' [emphasis added].⁵⁹ The next step, in October 1901, was the 2nd *IBSWT* congress in Amsterdam, held to discuss how to strengthen each country's laws, 'from an international point of view'. It deprecated 'lax international cooperation' and 'want of accord in the different national codes', as to procurement and urged the need for a central European bureau and licensing of the registry offices, which recruited women for foreign work, especially in South America. There was again a call for 'international legislative measures', including for improving currently 'lax' control of frontiers. It resolved that, without waiting for Paris, all should urge their respective authorities and unofficial bodies to

⁵⁵ *ibid.*

⁵⁶ Letter, Lansdowne to Talbot, 27 December 1900, FO83/1943, TNA.

⁵⁷ Letter, Talbot to Lansdowne, 4 May 1901, FO83/1943, TNA.

⁵⁸ Letter, *HO* (Murdoch) to *FO*, 24 May 1901, FO83/1943, TNA.

⁵⁹ *Times*, 14 June 1901.

combat *le traite des blanches*. The Netherlands immediately agreed to loan a police inspector for an investigation. The *NVA* then publicly declared the opening of this new campaign.⁶⁰

In Australasia, Coote's European campaign in 1899 was well reported but the Amsterdam congress really attracted coverage.⁶¹ Inspired, either by the developments in England, local interest groups or both, new legislation was adopted in some parts of Australia on these subjects. In *SA*, where women had just been enfranchised, the *Children's Protection Act 1899*, raised the age of consent from sixteen to seventeen, though allowing a defence of consent, for a child between those years, if there was reasonable grounds for believing the child was over seventeen. Exposing a child, by various means, to obscene publications was also an offence.⁶² In 1900 and 1901, *NSW* passed three further amending and consolidating acts on obscene publications and vagrancy.⁶³ Tasmania legislated on indecent publications.⁶⁴

The new Commonwealth also legislatively addressed some of these issues, within its limited sphere. Specification of a 'prohibited import' in s.52(c) of the *Customs Act 1901*, included those, which were 'Blasphemous indecent or obscene works or articles'. There was no similar provision for exports, presumably because Australia was not seen as an exporter of such materials. The *Immigration Restriction Act 1901*'s specification of prohibited immigrants included in s.3(f), 'any prostitute or person living on the prostitution of others'.⁶⁵ This provision could serve as an anti-trafficking measure, although criminal punishment remained within the jurisdiction of the states. There was no provision for emigration of such persons from the Commonwealth. The *CO* did not inform its colonies of the coming Paris conference.

At this stage, there was striking differences between the burgeoning, public anti-opium campaign in Australia, from 1902, and the apparent, far lesser interest in white slavery. There was certainly nothing comparable to the activism over the latter already in Britain, Europe and the *USA*. One cause was that (as yet) the issue did not have the same anti-Asian aspect, which mobilised wider, mass support for the moralistic leadership of Australia's anti-opium lobbies. The fact, that opium was a proven or, at least, accepted problem, whereas white slavery was not, was another factor. A final factor was the slower organisation of women into effective lobby groups. This process accelerated with the Commonwealth's enfranchisement of women in 1902. During that debate, *NCW* branches were established in Victoria and South

⁶⁰ *Times*, 28 September & 29 November.

⁶¹ *Daily News*, 8 March 1899; *NZ Herald*, 14 March 1899; *Newcastle Herald and Miners' Advocate*, 10 June 1899; *Evening Star*, 23 September 1899; *Register*, 12 November 1901; *NZ Times*, 22 November 1901; *Thames Star*, 25 November 1901; *Ohinemuri Gazette*, 27 November 1901.

⁶² **SA**: 62 & 63 Vic. no. 730 of 1899.

⁶³ **NSW**: 64 Vic. nos. 2 & 27 of 1900.

⁶⁴ **Tas**: 64 Vic. no. 26 of 1900.

⁶⁵ **Commonwealth**: nos. 5, 12, 13 & 17 of 1901.

Australia in 1902 (with Queensland following in 1905 and WA in 1911).⁶⁶

In September 1901, France led a vigorous discussion of white slavery at the congress of the *International Union for Penal Law* at St. Petersburg.⁶⁷ In 1902, the re-named *International Abolitionist Federation (IAF)*, now in Geneva, increased its voice against white slavery.⁶⁸ By March that year, the British government was well caught in this surging international momentum. Ambassadors from France (who provided the proposed conference program, drafted by Bérenger's *Comité Français*), Germany and Belgium asked if Britain would participate. (At this same time, Britain agreed to attend Belgium's conference on a multilateral treaty on sugar but not France's on bird protection.) Bishop Talbot did likewise, pressing for Coote to represent Britain.⁶⁹ Feeling besieged, the *FO* consulted the *HO*, which conceded the conference could prove 'valuable'.⁷⁰ The *FO* stressed that the *HO* should nominate a 'legal man', not a 'fanatic', such as Coote.⁷¹ So, it named Snagge, whom a relieved *FO* agreed was 'excellent' and the 'best man' but suggested that he consult Coote.⁷² Snagge was advised by the *LO* that under s.2(3) of the *CLAA 1885*, persons who conveyed women through Britain to work in a foreign brothel were guilty of the misdemeanor of 'procuration'. So, he went to Paris, *via* Brussels, to investigate the *Act's* effectiveness.⁷³

If the *FO* hoped the conference would be low-key, it was quickly disappointed. France had just enjoyed the prestige of hosting eleven governments, which had signed a foundational, multi-party bird protection treaty. (Britain had declined to attend or sign, despite having signed the preceding protocol in 1895.) So, this was another chance for France to confirm its clear global leadership on multilateral treaty making. The president, Émile Loubet, welcomed delegates from fifteen other governments (including Brazil), while foreign minister, Théophile Delcassé, opened proceedings on 15 July, before ceding the chair to Bérenger, with Switzerland's minister to France as deputy.⁷⁴

Snagge was immediately impressed with the 'serious' view taken on a matter held there to be of 'importance'. At the opening, he tried to portray Britain as a leader on the issue,

⁶⁶ Helen E. Gillan, *A Brief History of the National Council of Women of Victoria, 1900–1945*, NCW, Melbourne, 1944; Ada Norris, *Champions of the Impossible: A History of the National Council of Women of Victoria 1902–1977*, The Hawthorn Press, Melbourne, 1978.

⁶⁷ *Times*, 5 June 1901.

⁶⁸ *Times*, 30 May 1902. See also, Anne Summers, 'Introduction: the International Abolitionist Federation' and Karen Offen, 'Madame Ghénia Avril de Sainte-Croix, the Josephine Butler of France', *WHR*, 17(2), April 2008, pp. 149–52, 239–55.

⁶⁹ Letter, Talbot to Lansdowne, 6 March 1902, FO83/1943, TNA.

⁷⁰ Letter, *HO* (Murdoch) to *FO*, 1 April 1902, FO83/1943, TNA. He was citing the views of the Home Secretary, Sir Charles Ritchie.

⁷¹ Minute, *FO* (initials 'EB'), 23 April 1902, FO83/1943, TNA.

⁷² Note, Cranbourne to Lansdowne, 23 April 1902, FO83/1943, TNA. Snagge represented Britain at the *International Penitentiary Congress* in Paris in 1895. James Gascoyne Cecil, 4th Marquess of Salisbury.

⁷³ *LO* Opinion, Sir Robert Finlay and Sir Edward Carson, 9 July 1902, FO83/1943, TNA.

⁷⁴ *Times*, 5 June, 16, 18, 23, 26 July 1902.

responsible for the first investigation (1880) and legislation. The *CLAA 1885*, he declared, had ‘stood the test of judicial application’ and, thus, might provide the possible basis, ‘*mutatis mutandis*’, for any ‘international recognition’ of the ‘mischief’. Yet, he was ‘at pains to point out’, that on certain administrative questions, such as extradition, registration of prostitutes or *letters-rogatory*, Britain claimed the right to an ‘independent attitude’. That ‘reservation’ aside, he was ‘sure’ Britain would give ‘firm and sympathetic support’ to any ‘international measures’, which might arrest, if not render impossible, continuance of this ‘vile system’.⁷⁵ Afterwards, the *HO* reassured the *FO* it approved of Snagge’s guarded language.

Snagge welcomed France distributing a comparison of relevant European laws, despite the absence of statistics or examples. The conference divided into three committees—with Snagge in that on legislation. He agreed with its conclusion that the problem of procurement, especially from eastern Europe, was real and could constitute a ‘continuing offence’, within several different territories, which ‘might properly be the subject of international recognition’, given the absence of adequate legislation in some. Without an ‘international understanding’ for ‘the suppression of the evil’, he said, it would be impossible to secure prosecution and punishment. The committee defined particular offences, which he believed the *CLAA 1885* largely covered. An issue was European legislation, which made a more marked distinction between protection afforded to females of either minor or major age which, he conceded, was essential for countries where prostitution was regulated not prohibited.⁷⁶

Whatever his doubts at the start, Snagge commended the ‘spirit of moderation, of courtesy, and of conciliation [that] prevailed’, with committees not going beyond mere recommendations. The full conference accepted their proposals, before establishing a fourth committee to draft a provisional *projet de Convention* and *projet d’arrangement*. Both were unanimously accepted. *Articles I* and *II* of the former defined the offence of procurement of minors and adults respectively. *Article III* provided that states, which had not yet made these acts punishable offences, should legislate accordingly. Then, most importantly and potentially sensitive, *Article V(I)* provided that procurement, on the ratification of the convention, should be regarded as included within those crimes, for which extradition, currently in bilateral treaties then force, may be granted. So, this convention, if adopted, would create the first multilateral extradition agreement, though limited to one type of crime.⁷⁷

⁷⁵ Letters, Snagge to Lansdowne, 16, 23 & 25 July, 9 August & 24 November 1902, FO83/1943, TNA.

⁷⁶ Letters, Snagge to Lansdowne, 16, 23 & 25 July, 9 August, 24 November 1902, FO83/1943, TNA.

⁷⁷ *ibid*, TNA. The conference proceedings are at ‘International Conference for the Repression of White Slavery’, *Archives diplomatiques*, Tome XXXV, Paris, 1902; Louis Renault, ‘La "traite des blanches" et la Conférence de Paris au point de vue du droit international’, *RGDIP*, IX, 1902, pp. 497-529. See also Paul Appleton, *La Traite des Blanches*, A. Rousseau, Paris, 1903.

3. 'the commendable object': the conclusion of the preparatory *projet de Convention*

Despite its initial reserve, Britain came to support the preliminary *projet* on the white slave traffic and, once it did, was keen to ensure that its colonies acceded to it as well.

The British government was not given any respite in considering its next step. In September 1902, the *TUC* publicly raised the issue, as did somewhat later, the Bishop of London.⁷⁸ Delcassé pressed the *FO* for its response to the two *projet*. Then, the *IBSWST* secured Germany's backing for its third congress, for October in Frankfurt. Each national committee asked its respective government to send official representatives. The *NVA*, led by Lord Aberdeen (who had succeeded as president the deceased Duke of Westminster and whose wife, Ishbel Maria Hamilton-Gordon, had been inaugural president until 1899 of Canada's *NCW*) again sought official British representation.⁷⁹

The *FO* recoiled, observing that Snagge had 'warned' them about such a conference (but to be in Switzerland), and was 'strongly' of the opinion that 'we should hold ourselves aloof' from where '*maisons de tolerance*' would be discussed.⁸⁰ Reassured that this was not on the program, the *HO* was more positive, thinking that official representation 'would have been desirable' but that notice was too short, with Snagge absent. There was no chance of allowing Coote—whom Snagge, supposedly, regarded as, 'not quite the person, to say the least'—to represent Britain. So, the decision, with Snagge's 'entire approval', was that official British representation was 'inexpedient'.⁸¹ Yet, as the *FO* soothed Coote, it was important to 'show interest' in such an 'important subject'.⁸² So, the *FO* sent consular (not diplomatic) officials, not as a formal delegation or to vote on any resolutions, only to report.

Coote, apparently unaware of the esteem in which he was not held, profusely thanked the *FO* for this 'gracious act', which he later advised met with the 'mutual congratulation' of all 269 delegates from fourteen governments--nearly all Europe--with the Germans 'not slow to recognise the value of this friendly act', which was 'especially gratifying and helpful' to *NVA* delegates.⁸³ The *Kaiser's* message to the congress, of early October, and the support of France, whose justice ministry was already drafting a bill for the future convention, while pressing Britain, as to whether Egypt would adhere, mounted the pressure on Britain.⁸⁴ Britain's consul-general told the conference that existing English law met practically all the

⁷⁸ *Times*, 2, 5 & 23 September 1902.

⁷⁹ Letter, Coote to Lansdowne, 25 September 1902, FO83/1943, TNA.

⁸⁰ Minute, Sanderson to Lansdowne, 29 September 1902, FO83/1943, TNA.

⁸¹ Letter, *HO* (Cunynghame) to *FO*, 6 October 1902; despatch & telegram, *FO* to Sir Frank Lascelles (Berlin), 6 October 1902; minute, Sanderson to Lansdowne, 15 October 1902, FO83/1943, TNA.

⁸² Letter, *FO* (Sanderson) to Coote, 6 October 1902, FO83/1943, TNA.

⁸³ Letter, Coote to Lansdowne, 16 October 1902, FO83/1943, TNA.

⁸⁴ *Times*, 18 November 1902. Egypt, with its many foreign residents, was considered a special case, and Britain decided it was up to its own government, as advised by its foreign (largely British) advisers, to decide if it would adhere.

obligations in the adopted draft convention. The *FO* conceded that the draft seemed to 'embody sound principles' but wanted confirmation that no further legislation was needed before Britain agreed to sign.⁸⁵

The *FO*'s scepticism was undermined in November, when Snagge had a change of heart, after reading the consul-general's 'very satisfactory' report. He was impressed by the scale of the conference, support from European powers and unanimous resolution that the two Paris *projet*, as drafted by Bérénger, be adopted as stood, otherwise calls for further modification would endanger their authority and success. Some parts were of a 'more or less debatable character' but others were 'worthy of serious consideration'. He emphasised this, by providing press reports of German girls lured into a *USA*-based, worldwide trafficking network. Snagge's new stance also swung the *HO* firmly behind the Paris agreements.⁸⁶

The *HO*'s under secretary, Sir Kenelm Digby, confirmed that the offences detailed in Articles 1 to 3 of the proposed convention were covered by those in the *CLAA 1885* and, as that was an amending act of the *Offences against the Person Act 1861*, they came within the meaning of the *Extradition Acts 1873-95* (which applied to all colonies, except Canada). So, no new legislation was needed to make procuration an extraditable crime. The Crown was therefore competent to include it in extradition treaties without prior reference to parliament. Snagge had cautioned that one complexity was that the *CLAA 1885* prohibited procuration, even with consent, of females without reference to age, whereas European laws, and hence what constituted for them an extraditable crime, did. Thus, all parties to the convention may not have similar laws against the acts prohibited by the convention. Yet, Digby was unfussed: this was no 'substantial difficulty', as extradition treaties often varied in crimes listed. Usually, extradition was only granted when the offence was punishable in both parties to an extradition treaty. Procuration was not yet a crime in some British extradition treaties. Yet, again, he thought this was not 'an objection of substance'. Even if such a treaty was not amended after the convention was signed, while that foreign state's law remained 'imperfect', the state might be willing to surrender to Britain an accused regardless, although Britain would not be so bound: so, 'no harm would be done'.⁸⁷

With reference to Article 5, Home Secretary, Aretas Akers-Douglas, had no doubt procuration could be added to the list of crimes in Britain's existing extradition treaties, with those parties which also ratified the convention. So, no supplementary treaties with them would be

⁸⁵ Telegram, Lansdowne to Lord Cromer, 7 November 1902, FO83/1943, TNA. There are numerous *FO* minutes on this file assessing the convention and the *HO* advice. The parliamentary counsel, Sir Henry Jenkyns, was also consulted.

⁸⁶ Letter, Snagge to Lansdowne, 24 November 1902, FO83/1943, TNA.

⁸⁷ Letter, *HO* (Sir Kenelm Digby) to *FO*, 10 December 1902, FO83/1943, TNA.

necessary. Finally, on Article 6 and *Commissions Rogatory*, he did not think that England's existing law should be amended and, so, he could not dispense with the need for his order to a magistrate to take evidence for extradition requests or that such commissions could pass directly between magistrates and foreign representatives. Nonetheless, he noted the guarded terms of the article, which did not require a ratifying state to do anything not within its own law. So, this was also not an issue and, subject to that, he had 'only to suggest' that, if Lord Lansdowne concurred, it was 'desirable that in every way' Britain should 'support and encourage' the Paris proposals to deal with this 'serious evil'. The *FO*, he continued, as soon as possible, should advise France, for relay to the other governments, that Britain was 'properly' ready to sign and ratify both *projet*.⁸⁸

So, by early 1903, Britain, with the *FO*'s 'entire approval', was finally ready to sign.⁸⁹ This was timely, because the momentum of support, at home and abroad, and, thus, pressure on the British government, over the two *projet* had continued to build. France had already introduced a bill to meet its pending treaty obligations and Spain soon followed. France again pressed Britain to sign and, perhaps pointedly, made Coote a *chevalier* of the *Légion d'Honneur*, a rare award to a foreigner of its highest distinction for upholding the Republic's ideals. Perhaps out of resulting embarrassment, Snagge was knighted for his role in Paris.⁹⁰

Coote and the *NVA* had no intention of resting on their laurels. In February, they reported to the *HO* the progress of their work, done in close cooperation with the police, by meeting, warning and, in some cases, repatriating European 'victims of this criminal traffic', arriving at ports, railways stations and cities. They also took declarations from those suspected of being 'white slaves', which they then provided to the police, to assist in prosecution of offending recruiters. In March 1903, Coote and Bunting, with Lord Aberdeen, led a large deputation to meet Akers-Douglas, pressing him to 'deal with this evil'. They claimed to represent 21 societies, both sectarian and secular. Supporting aristocrats included Lord Stamford, the Dowager Duchess of Newcastle, the Countess of Strafford and Lady Frances Balfour; the latter, rare not only as a Liberal but also as president of the *National Society of Women's Suffrage*. Reinforcing their apolitical nature, former Conservative parliamentarian Sydney Gedge and former Treasury Solicitor and Director of Public Prosecutions, Sir Augustus Keppel Stephenson, attended.

The highly articulate Alfred Barry, Bishop of Rochester (a low churchman, previously Bishop of Sydney, 1884-89), did most of the talking. He explained that their activities and expressed

⁸⁸ *ibid.* Akers-Douglas was 1st Viscount Chilston.

⁸⁹ Letter, Lansdowne to Sir Edmund Monson, 2 January 1903, HO144/535/A48032/40, TNA.

⁹⁰ *Times*, 16 March, 30 April 1903 & 9 November 1903; 14 December 1904. FO83/1943, TNA.

hope for continued official cooperation. Akers-Douglas expressed his 'entire sympathy' and offered 'cordial cooperation'. He defended Britain's record, saying the deputation had acknowledged that the *CLAA 1885* worked 'satisfactorily' and expressing hope that foreign countries would adopt similar legislation to facilitate mutual extradition of offenders. He cited the importance of the London congress of 1899 in arousing interest among foreign governments, ignoring the signal fact that Britain's government had declined official representation. He explained that a specialist officer would be appointed, as required by the convention, once it was ratified, to deal with the matter and would welcome the continued supply of *NVA* reports. The licensing of employment registry offices would be more 'difficult', requiring new legislation.⁹¹ The *NVA* was now clearly an accepted voice.

In late 1903, support for the Paris agreements widened. In England, the *United Committee for the Prevention of the Demoralization of Native Races by the Liquor Traffic* added its praise for this international cooperation. Riding high on the recognition of its international leadership, France again pressed Britain to sign, providing copies of its new legislation, which the *HO* conceded was a 'very comprehensive measure'.⁹² The *USA* forwarded a request from the *WCTU* that Britain's Emigrants' Information Office give *NVA*-like warnings to arriving American women. Britain was, in fact, ready to sign both but other governments caused delay over the *projet de Convention*.⁹³ Some states' criminal laws did not agree on ages of female majority, while Germany, especially, had doubts over the provisions for letters-rogatory.

By early 1904, France was impatient to finalise the two *projet*, feeling they should proceed, without waiting for all powers to agree and leaving respective local legislation until later, its ambassador putting this position to the *FO*. The *HO* was enthusiastic, which the *NVA* had ensured, through two previous representations. Lord Aberdeen and Bunting put a letter in the *Times*, extolling the *HO*'s support. Promising to be apolitical and non-sectarian, it called for public financial support. So, the *HO* advised the *FO* to sign both *projet*, as soon as possible. Ultimately, on 18 May 1904, only the *projet d'arrangement*, which allowed for administrative cooperation without new legislation, not the *projet de Convention*, was signed. Some powers, notably Germany, still held minor technical objections, as the latter required legislative changes, which it was then unable to take.⁹⁴

While other countries formulated their final position, the lobby groups did not relent. That year, Millicent Fawcett who, with the *USA*'s Carrie Chapman Catt, had founded at the 3rd

⁹¹ *NVA* report of 'Deputation to the Home Secretary on the Suppression of the White Slave Traffic', 18 March 1902, HO144/535/A48032/45, TNA. *Times*, 20 March 1903.

⁹² *HO* file minute, 13 April 1903, HO144/535/A48032/47, TNA.

⁹³ *Times*, 30 April 1903; HO144/535/A48032/46, TNA.

⁹⁴ FO83/2177, TNA

ICW congress at Berlin in 1904, the *International Women's Suffrage Alliance (IWSA)*,⁹⁵ emphasised at a *NUWW* conference in York, the importance of persuading Europe's governments to abandon the regulation of vice as a necessary step to ending white slave trafficking. Also, Lord Aberdeen and Bunting published yet another lengthy letter in the *Times*, keeping the issue before the public and government.⁹⁶ The collective deposit—by Austria-Hungary, Britain, Denmark, France, Germany, Italy, Russia, Spain, Switzerland, Sweden-Norway--of ratifications, was delayed until 18 January 1905. (Brazil and Belgium followed soon after.) The international obligations thereby accepted were almost immediately exercised, with Russia asking Britain for its 'central authority' for communications.

The *CO* now decided for the first time to inform the colonies, ask if they desired accession and provide them with 'model' legislation. In early 1904, France, while pressing Britain to sign the *projet*, had asked whether its signature would bind its colonies. Surprisingly, the *FO* was unsure, presumably, as it did not know whether the *projet* should be seen as a non-political treaty, being on such an innovative subject. So, it asked the *HO* and, for the first time on this subject, the *CO* for their respective views. The *HO* wanted both signed as soon as possible and suggested that there was 'every reason' for the colonies to take an active part in implementing the treaty obligations.⁹⁷ Apart from the colonies' own legislation, to meet their treaty obligations, should they agree to adhere, there was a very specific issue, which Akers-Douglas had mentioned to the *NVA* the year previous. The *HO* recognized that once the two were signed, 'it will be necessary to remember the formalities necessary to bring the offences within extradition law.' Such amendment would effect the extradition treaty obligations of all British possessions, except Canada, whose legislation suspended the imperial legislation.⁹⁸

The *CO*, for its part, cautioned that Britain should reserve the right to permit separate colonial adherence or, after giving the prescribed notice, termination. Yet, unusually, it seemed unaware that the extradition obligations would bind the colonies, excepting Canada, through existing extradition treaties, if the government amended imperial extradition legislation and issued the necessary *OiCs* to meet its treaty obligations, irrespective of whether or not its possessions chose adherence. The *FO* replied that the *CO*'s concern could be achieved along the lines of the two clauses, which France had suggested, based on the appropriate clause in the 1886 Berne copyright convention. So, it had instructed its Paris ambassador, when joining the collective signing only of the *projet d'arrangement*, at the *Quai d'Orsay* on the afternoon

⁹⁵ Also known as *Alliance Internationale des Femmes*.

⁹⁶ *Times*, 10 November & 14 December 1904. Elisabeth Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton*, Oxford University Press, New York, 1985; Ellen Carol Dubois, *Feminism & Suffrage: The Emergence of an Independent Women's Movement in America, 1848–1869*, Cornell University Press, Ithaca, New York, 1999.

⁹⁷ Letter, *HO* (Edward Troup) to *FO*, 15 February 1904, FO83/2177, TNA.

⁹⁸ *HO* file minute, 18 April 1903, HO144/535/A48032/48, TNA.

of 18 May, to make a separate declaration under Article II of the *proces-verbal*, concerning its application to colonies. After ensuring neither office objected to ratification and, then, publication of the *projet*, the *FO* agreed that the *CO* give it to the self-governing colonies, provided they did not publish it.⁹⁹

So, at the end of January 1905, the *CO* sent a circular despatch to the colonies. This explained that, having signed and ratified one ‘agreement’ or ‘convention’, Britain had reserved the right of adhering or denouncing it on behalf of each colony. Accordingly, the colonial secretary, Alfred Lyttelton, said that he ‘would be glad to learn’, which colony wished to adhere. Those governments, which did, would need to consider what additional legislation would be required. If, ‘for any reason’, should adhesion ‘be impracticable’, he had ‘no doubt’ that such governments would assist as far as possible in realising the convention’s objective, which had the ‘fullest sympathy’ of the imperial government—a somewhat belated stance.¹⁰⁰

4. ‘one for the Commonwealth’: Australia’s response to the convention

The Commonwealth had limited powers on criminal issues but was willing to support the *projet*. Showing deference to the states, the Commonwealth was able slowly to secure their support for accession to the treaty.

The colonial response was underwhelming, to say the least. Most replied promptly but negatively. None of West Indies agreed to adhere, replying variously that it would be ‘useless’, ‘unnecessary’ and to ‘no advantage’. The only Asian colony to agree was Ceylon. In the Mediterranean, Cyprus but neither Malta nor Gibraltar agreed. In Africa, only the Gold Coast, Gambia and Southern Rhodesia agreed, with all four South African colonies declining. Newfoundland and the Falklands also declined, while Canada deferred its decision, asking first to see Britain’s draft legislation.¹⁰¹ In the South Pacific, Fiji declined but *NZ* signified at the end of June its desire to adhere. Overall, most were willing to assist in achieving the convention’s objectives but felt that they lacked the necessary machinery to accept formally the treaty obligations or claimed that the traffic did not exist in their territory. There had been no prior public discussion of the issue in *NZ* nor did the government announce its decision.¹⁰²

There had been almost nothing on this subject in Australia’s press.¹⁰³ A rare local comment was the ‘women’s point of view’ column in the socialist *Tocsin* in 1903, welcoming the attention that white slavery was receiving in Britain. Local press carried British reports of the

⁹⁹ FO83/2177; CO323/495/224-34, TNA; *Times* 15 February 1904.

¹⁰⁰ Circular despatch, *CO* (Lyttelton) to governors, 26 January 1905, vol. 31, CRS A1108 & vol. 24, CRS A11816, NAA. FO83/2177; HO45/536/A48032/50-109, TNA.

¹⁰¹ *Tocsin*, 9 April 1903.

¹⁰² The various responses are briefly noted at CO862/14/50, TNA.

¹⁰³ *Register*, 12 November 1901, 14 November, 13 December 1902; *Truth* (Brisbane), 1 February 1903; *The Sun* (Kalgoorlie), 15 February 1903.

ICW executive council meeting in September 1903 in Dresden, where Saxony's government had turned against regulated prostitution and Swedish delegates raised white slavery: noting the 'prominent part' played by delegates from some Australian states, notably *NSW* and 'Federated Australia'. The 3rd *IBSWST* congress in Frankfurt in October was reported, with the *SMH* observing that the issue was 'perhaps of the most vital importance to humanity'.¹⁰⁴ The *NVA*'s prosecution of a London bookseller selling indecent pictures from France was reported. In May 1904, an existing committee based at Sydney's *Young Men's Christian Association* (*YMCA*), stimulated by yet another letter from Coote, re-named itself the *NSW Vigilance Association for the Protection of Public Morals* and resolved to press the state government to amend its draft bills on girls and infant protection to embrace the provisions, which the *NVA* was seeking through amended English legislation. British press reports of Coote's activities at the *International Congress on Immoral Literature* at Cologne in November 1904 were carried, as was his statement on the publication of the white slave traffic convention text, though only by a number of regional, not, surprisingly, metropolitan newspapers. The *CO* then had not yet informed its colonies of its signing and Australasia's press largely ignored the treaty's conclusion, with only some belated, minor coverage.¹⁰⁵

The *CO*'s circular despatch arrived in Melbourne in mid-March 1905. George Reid had led, since the previous August, a weak, minority Free Trade government, which also did not control the senate. Hardly any of its legislation succeeded. Now, Lord Northcote emphasised to him the circular had not been sent to the states.¹⁰⁶ This was a very deliberate decision by the *CO*, which later observed, 'the matter has been dealt with as one for the Commonwealth', which alone was to decide on adherence and appoint a 'central authority'.¹⁰⁷ This step was one in a new, evolving method on dealing with Australian governments on treaties. On Federation, all circulars dealing with treaty matters had still been sent to all Australian governments. This first changed in early 1902 over the Japanese alliance treaty, though the states continued to receive circulars on some but not all bilateral extradition and commercial treaties. The multilateral sanitary and sugar conventions but not that on copyright were sent to all through 1902-03 but, in 1904, only the Commonwealth received circulars on the multilateral *ITU*, copyright, industrial property and sanitary conventions. In 1905-07 most but not all treaty circulars were only sent to the Commonwealth. This reflected a gradual shift by the *CO*, preferring the Commonwealth to take a more central role in treaty matters, reflected in its later disputed decision not to invite the states to the colonial conference of 1907.

¹⁰⁴ *SMH*, 7 May & 14 June 1904.

¹⁰⁵ *Freeman's Journal*, 26 November 1904; *Register*, 6 December 1904.

¹⁰⁶ Annotation on despatch, Northcote, 16 March 1905, vol. 31, CRS A1108, NAA.

¹⁰⁷ Minutes, (unknown) to Johnson & Green to Johnson, 6 & 7 December 1907, CO418/52/670, TNA.

In this instance, the *CO* seems to have overlooked or been unconcerned by a key constitutional fact, the Commonwealth had only limited powers over criminal matters. In the original discussion of the powers of a federal council in 1890, Griffith had cited the federal powers, including over criminal law, in the *BNA Act 1867* and seemed to assume this specific power should be similar for Australia. Although he was unclear, Deakin did not seem to share this view.¹⁰⁸ In 1891, the draft constitution bill provided for federal power over the 'Criminal Law so far as regards breaches of laws made by the Federal Parliament' but this phrase disappeared from the final version, which did contain two provisions, which survived the 1897 conventions and entered the final *Act*: Firstly, s.51(24) provided for the 'service and execution throughout the Commonwealth of the civil and criminal process and the judgements of the courts of the States'. Secondly, s.51(28) gave the Commonwealth power over 'the influx of criminals'. During the constitutional conventions of 1897, Garran wrote.

*Should the criminal law be assigned (as in Canada) to the federal government? There are obvious advantages in having one criminal law for all Australia. At the same time, there is no pressing need for a change of this kind, and it would be bad policy to overweight the Federal Constitution at the outset with provisions which are certainly not necessary to effective federation, and which add to the debatable matter of the Constitution.*¹⁰⁹

On the arrival of the *CO*'s despatch in 1905, Garran may have regretted this opinion.

In March 1905 Reid did not take a centralist position. He did not have the same close relationship, as either Barton or Deakin had had, with Atlee Hunt, who otherwise may have counselled a more assertive Commonwealth paramountcy. In fact, Atlee Hunt does not seem to have briefed his ministers or suggested a response. His assistant, Joseph Carrodus, merely translated the *projet*'s text The Commonwealth's only legislative powers of relevance were over immigration (as WA's premier later pointed out) and emigration, which could be used to either stop or 'interrogate' persons seeking to leave or enter Australia. With Reid then only passing through Melbourne briefly from Sydney to Perth, it was the influential acting prime minister, Allan McLean, who wrote to premiers in April 1905. A Scottish-born, conservative Protectionist, who had opposed federation, he asked that, as the subject 'largely' interested the states, whose 'machinery' would be required to make the treaty 'effective', whether the Commonwealth should adhere. The *CO* however, had encouraged the Commonwealth to make the decision unilaterally, perhaps overlooking that only the states had police authorities suitable for being nominated as the central authority. If his action was a step backwards on treaty implementation, he did not suggest separate state and Commonwealth adherence.¹¹⁰

¹⁰⁸ Proceedings of the Federation Conference, 1890, p. 105.

¹⁰⁹ Garran (1897), *op. cit.*, p. 146.

¹¹⁰ Circular letter, McLean to premiers, 8 April 1905, vol. 31, CRS A1108, NAA. John Rickard, 'McLean, Allan (1840–1911)', *ADB*, vol. 10, NCB:ANU, MUP, Melbourne, 1986, <http://adb.anu.edu.au/biography/mclean-allan-7413/text12895>.

Reid's government was then replaced within three months, by Deakin's informal Protectionist-Labour alliance, long before the final state replied to the Commonwealth in mid-November 1905. There had been very little in the local press on white slavery, while the debate on opium traffic was reaching its first peak in Australia at this time. From September to the end of the year, there were a few reports on claims of Chinese-run white slavery rings operating in the *USA* and Canada, which were obviously seen as of interest to Australians, in view of the strong sentiments surrounding Asian immigration and smuggling, including of opium. A later local report, on what today would be called a custody dispute, was framed in similar racial terms, as possible white slavery. There had been one article on Coote's celebration of the 1902 Paris conference and its results, as 'a great and noble' achievement.¹¹¹

In the meantime, four premiers had replied to Deakin on MacLean's query, supporting Commonwealth adherence. Queensland's did not. Tasmania initially failed to reply, before in November, answering that, it was 'willing to fall into line' with the majority view.¹¹² Atlee Hunt then briefed Deakin for the first time on the agreement, designed to prevent 'women and girls being enticed abroad for the purposes of prostitution', without offering a recommendation.¹¹³ So, Deakin asked Queensland to reconsider, 'in view of the commendable object'. The Liberal premier, Arthur Morgan, then indicated his agreement, perhaps being more amenable to a Commonwealth government of a similar party-coalition to his own.¹¹⁴

In London, the *HO*, during the long delay waiting for Australia and Canada's responses, had decided that no additional legislation was needed to meet Britain's obligations. Instead, it was only necessary to nominate a 'central authority', which was to be Frederick Bullock, of New Scotland Yard. His tasks would be to collect information, correspond directly with the 'central authority' of other signatories, keep a watch at British railways and ports on persons involved in the traffic, as well as agencies which offered women or girls 'situations abroad'. He was also to communicate with victims who, would be housed in 'suitable homes', pending repatriation to their home country, if they so desired. The *HO* noted the valuable assistance given to Bullock by the *NVA*.¹¹⁵ The *CO* seemed unconcerned with the largely negative response from the colonies or the long delay in Australia and Canada answering. At the end of 1905, it had sent two further circulars: one, advising that no 'model' ordinance had been

¹¹¹ *The Newsletter*, 2 September 1905; *Colac Herald*, 17 November 1905; *West Gippsland Gazette*, 28 November 1905; *Narromine News & Trangie Advocate*, 22 December 1905; *The Carcoar Chronicle*, 22 December 1905; *The Richmond River Express & Casino Kyogle Advertiser*, 22 December 1905; *The Shoalhaven News & South Coast Districts Advertiser*, 23 December 1905; *The Scone Advocate*, 29 December 1905; *The Muswellbrook Chronicle*, 30 December 1905.

¹¹² Letter, Tasmanian premier to prime minister, 9 November 1905, vol. 31, CRS A1108, NAA.

¹¹³ Memorandum, Atlee Hunt to Deakin, 20 November 1905, vol. 31, CRS A1108, NAA.

¹¹⁴ Letter, Queensland premier to prime minister, 13 December 1905, vol. 31, CRS A1108, NAA.

¹¹⁵ CO323/503/326-7, TNA.

drafted, as new British legislation was unnecessary; the other, was on Bullock's appointment and duties, plus the identity of the 'central authority' in each colony, adhering to date. The *CO* also asked all other colonies to likewise advise their *nominee*, for relay to Bullock, who should also receive their regular police reports. Lyttelton clarified that, despite the name of the treaty, it applied 'to all women without distinction of race or colour', perhaps a pointed reminder to its generally more racial-discriminatory colonies. Attaching an updated list of adhering countries, he said it was 'highly desirable' that all colonies adhered.¹¹⁶

This despatch arrived just days before Queensland's to Deakin belated reply in early February 1906.¹¹⁷ Atlee Hunt thought the Commonwealth needed to expedite its response.¹¹⁸ Before it so did, Deakin confirmed with attorney-general, Isaac Isaacs, his assumption that no Commonwealth legislation was required.¹¹⁹ So, at the month's end, he sent notification through Lord Northcote to the *CO* of the Commonwealth's desire for adherence and nominated each state's chief police officers, as the 'central authority' for communication with Bullock. He then advised the premiers accordingly.¹²⁰ There was almost no public notice of this decision. SA's premier, Tom Price, was the only political leader to have briefed the press. After the Commonwealth's request for accession, in February 1906, the matter then largely faded from public view in Australia. The absence of reported instances of white slave or obscene publications trafficking in Australasia meant there was nothing similar to the active lobbying of legislators by women's and religious organisations over opium. The issue was only just kept alive by sporadic reports from overseas in the Australian press. White slavery's discussion at the *ICW*'s conference in Paris in July 1906 and, especially, at the 4th *IBSWST* congress there in October, hosted by Bérenger's *Comité Français*, were reported, but little thereafter. So far, this was only a governmental issue—'la voix publique' there, was silent.¹²¹

Over the next two years the *CO* merely kept the colonies informed of foreign and colonial adhesions to the agreement, as well as nominations of the respective central authorities of the convention's parties. Otherwise, the *CO* did not raise the treaty in a policy sense, ignoring the *HO*'s suggestion that obscene publications but not white slave traffic be included in the already crowded agenda of the colonial conference of 1907.¹²² While the colonial prime

¹¹⁶ Circular despatch, *CO* (Lyttelton) to governors, 10 November 1905, CO323/503/343; CO862/14/123, TNA. The new signatories were Italy, Russia, Belgium, Portugal and Brazil.

¹¹⁷ Circular despatch, *CO* (Lyttelton) to governors, 27 October 1905, vol. 31, CRS A1108, NAA.

¹¹⁸ Memorandum, Atlee Hunt to secretary of AGs, 3 February 1906, vol. 31, CRS A1108, NAA.

¹¹⁹ Memorandum, Isaac Isaacs to prime minister, 15 February 1906, vol. 31, CRS A1108, NAA.

¹²⁰ Letters, Deakin to governor-general, 20 February 1906 & Deakin to premiers, 27 February 1906, vol. 31, CRS A1108, NAA.

¹²¹ *SMH*, 8 August 1906; *Register*, 19 October & 29 November 1905; *SMH*, 19 October & 16 December 1905; *Age*, 20 March 1906; *Colac Herald*, 19 October 1906; *West Gippsland Gazette*, 30 October 1906; *Queanbeyan Age*, 16 November 1906.

¹²² Letter, *HO* (Cunynghame) to *CO*, 29 August 1906, CO323/520/272-8, TNA.

ministers were in London for that, the foreign secretary tabled in parliament Snagge and Bullock's report on the *IBSWST* congress in Paris, which was not sent to the colonies.¹²³ Except by accident on one occasion, the *CO* pointedly did not send any of these circular despatches to Australia's states. In late 1907, Deakin asked the *CO*, through Northcote, whether he could share these with the states. When Lord Elgin agreed, Deakin did so, but through the governors, not directly. The last communication, for now, from the *CO* on the subject, was at the end of 1908, advising the significant accession, six months prior, of the *USA*, which had not attended the conference in 1902. Deakin read this but the Commonwealth saw no need to take further action in any regard.¹²⁴

Through 1906-09, white slave trafficking did not fade as a public issue in Britain, as it did in Australia, largely because the *NVA* would not allow it. Celebrating its 21st anniversary at the Duke of Westminster's Grosvenor House in May 1906, it looked forward to its next step. That came in October, in Paris, when the *Comité Français* hosted an *IBSWST* congress, after Coote had returned from Budapest, adding Hungary to the growing list of supportive governments. Official British attendance there was no longer even debated by officials. Snagge attended again, with Bullock. President Armand Fallières welcomed all to the *Palais de l'Élysée*, where Lord and Lady Aberdeen fulsomely praised France's 'epoch-making' leadership. He responded with kind words about Britain's delegation. Bérenger briefed the 300 delegates on progress, who resolved that all 'civilised countries' should adopt legislation ensuring greater surveillance of seaports and frontiers, restricting direct postage to children and preventing theatrical agencies, 'under the cloak of art', recruiting for prostitution.¹²⁵

The *NVA* continued its public effort at home, celebrating at its annual conferences the 'united action [which had] led to international agreement' by Europe's powers, the formation of affiliated committees in Egypt, the *USA* and parts of South America, financial contributions from individuals and, even, banks and, wider recognition of its work by foreign governments. Enormous encouragement ensued in June 1908, when the cause crossed the Atlantic for the second time (there, Brazil only had signed the *projet*), with the *USA* acceding. This was now a truly multilateral treaty. Soon after, New York's police commissioner voiced his concerns about the extent of the traffic there. Female activism also did not abate. The *NUWW*'s Louise Creighton, wife of the former Bishop of London, addressed a women's meeting on the issue at a Pan-Anglican congress, bringing the cause to Establishment women. At another level of the social scale, the Salvation Army's Florence Booth, Bramwell's wife, spoke out about the 'unspeakable fate' of the many European 'victims of [the] terrible conspiracy', which was this

¹²³ *Times*, 6 May 1907.

¹²⁴ Vol. 31, CRS A1108, NAA.

¹²⁵ *Times*, 16 May, 18 September, 10, 23, 25 & 25 October 1906; 22 June 1907.

‘dreadful traffic’. At the *ICW* congress at Toronto in June 1909, Lady Aberdeen, whose husband headed the *NVA*, spoke to more political women on peace, arbitration, suffrage and white slavery, when re-elected president.¹²⁶

The *NVA* was also active behind the scenes. During 1906-07 it formed a joint committee with the *London Council for the Promotion of Public Morality*, the *JAPGW* and the *London Committee of Deputies of the British Jews*, to draft new legislation against the traffic. By mid-1908, this committee advocated amending both the *CLAA 1885* and the *Vagrancy Act 1898*. The *NVA* was now acting more like an official advisory council, than a lobbying group. The *NVA*’s Coote and committee chairman, David Alexander, put these proposals before Yorkshire-born *HO* Liberal under-secretary, Herbert Samuel, pressing for Gladstone to receive a widely representative deputation. They wanted the proposed legislation in place before the 5th *IBSWST* conference planned for 1909 or 1910. Gladstone was amenable to all; but later sent advice there was no chance of such legislation proceeding in the remaining parliamentary session. If the *NVA* organized a private member’s bill in the next session, he intimated that the *HO* would be fully sympathetic, but could not offer ‘special facilities’.¹²⁷

The *NVA*-proposed meeting with the *HO* did not take place until the end of March 1909. In place of an absent and apologetic Gladstone, Samuel, supported by Bullock, met Alexander and Coote, who were supported by Lord Braye, the bishops of London and Southwark, the Chief Rabbi and some *MPs*. The deputation explained its legislative proposals, which they hoped to have realized by the *IBSWST* congress in Madrid. Samuel expressed his sympathy without entering any commitment.¹²⁸ The *NVA*’s draft bill duly arrived in the *HO* in May 1909, after a separate and unsuccessful bill to amend the *CLAA 1885* was introduced on 6 April into the Commons by the Liberal, Philip Whitwell Wilson and Hugh Law, a barrister from the Irish Parliamentary Party.¹²⁹ Gladstone and Samuel conceded under questioning there, that they might have to ask parliament for new, more drastic powers. In the end, the building political crisis over the Liberal’s ‘People’s Budget’ ensured that there would no legislation on white slavery that session. Gladstone rejected proposals that he should send Britain’s police report on white slavery to the other Paris signatories, which suggested that there was still some official coolness in Whitehall towards the agreement.¹³⁰

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¹²⁶ *Times*, 15 February, 13 June & 17 September 1908; 2 & 25 March, 21 June & 11 December 1909.

¹²⁷ HO45/10568/175440, TNA.

¹²⁸ Record of the *HO* meeting with the deputation, 30 March 1909, HO45/10568/175440/178486, TNA.

¹²⁹ *JCH*, vol. 164, 6 April 1909, pp. 102, 123, 218; *HCD*, vol. 3, 1909, p. 927.

¹³⁰ *Times*, 31 March 1909.

In 1904 and 1910, three multilateral treaties on white slavery and one on obscene publications, all signed in Paris, represent the first on what is now called transnational criminal law. The former was even more significant, by creating the first multilateral extradition provision—a subject, which stubbornly remained (and remains) largely in bilateral treaty form. As with most multilateral treaties at this time, the initiative came first from Continental governments, notably those of France and Germany, with Britain's drawn in, after some diffidence, by the vociferous lobbying of its *NGOs*, especially the *NVA*.

Britain then invited the accession of its colonies to all these treaties. With respect to that of 1904, the colonial response was originally mainly negative. Ultimately, four self-governing colonies (Canada, Newfoundland, *NZ* and the Commonwealth) but none of South Africa's did adhere. In Australasia, there were variously in the different colonies, local branches of British (and some American) *NGOs* but, as yet, nothing like the campaigns on these subjects, as there was in Britain, Europe and the *USA*; or, like that in Australia, on the separate campaigns against traffic in opium and plumage birds. This would soon change.

This first white slave traffic treaty marked represented an important foundation stone in the development of what is now called transnational criminal law, both with respect to the specific subject and the first step towards a multilateral extradition agreement. The drive behind it came overwhelmingly from '*la voix publique*', not government, especially in Britain. Australian governmental passivity would soon come under the same public pressure.

Chapter 5

‘an affront to women voters’: white slave and obscene publications traffic-II

The multilateral conventions for suppression of white slave and obscene publications traffic represent the base foundation, especially because of the former's extradition provisions, of today's transnational criminal law under treaties. Significant domestic legislation followed these treaties, including in Australia, emphasising the narrowing gap between modern international and domestic law. These treaties, like so many others at this time were driven by the mobilising '*la voix publique*', including in Australia, and governments were little more than the agencies which, sometimes with reluctance and/or diffidence, eventually responded by concluding treaties and legislation.

Following the signing of these two agreements in May 1910, the British government was continually pushed by campaigners, both inside and outside of parliament, to legislate to meet better its treaty obligations. The NVA, as the leading lobby group on these issues, was by now accepted as a virtual partner of the HO, in drafting appropriate legislation. As this process continued, even after legislation was enacted in 1912, the CO pursued those of its colonies, notably in Australia, yet to adhere to the conventions and legislate appropriately. As more foreign governments gave support to the treaties, the imperial government became more anxious that all its self-governing colonies adhere and, thus, more frustrated with the Commonwealth, in particular, over its delay, on the white slavery convention.

One factor, behind the slowness of the Commonwealth and the states to respond more promptly, was the initial absence in Australia of the same level of public agitation, as in Britain, over the subjects of these treaties. Only from mid-1910, did governments in Australia start to come under public pressure to act. To some extent, as with the anti-opium campaign, racial sentiments underpinned some of this public agitation, with concerns over Asian exploitation of young 'white' females. The more significant public pressure, however, came from the increasingly assertive female political voice. Belatedly, local but often imperially and/or internationally linked, church and women's groups clamoured for Australian governments to support these treaties, especially that on white slavery. This issue is also significant because, for the first time, the Commonwealth appointed a female as its official representative to an international conference, albeit of a non-governmental character, of the IWSA. Subsequently, however, the Commonwealth declined a direct request from the IWSA for participation in an international inquiry on white slavery, similar to that on opium.

The other major factor delaying the Commonwealth over these treaties was the federal system, as was often the case in this period on treaties, with the required legislation falling within the powers of both the Commonwealth and the states. The Commonwealth's accession

to the obscene publications agreement came more easily, although the Commonwealth was the last, in March 1912, of the five self-governing colonies to signify a desire for adherence. After Britain ratified the white slave convention in late 1912, the Commonwealth was again the last of the five to adhere, in mid-1914, just before war erupted. Some of the necessary legislation was enacted, after much delay, but the Commonwealth had to continue to chase state governments to act, a process not finalised for another decade.

1. 'uniform and effective action' : the federal impediments to treaty making, 1910-11

The mobilisation of the public voice in Britain against prostitution and pornography eventually spread to Australia, where it led to the first legislative measures made with regard to the new treaties.

By 1910, international momentum against the white slave traffic had continued to swell. Spain had offered to host the 4th *IBSWST* in Madrid that year and invited interested governments to attend. Across the Atlantic, in late 1909, the *USA's* president publicly admitted to being startled by an official report on the traffic, which recommended appointment of special agents at embassies in Europe, to liaise with foreign governments. A special commission on immigration reported on the extent of the traffic there and, at the same time, a New York grand jury successfully prosecuted a man for procuring young women for brothels.¹ In early 1910, France invited governments to a conference in Paris on suppressing the traffic in obscene publications. Germany, whose concerns over the issue of *letters-rogatory* for prosecutions, which had largely stalled progress after the 1902 conference (some other signatories also lacked adequate legislation), now advised that its earlier objections could be solved by agreement to a formal convention, if it was similar to its own draft, with provisions based on current extradition treaties and the *Convention on Civil Proceedings* of 1905. So, Germany proposed revisiting the *projet* at this conference.²

In contrast to its diffidence in 1902, the *FO* was now more comfortable with these Franco-German proposals. Germany indicated that it shared British views and would commend these to France. A crucial issue for Britain was that it should be made clear that the age of majority in civil law, which applied in the white slave agreement, should be that of the state whose criminal law was being applied. Britain held Germany's proposed amendments to be slight and reasonable. France soon indicated its happiness. So, the *FO* concluded that it 'should be easy to agree'. On obscene publications, the *HO* was comfortable with France's proposal, that the convention should be confined to addressing the manufacture or trade in such works, if they affected another country and prosecutions were made under the laws of the exporting

¹ *Times*, 21 July 1909 & 16 April 1910.

² Letter, *HO* (W. P. Byrne) to *CO*, 9 April 1910, CO532/20/192-203; CO323/568/421-431, TNA.

country. There was some difference between the definition of 'obscene' in the *NVA-HO* draft bill and France's, which did not extend to 'grossly offensive or disgusting'. Germany's definition was closer to Britain's. The *HO* and *FO* agreed that Britain's delegates should only be authorised to sign a *projet* not a convention and appointed no ministers but, along with Bullock, the respective deputy *HO* and *GPO* heads.³

Just before the conference, the *CO* considered colonial adhesion to any resulting agreements. France 'hoped' that colonies would be invited to accede.⁴ Winston Churchill, as colonial under secretary, agreed that this was 'most desirable' and deemed the colonial provision in the draft treaties 'satisfactory'.⁵ Given that it was 'far too late' to consult the colonies, the colonial secretary, Lord Crewe, agreed to France's proposal that Britain share a joint declaration on their respective colonies, similar to that made for the 1904 *projet*, reserving a right to denounce or allow their colonies' adherence. Crown colonies were not permitted a choice, as the *CO* thought that, extending the treaties to them, might 'occasion some difficulties', due to 'peculiar Eastern religions' in some, on which, *IO* guidance was sought.⁶

These developments took place around the general election of January-February 1910, which produced a very close result, with Asquith's Liberals only winning two more seats than the Conservatives. In early March, after parliament resumed, William Beale, an elderly Birmingham Liberal, who had supported the *Women's Enfranchisement* bill two years previous, introduced the *Post Office (Lotteries and Obscene Matter)* bill, providing for greater powers for the *PMG* to prevent postage of obscene matter. Apart from fellow Liberal and noted Congregationalist, Sir Albert Spicer, he gained other cross-bench support--John Wilson, a *Lib-Lab*, Primitive Methodist and former coal miner; Arthur Henderson, Congregationalist-turned-Methodist lay preacher, mechanic and trade unionist, who had just resigned as Labour party leader; Scottish Unionist, Sir Henry Craik and Conservative barrister, John Butcher. The bill was not passed before Britain faced another general election at the year's end.⁷

A week after that bill was introduced, the experienced Liberal, Joseph King, introduced a bill to amend the *CLAA 1885* and *Vagrancy Act 1898*, to provide for further protection of women and girls, greater restraint of immorality and vice, plus significantly, new provisions against aliens convicted of offences against decency and morality. The latter was clearly directed at white slavers. The bill's principal supporters had the expected profile. From the Liberals,

³ The main British policy file is HO45/11499, TNA.

⁴ FO10054Doms to CO, 4 April 1910, CO708/2, TNA.

⁵ Letter, *HO* (W. P. Byrne) to *CO*, 9 April 1910, CO323/568/421-2, TNA.

⁶ Minute, Green to Harris, 14 April 1910, CO323/568/421-431, TNA.

⁷ *JHC*, vol. 165, 15 February 1910 to 28 November 1910, Eyre & Spottiswoode, London, 1910, pp. 77, 83, 88, 97, 124, 133, 164, 179, 274.

there were three Scottish merchants, Sir James Gibson, Robert Balfour and John Bryce; the Nottingham lace manufacturer, Arthur Black; Leeds' newly elected Quaker, Edmund Harvey; the Welsh Baptist, Hay Morgan, and Congregational minister Silvester Horne. Charles Fenwick (a lay preacher) and Thomas Burt, both *Lib-Labs*, former Northumberland coal miners and Primitive Methodists, gave support but none did from Labour or the Conservatives. Gladstone fended off questions in the Commons over amending the *CLAA* 1885, explaining that this was being considered in the light of the Paris conference. The bill was withdrawn in June, when the *NVA*'s specific white slave traffic bill superseded it.⁸ New voices in Britain also pressed for legislative action. The *JAPGW* organised around thirty Jewish organisations to support an unofficial, international conference at London's Bechstein Hall from 5 April. There were representatives from Austria, France, Germany, Russia and the *USA*, notably the latter's *National Council of Jewish Women*. Samuel agreed to be guest speaker at the conference dinner, whose notable attendants included, Leopold de Rothschild, head of the family's banking business, people to whom Samuel had to listen.⁹

Two weeks later, French foreign minister, Stéphen Pichon, welcomed official delegates to Paris, praising the 1904 *projet* and the work of the *IBSWST*, for saving many females. He added that they had to complete the task, by deciding how offenders were to be punished. He also said that agreement on suppressing obscene publications presented new difficulties, as there had been no preliminary preparations or discussion. Any treaty needed to take account of different 'manners and cultures', so that it did not 'infringe' on 'respectable interests', such as of science, art and intellectual work, and only on the 'contagion of mere debauch and obscenity'.¹⁰ So, he commended Bérenger as conference president, claiming that he was renowned throughout Europe for supporting a free press. At the close, on 4 May, parties agreed under articles of the *White Slave Traffic* agreement, to the punishment of people who, 'in order to gratify the passions of another person', has 'procured, enticed, or led away, even with her consent, a woman or girl under age' or, 'by fraud, or by means of violence, threats, abuse of authority, enticed or led away a woman or girl over age for immoral purposes.'¹¹

⁸ *Times*, 19 April 1910. *JHC*, vol. 165, pp. 65, 77, 82, 91, 124, 131, 135, 164, 168, 178, 198, 211, 219, 236, 240.

⁹ Apart from de Rothschild and his wife Marie, there were two daughters of Sir Anthony de Rothschild; Annie Yorke, widow of Conservative politician, Eliot Yorke; Lady (Constance) Battersea, widow of Liberal politician, Cyril Flower; Lady (Louisa) Cohen, widow of Conservative politician, Sir Benjamin Cohen; Clarissa Bischoffsheim, widow of a wealthy Continental banker, and her widowed daughter, Ellen Cuffe, Countess Dowager of Desart; and, Lady (Helen) Faudel-Phillips, wife of London's former lord-mayor, daughter of the former proprietor of the *Daily Telegraph*, and sister to Sir Edward Lawson, then its present chief proprietor; *Times*, 28 March and 6, 7 & 8 April 1910. Generally, see Edward J. Bristow, *Prostitution & Prejudice: The Jewish Fight Against White Slavery, 1870-1939*, Oxford, Clarendon, 1982.

¹⁰ *Times*, 20 April 1910.

¹¹ *Times*, 12 May 1910. *International Agreement for the Suppression of the White Slave Traffic*, Paris, 4 May 1910 & *International Agreement for the Suppression of Obscene Publications*, Paris, 4 May 1910.

Domestic pressure on the British government over white slavery was unabated. In the middle of the conference, another cross-bench private members bill—the *CLAA (White Slave Traffic)*—was introduced, framed to amend not only the *CLAA 1885* but also the *Vagrancy Act 1898*. Supporting the Conservatives’ Alan Hughes Burgoyne and Alfred Hamersley, were Lanarkshire Liberal, John Howard Whitehouse and Labour’s Charles Bowerman, a print unionist and former *TUC* president. Two months later, Joseph King introduced a *Morality* bill, seeking to amend, not just those two acts but also the *Obscene Publications Act 1857*, *Indecent Advertisement Act 1889* and *Punishment of Incest Act 1908*.¹² Outside Westminster, Florence Booth and recently re-elected Liberal politician, Walter McLaren, who shared his wife’s (Eva) strong commitment to female rights, spoke on the issues to the *NVA*, again calling for ‘international legislation’.¹³ No domestic legislation went forward, due to another general election at the year’s end but prospects for Britain ratifying both treaties had warmed.

By late June, after reading the report of its delegation, the *HO* thought that it ‘very desirable’ that Britain should be an original signatory, although concluding that further legislation would be necessary to fulfil treaty obligations. The *HO* also advised the *FO* that it should proceed to ratification of the *Obscene Publications* convention. The *FO*, however, thought it best to wait until a number of other states were also ready.¹⁴ This delay in securing agreement on this ‘international legislation’ was critically discussed at the *IBSWST* congress in October 1910, the *FO*’s correspondence on which was tabled in parliament by Grey and Churchill.¹⁵

Meanwhile, in Australia, up to this date, there had been little public agitation on the issues covered by the two treaties. Then, this changed. Obscene publications traffic was first raised with the Commonwealth in July 1910, soon after Fisher’s Labour government took office. A deputation of the church-based, *Social Reforms Bureau*, led by Wesleyan lay-preacher, William Judkins, supported by two Wesleyan ministers, Alexander Edgar and Arthur Arnott, met Fisher.¹⁶ He rejected their call for a Commonwealth censor.¹⁷ He said that the Commonwealth under the *Customs Act 1901* had power to prohibit importation of ‘indecent or obscene’ material, which would be ‘fully-exercised’, but none to seize items sold in shops.

¹² *Times*, 22 June 1910.

¹³ *Times*, 28 May 1910.

¹⁴ Minute on report, *HO* (initials unreadable), 20 June 1910, HO45/11499; for discussion of associated legislation, see HO45/10568/175440, TNA.

¹⁵ *Times*, 7 November 1910.

¹⁶ A tireless campaigner against prizefighting, gambling, racing, drinking, dancing, prostitution, barmaids and opium, Judkins was once fiery but now fatally afflicted with cancer and a removed kidney. Graeme Davison and Keith Dunstan, ‘Judkins, William Henry (1869–1912)’, *ADB*, vol. 9, NCB:ANU, MUP, 1981, <http://adb.anu.edu.au/biography/judkins-william-henry-6889/text11943>. Arthur Arnott was also a Salvation Army officer, after whom, his father, William, a successful Scottish-born biscuit-maker, named the famed *SAO*.

¹⁷ *West Australian, Examiner and Mercury*, all 29 July 1910. This would be established in 1917 for wartime security reasons.

He explained that he ‘would like to have larger powers’ over trade and commerce ‘but that was a political question’, which he planned to address by a constitutional referendum.¹⁸

Although it is unclear whether the Paris conference was an influence, from mid-1910 NSW legislated greater protection for ‘girls’, amending the age of fourteen to sixteen for some offences, under the principal *Act* of 1900, and prohibiting employment of those under eighteen in brothels.¹⁹ White slavery explicitly re-appeared in Australian public policy debate, in October 1910, in the Commonwealth parliament. James Fowler, a Free Church Scotsman, had taken up journalism after gold-mining and just switched to the Liberals, claiming Labour was becoming too centralist. He introduced a private ‘Expatriation Regulation’ bill (which, strangely, Garran had helped draft) to restrict emigration of young people. He mentioned a young Australian girl being taken to India, by her Indian-born father, and raised as a Muslim. Within a few days, he fed press reports that Australian girls under sixteen years were being recruited for supposed theatrical tours in India (which English campaigners claimed was a common white-slaver ruse).²⁰ In Britain, xenophobia was a key element in concerns over white slavery. In Australia, anti-Asian sentiment fed similar concerns, as over opium, something shared by much Australian opinion. In the senate, James McColl, a Northumberland-born Liberal and English Presbyterian, raised this broader issue with Labour’s shrewd Scottish-born senate leader, Gregor McGregor, following a report in the *Argus* newspaper. He asked, whether the government would take administrative or even legislative measures to stop such employment, if it was proved inappropriate. McGregor, a former wrestler, did not automatically oppose this call from across the floor and replied strongly that no government member, who could read, would fail to notice such an important report and insisted that the government was responding.²¹ In bipartisan agreement, Fowler withdrew his bill on an assurance from Batchelor of action.²²

That week, Batchelor, as External Affairs minister, had Garran’s deputy, Gordon Castle, draft an appropriate bill. During its second reading, Batchelor told parliament that it was designed to protect Australian children outside the Commonwealth, to where, of course, its jurisdiction did not extend, by not allowing their improperly supervised emigration. He said that, the (then lawful) removal of a child to India was a matter that, ‘we all regret’, but that the courts had

¹⁸ Deakin had succeeded with the first referendum (1906) and, partly, the second (1910). Fisher’s was the third

¹⁹ 1 Geo. 5, no. 2 of 1910; 2 Geo. 5, no. 21 of 1911.

²⁰ *CPD, HoR*, vol. 41, 13 October 1910, pp. 4528–38; 1622/1/138 Part 1, CRS A1838, NAA. G. C. Bolton and B. K. De Garis, ‘Fowler, James Mackinnon (1863–1940)’, *ADB*, vol. 8, NCB:ANU, MUP, 1981, <http://adb.anu.edu.au/biography/fowler-james-mackinnon-6224/text10709>.

²¹ *CPD, Senate*, vol. 42, 18 October 1910, p. 4528; *Argus*, 18 & 19 October 1910; Amanda M. Rolfe, ‘McColl, James Hiers (1844–1929)’, *ADB*, vol. 10, NCB:ANU, MUP, 1986, <http://adb.anu.edu.au/biography/mccoll-james-hiers-7317/text12693>; G. Grainger, ‘McGregor, Gregor (1848–1914)’, *ADB*, vol. 10, NCB:ANU, MUP, 1986, <http://adb.anu.edu.au/biography/mcgregor-gregor-7362/text12789>.

²² *CPD, HoR*, vol. 41, 13 October 1910, p. 4538

prevented the reported case of children being taken to India. His bill, he explained, would ensure that 'no adult Asiatic may be permitted to take a child of European race or extraction from Australia without obtaining a permit', which he himself would have to sign. Under questioning from a somewhat dissatisfied Fowler, he claimed that the age limit of sixteen years in the bill was a misprint, which should have read eighteen.²³ He conceded that it would be 'absurd' to refuse absolutely all such cases but, if emigration was contractually not family based, a permit was required to ensure children were 'properly treated'. The bill reflected concerns over 'White Australia', protection of aborigines and, what Liberal Protectionist lawyer, Ernest Littleton Groom, called 'growing child rights', yet, it was also related to, as the Liberal's George Edwards said, English white slavery legislation.²⁴ The *Emigration Act 1910*, amended by the senate to make the age limit of males sixteen, while retaining eighteen for females, received assent on 25 November. Atlee Hunt advised customs officers and shipping companies of this, although he thought there would be few such cases.²⁵

Thereafter, from early 1911, both issues receded--as Labour concentrated on the referendum--only to return within days of the referendum's resounding defeat in April. With Fisher in London, Frank Tudor, minister for *T&C*, announced, on a Sunday, that he had been considering the restriction of entry into Australia of 'improper' books. This issue remained 'trade and commerce within the boundaries of a State' over which, due to the referendum defeat, he said, the Commonwealth lacked power. So, he encouraged the states to penalise heavily both display and sale of obscene and indecent material. He was aware of actions being taken in Britain but said that the Commonwealth could not do likewise.²⁶

So, he 'invite[d]' the premiers to consider, 'specially' a matter 'of very great importance', which was 'objectionable literature of an indecent or immoral character'. He explained that, although attention had been given to the matter 'many' times, the great volume of such books rendered doubtful effectiveness of a general Commonwealth import prohibition under *T&C* supervision. He also thought that this would require public naming of such works, which would thereby achieve their greater advertisement to 'a certain class of readers'. Titles could also easily be altered to evade control. So, he claimed that while, 'in no doubt' about the 'very great necessity' of discouraging the dissemination of 'pernicious literature', the 'only proper

²³ This was not correct. Atlee Hunt's instructions to Garran said 'sixteen' but Batchelor later changed it. Minute, Atlee Hunt to Garran, 21 October 1910, 1910/26, CRS A2863 & 1622/1/138 Part 1, CRS A1838, NAA.

²⁴ *CPD, HoR*, vol. 45, 9 & 10 November 1910, pp. 5834, 5991-6006; file 1622/1/138 Part 1, CRS A1838, NAA. *Emigration Act 1910*, no. 26 of 1910. Dean Jaensch, 'Batchelor, Egerton Lee (1865-1911)', *ADB*, vol. 7, NCB:ANU, MUP, 1979, <http://adb.anu.edu.au/biography/batchelor-egerton-lee-82/text8641>.

²⁵ *CPD, HoR*, vol. 46, 16 November 1910, pp. 6207-8; *CPD*, Senate, vol. 45, 11, November 1910, p. 6013 & vol. 46, 15, 16 November 1910, pp. 6068-6084, 6170; 1622/1/138 Part 1, CRS A1838, NAA. *Emigration Act 1910*, no. 26 of 1910.

²⁶ *SMH*, 1 May 1911; *Worker*, 4 May 1911. Janet McCalman, 'Tudor, Francis Gwynne (Frank) (1866-1922)', *ADB*, vol. 12, NCB:ANU, MUP, 1990, <http://adb.anu.edu.au/biography/tudor-francis-gwynne-frank-8874/text15583>.

and only successful' method was to 'heavily penalize' shop sales, adding perhaps pointedly, 'of the Commonwealth'. He 'venture[d] to express the hope' that states would take 'uniform and effective action' to make such literature's display or sale punishable.²⁷

One immediate result was that the Queensland government re-introduced in late July the *Police Jurisdiction and Summary Offences* bill, which provided for police seizure and destruction of obscene material. Originally proposed in 1909, the bill made good progress this time through the legislative process only to face sufficient opposition on some of its other aspects, such that it was not taken forward.²⁸

2. 'we have no power': the white slave traffic treaty and the Immigration Act, 1911-12

Although the federal system delayed its accession to the white slave traffic convention, the Commonwealth moved within its own legislative sphere, amending the *Immigration Act* in 1912 to target foreign procurers of prostitution, not just prostitution itself.

On 15 March 1911, prompted by reports that France and Germany were moving to legislate domestically, Britain joined both, along with Belgium, Italy, Spain and Switzerland, in depositing ratifications of the *Obscene Publications* agreement. Denmark followed shortly after, as did Luxembourg, plus Portugal and Russia, by year's end.²⁹ The *FO* had asked the *CO* to draw the colonies' attention to the provisions under Article 7 for colonial adhesion and Article 1(1), the latter of which seemed to the *FO* to contemplate the need for legislation, to give courts power to take cognizance of acts committed in foreign countries. Crown colonies were not to be informed until the *HO* had decided what, if any, legislation which Britain would adopt. (Within two months, the *HO* advised there was no need for new legislation.) So, three months after ratification, Britain informed colonies of this treaty (but not that on white slavery) for the first time. The circular despatch to the five self-governing colonies suggested that it was 'desirable' that they accede and asked if there was any 'impediment' to so doing or if any legislation would be necessary. This also made a special point of suggesting that the Commonwealth would, 'no doubt', communicate with the states, if necessary.³⁰

At this time, Fisher was absent attending the imperial conference in London. The *Declaration of London* was the only multilateral treaty on the crowded agenda, which concentrated, as usual and instead, on internal imperial questions, such as commerce, defence and communications. The *CO*, ignoring *HO*'s suggestion that obscene publications be discussed,

²⁷ Circular letter, Tudor to premiers, 1 May 1911, vol. 8, pp. 27-8, CRS A62, NAA.

²⁸ *Brisbane Courier*, 6 November 1909 and 9 December 1911.

²⁹ In 1912, Norway, Austria-Hungary and the Netherlands followed. Of the original signatories, Brazil did not ratify until 1924. The *USA*, where 'freedom of speech' was constitutionally enshrined, never signed.

³⁰ Despatch no. 271, Harcourt to Dudley, 6 July 1911, vol. 69, CRS A11816 NAA; CO532/29/189-193; CO323/578/463-468.

did not raise either convention with the colonial delegations, relying, instead, on the usual method of advising them by circular despatch. In Australia, in early August 1911, while the premiers were still digesting Tudor's proposals on obscene publications, this despatch arrived. Fisher, on reading this, days after returning from London, asked the premiers whether they agreed to the Commonwealth's accession and, if so, to send him their relevant legislation, for relay to the *CO*. The inevitable delay caused by Australia's federalism then unfolded.

While awaiting the Commonwealth's answer, the *CO* received from its other colonies a more positive response to this treaty than it had over the *projet* of 1904. Within weeks, Canada had agreed. South Africa, *NZ* and Newfoundland followed by the end of 1911. All advised that little or no new local legislation was required. Most of the non-self governing colonies and possessions also desired adherence, without raising any issues, except that some questioned whether Britain's own central authority should act on their behalf in dealings with foreign officials. By year's end, only Jamaica, Barbados the Leeward Islands, the Western Pacific and Fiji (which replied by February 1912) were being chased. The *CO* next advised that Germany would apply the convention to its colonies, a subtle reminder to the Commonwealth to reply.

Finalising the notification of accession of the other main, self-governing colonies, the *CO*'s Berriedale Keith observed wearily that,

*as usual nothing has come forth from the Commonwealth. It is essentially a matter for the States and whenever the States and the Commonwealth are both concerned, the rule now appears to be that neither does anything.*³¹

So, he drafted a despatch for the colonial secretary, Lewis Harcourt, pointedly informing the Commonwealth of the other four accessions. This despatch, of course, would not arrive for four weeks and, so, he had spoken and acted just a little too soon. For, coincidentally, a few hours earlier in Melbourne, Fisher had advised the governor-general of the Commonwealth's desire to adhere, indicating the states' 'willingness to co-operate'. This notification crossed with the *CO*'s latest reminder. Australian accession was confirmed on 12 April 1912.³²

Notable about the Commonwealth's response was its nomination of the *DEA*, as its central authority for this issue, unlike the other self-governing colonies and possessions, which had nominated senior police officers. For, unlike the central governments in South Africa and Canada, the Commonwealth had no police force. The *CO* did not contest this but had already balked at the *HO* nominating itself as Britain's 'central authority'. One called this 'curious', while Lambert went further, saying it was 'slovenly', before adding, 'an office cannot be an

³¹ Minute, Keith to Robinson, 21 February 1912, CO532/41/298; CO532/37/200-201; HO144/10130, TNA.

³² Letter, Fisher to Denman, 21 February 1912, League Obs1, CRS A981, NAA; HO144/10130; CO532/41/298-302; CO532/37/200-201, TNA.

authority here.’ In the end the *CO* decided that it was not its affair.³³ Over the remainder of 1912, the *CO* kept colonies informed of related developments, such as the nominated ‘central authorities’ of Britain and its self-governing colonies, the accession of Denmark for Iceland and its Antilles, plus that of the Commonwealth itself. The *CO* later raised its eyebrows again, when the Commonwealth sent the copies of Australian legislation direct to the German consul-general, for the *Zentralpolizeistelle zur Bekämpfung unzüchtiger bilder und schriften* (*ZPBUBS*) in Berlin³⁴, when such communications were supposed to use the so-called ‘diplomatic channel’. On this, as well, the *CO* decided not to worry, unless the *FO* objected. Apart from that, the subject essentially faded from imperial and Commonwealth policy-making, being superseded by the white slavery issue.

The only information that the *CO* had provided its colonies on white slave traffic, since asking if they wished to adhere to the 1904 convention, was a parliamentary paper, sent in mid-1911, with Snagge’s report on the *IBSWST* conference in Madrid of October 1910.³⁵ The next related communication was a circular despatch of late October 1912, two months after Britain, along with some other signatories (Austria-Hungary, France, Germany, Netherlands, Russia and Spain), had ratified the convention and its associated final protocol. The *CO* sent the colonies this correspondence on the conference and asked if, under the convention’s Article 11, they wished to adhere. This arrived in Melbourne, in early December 1912. A second despatch soon arrived; notifying that South Africa had already nominated its central authority but did not mention that Canada had also agreed to adhere. Atlee Hunt briefed Labour’s new External Affairs minister, Josiah Thomas, a former Cornish miner, without offering a recommendation. Although wanting to consult the states before replying to the *CO*, the Commonwealth took some subtle preparations for adherence.³⁶

In parliament, in what seems a contrived question and answer by two Labour members (and both Methodist lay preachers), James Fenton asked Thomas if he had noticed the ‘drastic’ legislation in Britain and whether he had the power to deal with persons trying to conduct their ‘nefarious practices’ here. Fowler, a Liberal, having pushed Labour into legislating against traffic out of Australia, through the *Emigration Act 1910*, now asked whether Thomas was ‘fully empowered’ to deal with incoming traffic, given the Commonwealth held the ‘entire power’ over immigration, as well as emigration. Thomas stumbled, admitting that he

³³ Minutes, Robinson, 18 February & Lambert, 23 July 1912, CO532/45/204-208. CO323/610/158-162; CO532/55/437-443; CO532/56/595-598; CO532/59/447-9; CO532/60/91-7; CO323/642/19-26, TNA. League Obs1, CRS A981, NAA.

³⁴ The English title used was *Central Depot for the Suppression of Obscene Publications*.

³⁵ Cd. 5651, May 1911, vol. 31, CRS A1108, NAA.

³⁶ Despatch no. 437, Harcourt to Denman, 30 October 1912; memorandum, unsigned (with Atlee Hunt’s typeface), undated, vol. 31, CRS A1108, NAA. CO532/43/443-50; CO532/51/3-6, TNA.

was 'not quite sure', while agreeing that the Commonwealth had full power over immigration and, with his government's earlier 'special' *Act*, power over emigration of persons (actually, females) under sixteen years of age. Beyond that, he conceded, 'we have no power' but was sure that parliament would not 'hesitate' to grant it. Indeed, parliament had already been asked to extend the Commonwealth's power over immigration including, without any special notice given to it, on white slave traffic into Australia.³⁷

The amending bill, which was then before parliament was enacted as the *Immigration Act 1912*, had been proposed originally the previous June. The main concern then had been over migration of people to Australia invalidated by disease. (Further changes were also later added due to new concerns about Asians, especially Chinese, evading immigration controls.) Of the ten new immigration exclusion categories, which Atlee Hunt had proposed, seven were concerned with health; one was for persons convicted of crimes attracting a year or more imprisonment; another was for crimes 'involving criminal turpitude'; the last, significantly, was for 'Anarchists, prostitutes, procurers, or persons who are supported by or receive any part of the proceeds of prostitution.' Thomas struck out the oddly placed 'Anarchists', changed 'criminal' to 'moral' turpitude but essentially preserved the recommendations drafted under Garran's supervision. So, the *Act*, given assent on 24 December, replaced section 3.(f), which declared a 'prohibited immigrant' to be a 'prostitute or person living on the prostitution of others', by inserting one additional word, 'procurer', into the new section 3.(g). Later, Atlee Hunt confirmed that this amendment was done to curb white slavery.³⁸

In early 1913, Fisher, on Thomas' advice on the *CO*'s October 1912 request, asked for the premiers' views, as to whether the Commonwealth should accede. He did not offer them a choice of separate accession.³⁹ Within a month, five had signified their concurrence, with WA the keenest and Tasmania, as was becoming common on treaties, suggesting that the effect on the state was so remote as to make accession unnecessary but was prepared to cooperate, if all other states agreed. *NSW* finally responded in March 1913 but only to ask for a copy of the 1904 *projet*. Once this was provided, it did not convey its agreement until mid-June, four months after it had been asked.⁴⁰ In the interim, the Commonwealth continued to receive updates from the *CO*, as to the international and colonial responses. By mid-March 1913,

³⁷ *CPD, HoR*, vol. 51, 16 December 1912, p. 7124. Thomas was appointed after the death of Batchelor. Bruce Pennay, 'Thomas, Josiah (1863–1933)', *ADB*, vol. 12, NCB:ANU, MUP, 1990, <http://adb.anu.edu.au/biography/thomas-josiah-8779/text15391>; J. R. Robertson, 'Fenton, James Edward (1864–1950)', *ADB*, vol. 8, NCB:ANU, 1981, MUP, <http://adb.anu.edu.au/biography/fenton-james-edward-6155/text10571>.

³⁸ Memorandum for the Minister, Atlee Hunt, 12 June 1912; minute, Atlee Hunt to Garran, 23 October 1912, 1912/46, CRS A2863; minute, Atlee Hunt to Shepherd, 16 October 1913, 1915/5651, CRS A1, NAA. *An Act to amend the Immigration Restriction Act 1901–1910*, no. 38 of 1912.

³⁹ Circular letter, Fisher to premiers, 10 January 1913, vol. 31, CRS A1108, NAA.

⁴⁰ The premiers' replies are in vol. 31, CRS A1108, NAA.

seven foreign governments had ratified and more were expected to follow. *NZ* had also informed the *CO* of its desire to adhere. The *CO*'s regular updates may have been designed to induce colonies to give timely notice of adherence.⁴¹

There were also two administrative matters associated with the convention, which the *CO* wished to confirm: the number of copies of relevant domestic legislation to be sent to France and, more importantly, the method for communication of extradition requests. Germany insisted that, under the convention, it had the right to accept such requests from both foreign governments and their colonies, only through the 'long' or diplomatic channel. The Dutch, however, held that colonies should communicate directly through their respective judicial authorities. Britain decided that it would use the diplomatic channel itself, while allowing colonies, which it hoped would agree to the same method, to accept requests through foreign consular (not diplomatic) agents in their territories or direct from judicial authorities. By May, the *CO* was concerned to settle the whole issue, John Risley saying it was 'high time' they instructed Crown colonies and, so, wanted to confirm if the two tardy self-governing colonies, Australia and Newfoundland, agreed to accession.⁴²

While the *CO* tried to marshal the final colonies' adhesion, the issue was kept before the imperial government by a fresh attempt to improve Britain's legislative framework. In February 1912, in the Commons, Conservative army officer and Anglican minister's son, Arthur Lee, introduced a bill to amend the *CLAA, 1885, Vagrancy Act, 1898* and *Immoral Traffic (Scotland) Act, 1902*. He had, as usual on this issue, cross-bench support, including from Burgoyne, Hamersley, Whitehouse and Bowerman--the proponents of 1910's unsuccessful bill--plus the Irish Catholic, Sir Thomas Esmonde, and James Millar, a Scottish Liberal and barrister. Over the next ten months, the bill underwent minor amendment in both houses but, finally, received royal assent in December.⁴³ Press reports of this did much to arouse, belatedly, the hitherto, somewhat somnolent public interest in Australia. (The *CO* ruled against Berriedale Keith's proposal to send this 'important' *Act* to the colonies in a policy despatch.⁴⁴) Britain's desire to finalise its colonies' accession was also driven by the coming *IBSWT* congress, to be held in London from 30 June. Cote, hailing the last congress's 'brilliant' success, asked the *HO* for representatives again. He told the *CO* that the

⁴¹ France was formally notified of Canada and South Africa's adherence, while *NZ*'s had informed the *CO* of its desire to adhere. One minor complexity needing further action was that adherence to the 1904 *projet*, to which South Africa had not as it did not exist when its four constituent colonies had adhered, was a prerequisite for ratification. Germany legislated to bring the treaty into force with respect to extradition. The Netherlands applied the convention to its East Indies.

⁴² Minute, Risley to Just, 27 June 1913, CO532/52/244-5. For other details see CO532/52/244-7, 367-470; CO532/56/37-42, 118-120, 378-83, 458-463, 665-680; CO323/56/311-313; CO532/57/499-515, TNA.

⁴³ *JHC*, vol. 167, Sess. 1911-12, pp. 18, 168, 214, 279, 385, 392, 395-407, 448-9, 454-6, 459.

⁴⁴ Minute, Keith to Davis & Just, 19 December 1912, CO532/50/102, TNA.

government had always 'taken a keen interest', despite these not being official conferences, and the *FO* had forwarded the *IBSWST*'s invitation to 28 foreign governments. Noting that *IBSWST*-affiliated committees now existed in Europe, the *USA*, South America and Egypt, he asked the *CO* to forward invitations to Canada (which had already decided on female representation) and South Africa, which both had committees. A diffident *CO* complied.⁴⁵

The *IBSWST*'s lack of an invitation to Australia, *NZ* and Newfoundland appears to have been based solely on the absence of an affiliated organisation there, not that they were not yet parties to the convention. (*NZ* had already asked the *CO* for accession but this had not yet been finalised or announced publicly.) Yet, Australian attendance was raised when *NSW*'s *NCW* representative to the *ICW* conference in *Den Hague* in May, Louise Vickery, offered her services to Reid, now high commissioner in London.⁴⁶ (She was the young widow of a much older and very wealthy Sydney businessman and sometimes politician, London-born Ebenezer Vickery, who had long financially supported Methodism, the *YMCA* and *YWCA*.⁴⁷) She did not need nor ask for funding, even offering to pay for her own cablegrams. Reid's office told her that the conference was not official and Australia was not invited but still referred her offer to Atlee Hunt, mentioning the invitations to Canada and South Africa.⁴⁸ In the long hiatus before Cook took over, Fisher declined making such a commitment. Labour was very much focussed on other issues, especially the combined constitutional referendum and federal election in late May, with both resulting in defeats, the latter to Joseph Cook's Liberal party, by one seat. On Fisher's last days in office, Atlee Hunt replied briefly, directly to Vickery, merely repeating that Australia had not been invited.⁴⁹

During Labour's last week, Atlee Hunt and his assistant, Joseph Carrodus, reminded Thomas about the convention, probably wishing to tidy up unfinished business before governments changed. Advising that five states supported the Commonwealth's adherence and that Tasmania was willing to join the others, though seeing it as unnecessary, Carrodus 'submitted' that the Commonwealth should advise Harcourt of the desire for accession.⁵⁰ Thomas agreed, though Fisher did not so inform the *CO*. Instead, he wrote yet again to the premiers, indicating that the Commonwealth would adhere and asking for their relevant

⁴⁵ Letter, Coote to *CO*, 22 April 1913, CO532/65/92-101, 261-277; CO532/60/174-178, TNA.

⁴⁶ Letter, Vickery to Reid, 22 May 1913, vol. 31 CRS A1108, NAA.

⁴⁷ A teacher before marriage, Louise focussed, after his death, much of her energy on the *NCW*. G. P. Walsh, 'Vickery, Ebenezer (1827-1906)', *ADB*, vol. 6, NCB:ANU, MUP, 1976, <http://adb.anu.edu.au/biography/vickery-ebenezer-4779/text7953>.

⁴⁸ Memorandum, Savage to Atlee Hunt, 6 June 1913, vol. 31 CRS A1108, NAA.

⁴⁹ Letter, Atlee Hunt to Vickery, 27 June 1913, vol. 31 CRS A1108, NAA.

⁵⁰ Memorandum, Carrodus, 17 June 1913, vol. 31, CRS A1108, NAA.

legislation. All states replied within a month, which was unusually prompt, but there was still some doubt within the *DEA*, whether all relevant legislation had been provided.⁵¹

While Cook followed this up, the *CO* had finally lost patience. On 11 July, days after the *IBSWST* congress closed, the *CO* confirmed the accession of Canada, South Africa and *NZ* and asked again for the Commonwealth's decision. This was due to arrive on 11 August but Harcourt would wait no longer, especially as the reply, if posted, would not arrive for another month. So, on 7 August, he cabled--not common procedure--expressing his 'trust' that the Commonwealth 'will shortly be in a position to concur' in accession, explaining that this was needed before issuing an imperial *OiC* under the *Extradition Acts 1873-95* to meet treaty obligations. (As these *Acts* applied to all colonies, except Canada, local *OiCs* would not be issued under local extradition legislation.) The next week, as Atlee Hunt briefed Glynn, the new Liberal minister, on the Commonwealth response, they received another communication--a report on the *IWSA* congress, of mid-June 1913, at Budapest.⁵² This--both the first attendance at and report by a female Commonwealth representative of an international, albeit unofficial, conference--proved the most important external influence on Australian policy.

3. 'the nefarious traffic': the awakening of Australia's female political voice, 1913

The mobilization of the public voice in Australia on white slavery was slower than in Britain but, as the especially female voice began to sound the Commonwealth moved to put in place process for what was effectively a ground-breaking multilateral extradition convention.

The passage of Arthur Lee's bill in Westminster in December 1912 had been reported with regularity in the Australian press. This galvanised a hitherto placid public opinion, within both church and, especially, secular women's organisations. In February 1913, an unsigned but initialled letter in Melbourne's press claimed that 'foreigners' were luring local girls to WA brothels. Victoria's controversial police chief commissioner, Thomas O'Callaghan, denied that even the 'faintest evidence' of such traffic existed and doubted that it did in other states. This unleashed a wave of criticism.⁵³ Prominent female activist, Vida Goldstein, had made white slavery, along with equal pay and marriage laws, her primary focus. She convened a *Women's Political Association (WPA)* meeting to discuss O'Callaghan, the mere mention of who brought cries of 'Shame!' She stressed the importance of getting their concerns better represented in the press, which had not taken up white slavery, as had

⁵¹ Circular letter, Fisher to premiers, 21 June 1913, and the various replies, vol. 31, CRS A1108, NAA.

⁵² Circular despatch no. 403, Harcourt to Denman, 11 July 1913; memorandum, Starling to the prime minister, 8 August 1913; Memorandum, Atlee Hunt to Glynn, 16 August 1913, vol. 31 CRS A1108, NAA.

⁵³ *Age*, 25 and 26 February 1913. O'Callaghan explained that women were not being drawn into this traffic because they could 'command such high wages and have absolute freedom'. He was later represented as corrupt in Frank Hardy's fact-based novel *Power without Glory*. Robert Haldane, 'O'Callaghan, Thomas (1845-1931)', *ADB*, vol. 11, NCB:ANU, MUP, 1988, <http://adb.anu.edu.au/biography/ocallaghan-thomas-7871/text13679>.

London's press. The WPA resolved to move the *Woman Voter*, from monthly to weekly publication, to protest better the cause. Shortly, it asked the Commonwealth to accept its nomination of an official delegate for the IWSA conference in Budapest in June. Goldstein, then, nominated to stand as an independent WPA representative for the June 1913 elections and called on Australian women to support English women, fighting for suffrage and against white slavery, and the coming referendum to expand Commonwealth powers over trade and commerce, including control over immigration and emigration. The WPA listed this last point, as well as 'drastic' legislation against white slavery, as the last of nine questions placed before all Victorian candidates. In Victoria, William Watt's Liberal government legislated some greater, if still limited, protection of girls aged between sixteen and eighteen.⁵⁴

Another influential, if less radical, female voice was added, when Victoria's *Women's Guild* (WG) convinced its 'umbrella' organisation, the local NCW, to convene a special meeting. Widely attended on 27 March, vice president Janet Strong, Scottish-born, as was her prominent liberal and outspoken husband Charles, referred to great concern in England, Europe and America. She called for the traffic to be made illegal in Australia and warning notices posted for arriving young female immigrants, who should be given to the care of 'matrons' of their religion. The Methodist Mission claimed that there was a 'house of decoy' in Fitzroy. The wife of Frederick Spurr (English-born president of Victoria's *Baptist Union*), herself a WCTU activist, said that they needed to examine local laws. Cecilia Downing, active in the local WCTU, WG and *Women's National League*, and London-born wife of a Baptist minister-turned-banker, successfully moved for an investigation.⁵⁵ O'Callaghan, again responded publicly. Having investigated the issue, when Stead had first raised it in 1885, he had 'no hesitation' in denying that the traffic existed, and, if it did, he would know. Yet, he revealed that he had recommended Victoria legislate along English lines. That government now made one concession, appointing an advisory board for its new immigration bureau to

⁵⁴ *Age*, 7, 12 March; 11, 16 and 30 April, 3 May 1913. She praised the *Age* for supporting suffrage and equal pay, while saying they did not expect anything from the *Argus*, which had opposed all advances for women. One of four Victorian-born daughters of Polish-Jewish and Irish parents, she had been raised a Unitarian. Her mother, though not her father, had been committed to female suffrage, along with social reform, including teetotalism. Vida had helped her mother in the *Women's Suffrage Petition* of 1890. By the decade's end, she was the colony's leading radical female voice, focussing on suffrage and 'sweated' labour. In 1902 she had addressed the IWSA conference in the USA, was elected secretary, testified before a congressional committee and attended the ICW conference. She had stood unsuccessfully for the senate in the 1903 federal election as an independent, supported by the *Women's Federal Political Association* (renamed to WPA). She founded her own newspaper, the *Woman's Sphere*. After realizing Victorian suffrage in 1908, she turned to other causes: founding the *Woman Voter* and again standing unsuccessfully for the senate in 1910. In 1911 she had made a great impact in England when speaking to the *Women's Social and Political Union* (WSPU). Janice N. Brownfoot, 'Goldstein, Vida Jane (1869–1949)', *ADB*, vol. 9, NCB:ANU, MUP, 1983, <http://adb.anu.edu.au/biography/goldstein-vida-jane-6418/text10975>; Janette M. Bomford, *That dangerous and persuasive woman: Vida Goldstein*, MUP, Carlton, Vic., 1993. 4 Geo. 5, no. 2505 of 1914.

⁵⁵ *Age*, 14 March and 29 March 1913; *Argus*, 28 March 1913; *Register* 28 March 1913. Strong was an expelled Presbyterian minister who founded the Australian Church. Judith Smart, 'Downing, Cecilia (1858–1952)', *ADB*, vol. 14, NCB:ANU, MUP, 1996, <http://adb.anu.edu.au/biography/downing-cecilia-10043/text17711>.

meet, question and counsel young immigrants. The board comprised mainly women, drawn from churches (Presbyterian and Methodist) and more 'moderate' women's groups, such as the YWCA and the GFC. Snubbed, the WPA called for the board's powers to be widened.⁵⁶

In mid-1913, this campaign reached a crescendo. With Downing presiding, Spurr's wife spoke to the annual meeting of the Victorian WCTU on 'White Slave Traffic in Other Lands: Does it Threaten Australia?' A resolution was adopted for mothers to protect their daughters against these 'evils'. At a large meeting, organised by Victoria's protestant churches, her husband moved, to applause, that in view of

*the dreadful revelation of the white slave traffic made in course of recent investigations in England, and the grave suspicion that agents of the traffic have begun work in Australia, the Government be urged to introduce a bill framed on the lines of the recent English legislation that will act as a deterrent to the agents of the nefarious traffic, and to safeguard the future for this State.*⁵⁷

As only a brief visitor to Australia, the Englishman probably did not know of the constitutional complexity, involved in such comparable legislation. The controversial and prominent Ulster-born Presbyterian, Dr. John Rentoul made emphatic claims of actual white slave cases in Melbourne and opened a mission house in Fitzroy, to counter white slave recruitment. This inspired the YWCA in Adelaide to propose the same.

The campaign spread to Sydney, led by prominent Anglican minister, Stanley Dumaresq Yarrington, who promised a 'fight to the last drop of our blood against the Chinamen who degrade the white women of Australia.' In NSW, a *Public Morals Association* conference, the state Labour Council, NCW, *Women's Liberal League*, plus various churches, called for legislation.⁵⁸ State governments, however, continued to deny that there was any actual white slavery in their respective jurisdictions. Victoria's new chief commissioner of police, George Sainsbury, maintained O'Callaghan's line, saying the NCW, Spurr and Rentoul had failed to justify their 'sensational allegations', offering only 'vague' and 'general' claims, over which there was 'considerable doubt'; police needed 'definite particulars' of cases. After Liberal chief secretary, William Watt read a police investigatory report, Victoria announced that it would introduce 'severe' legislation on the English model, but only if the traffic's existence could be established. SA's Liberal chief secretary, John Bice, took the same line.⁵⁹

There were overseas influences, as well, encouraging the local campaign and placing pressure on governments to act. In Sydney and Melbourne, visiting Americans from the *Men and Religious Forward Movement*--New York-based and in ninety US cities--spoke of the need

⁵⁶ *Age*, 11 February 1913; *Weekly Times*, 8 & 29 March & 19, & 26 April 1913.

⁵⁷ *Age*, 16 April & 19 May 1913.

⁵⁸ *Register*, 5 May; *Argus*, 4 July; *SMH*, 21 May; all 1913.

⁵⁹ *Age*, 20 May, 5 & 12 July; *SMH*, 27 May, 21 & 23 July; *Argus* 19 May, 1 & 5 July; *Register*, 23, 28 June, 4, 8 & 17 July; all 1913.

for Christian men to be more involved in social issues championed by women, including, they said to cheers, against white slavery. The press reported that John D. Rockefeller was establishing the *Bureau of Social Hygiene* to fight the traffic and the major states of New York, Illinois and California investigating. From Westminster, came news that William Chapple, NZ-born Liberal, supported by Percy Alden, of the anti-plumage traffic campaign, introduced a bill to amend the law for better protection of females against prostitution. NCW conferences in *Den Hague* and Paris in May and June were well reported in Australia. This inspired a NSW's NCW executive meeting at government house, with Lady Edeline Strickland, the governor's wife, presiding, and other influential women, including feminist Rose Scott, present. After investigating the 'dangers' of white slavery, they petitioned NSW parliamentarians to legislate against the 'evil'. A similar call came from the SA branch of the WCTU, while Queensland's NCW had a parliamentarian table its similar petition. Goldstein had the WPA request the Commonwealth 'appoint a commission [with female representatives] to inquire into the extent and causes of the white slave traffic in Australia'.⁶⁰ Not all overseas reports were so positive. The *Argus*, which Goldstein labelled an opponent of women's rights, crowed over a report that Teresa Billington-Greig, prominent *Mancunian* suffragette, had 'expose[d]' the 'rampant sensationalism' behind the 'so-called White Slave Act'.⁶¹

Goldstein's call for a Commonwealth investigatory commission, a concept modelled on the Shanghai opium commission of 1909, had a notable international source. Earlier, the WPA had tried to organise unofficial representatives from each state for the next IWSA congress but, more importantly, it also had somehow persuaded Fisher, just before he lost the June 1913 election, to appoint its *nominee*, Gertrude Burke, as an official Commonwealth representative to the IWSA congress in Budapest.⁶² A guest of the Austro-Hungarian government, Gertrude Spencer (*née*, Burke) spoke at the official reception, attended by 2,400 delegates, including officials, from 22 countries.⁶³ Although largely a Continental European

⁶⁰ *SMH*, 5, 6, 13, 16 August; *Register*, 22 August; *Argus*, 10 September; *SMH*, 18 September; all 1913.

⁶¹ *Age*, 12 April; *Register*, 13 March, 24 April; *Argus*, 2 August; all 1913. Billington-Greig formed the *Women's Freedom League*. The press suggested this change arose from her recent marriage but it, more likely, was related to her resignation from the WPSU over alleged authoritarian leadership by Emmeline Pankhurst and daughter. Christabel. *JHC*, vol. 168, 10 March 1913 to 15 August 1913, Eyre & Spottiswoode Ltd., London, 1913, pp. 105, 159, 216.

⁶² Why Fisher endorsed this and not representation at the IBSWST conference is unclear. Both were unofficial. Perhaps to avoid criticism of this unprecedented imitative, Fisher also asked Sir John Cockburn, former SA Labour premier and agent-general in London, to attend the concurrent *Men's Alliance for Women Suffrage* conference. John Playford, 'Cockburn, Sir John Alexander (1850–1929)', *ADB*, vol. 8, NCB: ANU, 1981, <http://adb.anu.edu.au/biography/cockburn-sir-john-alexander-5701/text9637>. The Scottish-born doctor and his wife had been active in Australia's WSL. He had represented the Commonwealth at two international labour insurance conferences in Europe in Dusseldorf (1902) and Vienna (1905). Due to ill-health, he declined, so Dr. Charles Drysdale, an English electrical engineer and advocate of birth control who, influenced by his mother, had founded the *Men's League for Women's Suffrage*, represented both Britain and the Commonwealth, making an 'energetic' opening speech, pleading for justice and equal freedom for women.

⁶³ Burke's parents were both County Cork-born Protestants: her father, a civil servant in India before migrating,

congress, the *USA* was well represented, especially from California and Oregon, where women were enfranchised, while America's Carrie Chapman presided.⁶⁴

As one of the only three 'countries' attending, which gave women the vote nationally (the other two were Finland, 1906 and Norway, 1913), and the only voting British subject present (Canada and South Africa but not *NZ* were represented), she was appointed to the newly-formed *Committee of Enfranchised Women*. She reported to Glynn.

*But for the action of your department the British Empire might have been unrepresented on this important committee, which will prove to be an influential and far-reaching organisation for promoting the interests of women, and peace and friendship between nations.*⁶⁵

Surprisingly, she told journalists that the female vote in Australia ensured there was neither white slavery nor commercialized vice. Despite this, the congress unanimously called on all governments represented there to hold an international inquiry into the 'extent and causes of commercialised vice' and each woman's suffrage organisation to ask their own government to institute a similar national inquiry, with women included.⁶⁶ The conference and Spencer's role were widely reported in Australia, where parts of the wider community, especially those represented by women's organisations, were growing impatient over governmental inactivity.

By mid-1913, the *CO* was also clearly frustrated with the Commonwealth over this further instance of the federal system delaying inordinately treaty accession, as the empire and major European powers were moving swiftly to support the treaty. In August, further advice arrived from the *CO*—cabled not posted, which signified urgency—that Canada, South Africa and *NZ*

first, to Tasmania and, then, Melbourne for a senior banking position; her Paris-educated mother, founded the *Alliance Francaise de Victoria*, in which Gertrude became fluent. She graduated from Melbourne University in classics, performed in French-language theatre, moved to London to teach French, and, then, Paris, for further study. In London she mixed with two Englishwomen, Margaret Hodge and Anna Newcombe, active previously in Australian women's politics and now in London's suffragettism and anti-white slavery campaign. Gertrude was in Budapest on her honeymoon, having just married Lancashire-based Anglican minister, Frederick Spencer, who, like the minister conducting the service, Hugh Chapman, were 'enthusiastic' and 'ardent' supporters of female suffrage and 'unswerving champion[s]' of the Pankhursts and *WSPU*. Chapman, avowing obedience to royal not episcopal authority, followed his own belief's and pair's wishes in omitting 'obey' and 'the foolish mediaeval custom of "giving away" the bride' who, he explained, 'was quite capable of disposing of her own hand.'

Advertiser, 19 June 1913; *Age* & *SMH*, both 21 June 1913; *The Woman Voter*, 19 August 1913; *The Sun*, 5 October 1913.

⁶⁴ *Age*, 11 April; *Woman Voter*, 15 & 29 April; *Australasian*, 19 April; *SMH* 23 April; all 1913. The Australian representatives were Ada Holman, *NSW*; (Mrs.) Mary and (Miss) Kate Mackay, Victoria; Bessie Rischbieth, West Australia; Elizabeth Tighe, Queensland and (Mrs Henry) Emily Dobson, Tasmania.

⁶⁵ There is a small extract from her report on 1915/5651, CRS A1, NAA. The full report was published in *The Sun*, 18 August 1913 and *The Woman Voter* and *Telegraph* (Brisbane), both 19 August 1913.

⁶⁶ *Age*, *Register* and *SMH*, all 21 June 1913. There were ther notable attendees. Anna Shaw, born in Newcastle-upon-Tyne but one of the first ordained, female *US* Methodist ministers, spoke notably. A founding member of the *WCTU* and *ICW*, she presided since 1904 over the *National Amercian Women's Suffrage Association*, formed with Susan B. Anthony and Elizabeth Cady Stanton. From England, came Millicent Fawcett, *IWSA* vice-president. Spencer enthused over the 'thrilling' presentation of a banner from Chinese suffragists, as this 'world-wide awakening, that we call the woman's movement' made a 'deep impression' on her. In the congress's discussion of white slavery, Spencer thought the most outstanding speaker was Jane Addams, celebrated Presbyterian social reformer from Chicago, author of the immensely popular *A New Conscience and Ancient Evil*. Almost as impressive was England's young Maude Royden, *NUW* editor of suffragette newspaper *Common Cause*

had all asked to adhere. (This was formalized by 1 October). In veiled encouragement, this added that the imperial government ‘trust[ed]’ that the Commonwealth would ‘shortly be in a position to concur’. Newfoundland was also slow but would soon agree.⁶⁷ There was an additional reason to secure the Commonwealth’s early agreement. To carry out the provisions of the treaty’s *Article 5*, an *OiC*, under the imperial *Extradition Acts 1873-95*, was required for all adhering colonies (except Canada). So, a few days after this cable, an earlier but slower *CO* despatch arrived, not only reiterating the query on accession but also advising that letters of request for extradition in the courts of Austria, France, Russia and the Netherlands had to be transmitted through the diplomatic channel. For the latter’s colonies, however, they were to be submitted directly through judicial authorities. The *CO* wanted to know, which of the two methods allowed in *Article 6*, the Commonwealth preferred for the other signatories: either directly to judicial authorities or through Australian-based foreign consuls. The *CO* also sought the relevant legislation for relay to other signatories, as the convention required.

In the *DEA*, while considering the cabled query, Atlee Hunt and Carrodus also read the press coverage of the *IWSA* meeting and, more importantly, Spencer’s report. So, Cook in late August, advised the premiers, as matters within their jurisdiction, of the *IWSA*’s call for national inquiries, as part of an international inquiry.⁶⁸ Within a week, Atlee Hunt recommended and Glynn approved that, as those states, which needed to legislate, had agreed to so do, the Commonwealth should request adherence. To save time, Cook had the governor-general cable a brief reply, which arrived at the *CO* two weeks before Newfoundland’s earlier posted request for adherence. So, all self-governing colonies had now agreed to adhere but there were still several issues to resolve to complete the empire’s treaty process.⁶⁹

The first was to clarify, which of the three methods, as set out in the convention, the Commonwealth wished to use for receipt of foreign requests for its judicial assistance (*Commissions rogatoires* or letters rogatory), in cases dealing with the offences listed in the treaty. Each adherent was required to communicate its chosen method to the others. Harcourt had already advised, in his earlier despatch, which governments (now including Portugal and Germany), had stipulated that they would only accept such requests ‘exclusively’ through the diplomatic channel. He did not mention that this was also the requirement for requests to Britain and Ireland. Britain had agreed with these powers that the channel for receipt but not transmission of such requests was decision purely for each party. The colonies, lacking sovereignty (and thus the presence of foreign diplomats), could only employ the diplomatic or, as *CO* officials rightly termed it, ‘long’ channel, for it involved foreign requests going

⁶⁷ *SMH*, 5, 6, 13, 16 August 1913.

⁶⁸ Circular letter, Cook to premiers, 19 August 1913, 1915/5651, CRS A1, NAA. *SMH*, 5 & 6 August 1913.

⁶⁹ This included accession of Papua and Norfolk Island. *SMH*, 5 & 6 August 1913; 1915/5651, CRS A1, NAA.

successively through the *FO*, *CO* and, finally, governors. So, Harcourt tactfully ‘suggest[ed]’, that with a view to ‘saving time and correspondence’, either of the first two or both of those methods ‘should be adopted’. He reminded the colonies that, if the second method were chosen, the ‘intermediary’ would be a consular not a diplomatic agent.⁷⁰

When Atlee Hunt advised Glynn, he deemed the second of the three methods ‘preferable’, by which he wrongly assumed that this applied to requests both to and from Australia. For the former, he thought the advantage would be that Australian-based foreign consuls could translate the letters for local judicial authorities. For the latter, he assumed that Australian tribunals could send their requests to British consular officers, presuming that they were made available for this purpose, in the recipient country. (He did not clarify if he meant first through the Commonwealth and/or the *CO*.) This, he said, would ensure the request would receive ‘proper attention’. Glynn accepted this advice, which Cook relayed to the *CO*.⁷¹

On reading this, Davis expressed frustration to Sir Hartmann Just.

*It is heartbreaking after all the trouble we have taken to find the Commonwealth fallen in the dreary old trap about letters of request. We must put it right.*⁷²

So, the *CO* cabled a reply on 10 September, pointing out the error and asking for confirmation, that in view of this, whether the Commonwealth still preferred the second method for requests to Australia.⁷³ On reading this, Carrodus briefed Atlee Hunt, who directed a reply confirming that the Commonwealth still preferred the consular path for receiving requests, as ‘most expeditious and satisfactory’, adding that a condition should be added that consuls in Australia were required to ‘intimate fact of request’ to his department.⁷⁴ This suggests that perhaps his concern was for the Commonwealth to be in control of or, at least, be informed of the process, not by-passed by direct foreign communications with the states.

The second matter was the nature of relevant legislation in each colony. When Davis discussed with Just about asking the *FO* to notify France of the adherence of *NZ* and Newfoundland, he thought that the *FO* might demur, as Newfoundland, unlike Canada, had yet to legislate to meet the convention’s obligations. In the case of the two landmark multilateral maritime conventions of 1910, the *CO* had awaited colonial legislation, before notifying adherence. In this case, he thought that there was an ‘important difference’. The white slavery convention’s *Article 3* provided for accepting parties, whose ‘legislation may

⁷⁰ Despatch, Harcourt to governor-general, 10 September 1913, CO532/53/106-9, TNA.

⁷¹ Apparently, this was a rare misunderstanding by Atlee Hunt or he may have had a hidden policy motive.

⁷² Minute, Davis to Just, 5 September 1913, CO532/53/106, TNA.

⁷³ Cablegram, *CO* to governor-general, 10 September 1913, CO532/53/109, TNA & vol. 31, CRS A1108, NAA.

⁷⁴ Memorandum, Carrodus & annotation, Atlee Hunt, 19 & 22 September 1913, vol. 31, CRS A1108, NAA.

not at present be sufficient to deal with the offences' in the treaty, had 'engage[d] to take or to propose to their respective legislatures the necessary steps to punish these offences'.⁷⁵

This, however, became a 'serious matter', as Berriedale Keith later told Johnson and Just, when the *HO* shared the draft *OiC*, applying the imperial *Extradition Acts 1873-95* to the treaty, which was meant to come into force six months from 1 October. Appropriate colonial legislation was a perquisite for the *OiC*'s issue. He said Canada was 'fine', while Newfoundland had definitely not legislated but had promised to so do. (It would, in March 1914, just within the six months deadline.) *NZ* had assured that its existing legislation was sufficient, which Keith felt the *CO* had no responsibility to confirm. South Africa had given no such 'express assurance', so, the *CO* should ask for it. The position with Australia, he continued, 'is even worse', with no legislation for Papua or Norfolk Island; of the states, 'we know nothing' and, thus, 'we cannot even express an opinion as to adequacy'. So, the *CO* had to confirm Australia's position before issuing an *OiC*. Although there appeared sufficient time, this grew more pressing, as some treaty parties notified enactment of legislation.⁷⁶

Britain's established practice had always been that it did not consult, in advance, any colony, (except Canada, on the *USA*) on extradition treaties. Subsequent notification was all that was given. Imperial extradition legislation had been treated in the same way. This *OiC* was not to be made applicable to Crown colonies, many of which had declined adherence. Berriedale Keith, however, now believed that, 'at the present date', an *OiC*, 'even' under the *Extradition Acts 1873-95*, should not be issued 'without informing' the self-governing colonies, who would therefore be bound by it.⁷⁷ He did not make clear whether or not he meant consulted in advance. In the end, Harcourt did advise those governments that an *OiC* was being prepared but he neither sent a draft nor asked for their opinions, merely promising to convey the *OiC*, 'in due course', which surely meant after its issue. He also explained how English legislation had been amended to meet the treaty's provisions and said that he was 'not aware' of the similar local legislation of the Australian states, *NT* and Papua. So, he suggested that the Commonwealth would 'no doubt consider', whether further legislation, beyond that cited in its cable notifying adhesion, was 'desirable . . . to ensure that the Convention may receive full effect in the Commonwealth and Papua.' Perhaps, inadvertently, he pressed for an early response by sending, soon after, the respective legislation of France, Germany, the

⁷⁵ Minute, Davis to Lambert, Risley, Johnson & Just, 17 September 1913, CO532/53/123-4, TNA.

⁷⁶ Minute, Keith to Lambert, Risley, Johnson & Just, 10 November 1913, CO532/59/258, 223-7, 258-77, TNA.

⁷⁷ Minute, Keith to Davis, 5 January 1914, CO532/53/495, TNA.

Netherlands, Russia and Spain.⁷⁸ In mid-January 1914, Harcourt advised the colonies of the pending *OiC*, without yet sending a draft copy, let alone asking for their observations.⁷⁹

The question of the *OiC* led directly to the third matter, which the *CO* needed to resolve. As it had advised on 11 July, all adherents to the convention were required to provide each other with copies of their relevant enactments. Cook had promised to provide these when he notified the desire for adherence at the end of August but had not so done. This had delayed formal notification of the Commonwealth's adherence and issuing of the *OiC*. So, only later in November, did Cook finally provide the legislation, which, of course, did not arrive in London until after Christmas. Even then, some *NSW* legislation was missing and not provided for a further four months. Moreover, Cook gave no express assurance that the various existing legislation met the convention's requirements. Subsequent events suggest not all of it did.⁸⁰

As 1913 closed, both the imperial and Commonwealth governments remained under public pressure to do more with respect to the Paris conventions. Emmeline Pankhurst spoke in the *USA* on suffrage and white slavery. Maude Royden addressed a major church congress at Southampton. Noted Anglican missionary, Ruth Rouse, celebrated the role of the 'world-wide' women's movement in cooperating with churches to combat the twin evils of white slavery and 'evil' pictures or literature. John Grant sent all parliamentarians a pamphlet on white slavery, entitled *The Heart of Hell*, to garner support for the campaign for further amendment of the *CLAA 1885*.⁸¹ When the Commons opened on 10 February 1914, three Liberals--Chapple, Alden, and King--supported by others, presented yet another bill to consolidate and amend various enactments, concerning offences against the person, vagrancy, protection of women and girls, prostitution, brothels and other similar premises and extradition, to make 'further and better provision' against 'offences against morality'.⁸²

The attention of some British-based groups, agitating for this legislation, now turned their attention to Australia where, despite regular press reports of the British campaign, public demands for action had somewhat subsided by late 1913. There were a few instances, where the public still raised white slavery with Australian governments, all of which were fruitless. The Queensland branch of the *Australian Natives Association (ANA)* called for federal legislation to compensate for the state government's decision in 1911, under the weight of

⁷⁸ *ibid.*

⁷⁹ Circular despatch, Harcourt to (self-governing) colonies, 14 January 1914, CO532/53/499; CO532/60/117-121, TNA; vol. 31, CRS A1108, NAA.

⁸⁰ See the correspondence in 1912/275, CRS A1; vol. 31, CRS A1108; vol. 2, CRS A738, NAA.

⁸¹ *Times*, 5, 30 September & 2, 8 October 1913; *West Australian*, 29 September 1913. The pamphlet was completed for the *New Constitutional Society for Women's Suffrage*, which had been created in 1910 to unite suffragists.

⁸² *JHC*, vol. 169, 10 February 1914 to 18 September 1914, p. 77.

female-led public campaigns, to rescind the application of the local *Contagious Diseases Act 1868* to specified urban areas. The ANA wanted legislation not only to control venereal disease but also punish prostitutes and procurers. So, Cook asked his attorney-general, William Irvine, (Victoria's noted anti-centralist), who replied that the only possibly relevant Commonwealth power related to quarantine but doubted these matters fell within its scope. The matter was not pursued.⁸³ In parliament, only days before, Labour's maverick Dr William Maloney, asked whether a man, 'suspected of being connected with the white slave traffic' was persuaded to leave the Commonwealth, with a free passage to Java, instead of a full investigation, conviction and punishment, if warranted.⁸⁴ Police had reported an Armenian, of 'undesirable character', but Glynn replied that there was no evidence connecting him with white slave trafficking. So, the only possible action taken was that he was 'induced to leave', on a promise of repayment for his passage.

The decision not to prosecute was important, as it meant the Commonwealth had no court cases to provide, as required by the convention. Atlee Hunt may have advised Glynn to take a stronger line, for as he later advised him, the Commonwealth had the power of deportation, if there was satisfactory evidence to declare someone a 'prohibited immigrant' on entry. The deportation of a 'notorious white slave trader', he explained, would show that the *Immigration Act* was being 'strictly enforced' against white slavery.⁸⁵ Carrodus suggested to Glynn that the question should be kept on the 'syllabus', as he had received various communications from 'Liberal associations' including, from the (male) leadership of the *Liberal Union*.⁸⁶ Glynn, felt compelled to assure privately NSW's *Women's Liberal League* that the Commonwealth would also take all necessary steps in the administration of the *Immigration Act* and by any other federal legislation to suppress the traffic. Yet, contrary to the impression the *League* drew from this, he had no plans for further Commonwealth legislation.⁸⁷ SA's *Women's Non-Party Political Association* pressed Cook to hold a royal commission into white slavery, which Cook just deflected as usual to the states.⁸⁸ Governmental indifference in Australia would soon be challenged.

4. 'this evil does exist': female activism and the conclusion of the convention, 1913-14

The innate indifference of most governmental officials in Australia to the issue of white slavery was confronted in 1914 by a strident female public voice. They did not succeed in

⁸³ Attorney-general's (Irvine) opinion, 16 October 1913, vol. 1/11, CRS A1497 NAA. Barclay, *op.cit.*, pp. 21-29.

⁸⁴ *CPD, HoR*, vol. 43, 23 October 1913 p. 2464.

⁸⁵ Letter, Atlee Hunt to Glynn, 30 March 1915, 1915/5651, CRS A1, NAA.

⁸⁶ Memorandum no. 7, unsigned & undated but c. March 1914, vol. 31, CRS A1108, NAA.

⁸⁷ Letter, Luffman to Glynn, 24 March 1915 & Glynn to Atlee Hunt, 27 March 1915, 1915/5651, CRS A1; nos. 16300 & 17653, vol. 5, CRS A739, NAA.

⁸⁸ 1915/5651, CRS A1; nos. 16300 & 17653, vol. 5, CRS A739, NAA.

placing the issue at the centre of official policy but the Commonwealth, nonetheless, finally acceded to the convention, while resisting calls for wider enquiry into the crime.

By early 1914, the *CO*'s questions seem to have prompted the Commonwealth to finalise the steps that the *CO* required before notification of accession. Cook now finally provided the *CO* with copies of relevant state legislation in the numbers required for relay to each signatory. He also confirmed, after some months since asked, that there was no specific relevant Papuan ordinance but, by an ordinance of 1902, Queensland's criminal code was made applicable to Papua.⁸⁹ On Christmas Eve, he had Atlee Hunt ask Garran, if offences in the convention were 'sufficiently covered' by the Commonwealth's *Extradition Act, 1903*. In January, Garran confirmed that the imperial *Extradition Acts 1873-95* and respective imperial *OiCs* applied to Australia. The extraditable offences, scheduled in that *Act*, were those in the imperial *Offences against the Persons Act 1861*, plus those in any colonial act amending or substituting for it. The section in that *Act* on 'procuration and attempted procuration' had been repealed by the *CLLA Act 1885*, which had then made new provision for these offences. The 1912 amendment had modified English statutory law, including the *Offences against the Persons Act 1861*, to cover the quoted provisions of the treaty. He advised that those offences came within the provisions of the imperial *Extradition Acts 1873-95* and, thus, under the Commonwealth's *Extradition Act 1903*, no further Commonwealth legislation was required.⁹⁰ So, finally, France could be notified of the Commonwealth's desire for accession, which was done on 23 January 1914, about five months after the other self-governing colonies.

Meanwhile, Cook had received underwhelming responses from the premiers on the *IBSWST* proposal, for participation in national and international inquiries. Four did not even reply. Those of the two that did, justified Berriedale Keith's earlier wry observation of how the different governments in Australia tried to push responsibility on certain issues onto each other, resulting in no action. At least *SA*'s Archibald Peake offered 'every assistance' before adding that, to avoid 'overlap', the Commonwealth must organise it. Glynn, however, told Cook that this was a state not federal matter and the only existing legislation, 'properly' within the Commonwealth sphere, was confined to immigration, for which action had already been taken with the *Immigration Act 1912*. Tasmania's Albert Solomon avoided answering the main question and reiterated that he could assure Cook that, after a careful police inquiry, there was no 'procuration' there.⁹¹ The Commonwealth's own indifference was soon clear.

⁸⁹ Letters, Whitham to Cook, 3 November 1913 & Shepherd to Whitham, 13 November 1913, vol. 31, CRS A1108; 1912/275, CRS A1, NAA.

⁹⁰ Memorandum containing legal opinion, Garran to Atlee Hunt, 15 January 1914, vol. 1/12, pp. 97-8, CRS A1497; vol. 31, CRS A1108, NAA.

⁹¹ Letters, Peake to Cook, 10 September 1913 and Solomon to Cook, 7 October 1913, 1915/5651, CRS A1, NAA.

In mid-January 1914, Cook received a formal letter from the *IWSA*'s Millicent Fawcett. She explained that twenty-six countries represented officially at Budapest had unanimously adopted its resolutions. She added that the representatives, from where women had the vote, had said that the first use of their 'newly acquired political power' had been to strengthen the laws to prevent commercialised vice and protect the young of both sexes. Indeed, Australia's delegate (Spencer) had declared, she continued, that the vote enabled women to 'insist upon a vigorous & impartial administration' of laws for repression of the white slave traffic, with such success, that commercialised vice was 'very greatly diminished' in Australia. So, Fawcett asked Cook, as 'head' of the 'Australian' government to hold a national inquiry, including with female appointees, and co-operate with an international inquiry.⁹² Cook did not deign to reply personally. Instead, he had Atlee Hunt answer briefly that the matters raised were not for the Commonwealth but the states, which had been previously informed. Atlee Hunt told Carrodus that there was no need to send her letter to the states, because of Cook's earlier circular on Spencer's report. Overall, this was a very passive response.⁹³ Although state legislation was part but not all of the measures needed to meet the Commonwealth's treaty obligations, the cooperation in an international inquiry, much like the international process leading to the *Opium Convention*, was clearly a Commonwealth matter, as would be the holding a national inquiry, as part of this process.

Unsurprisingly, the Commonwealth was more responsive to approaches from the *CO*. It had not yet answered Harcourt's inquiry, as to whether Australia's legislation was 'sufficient'. On the arrival of his despatch on the *OiC*, in mid-February, Carrodus drafted a checklist of steps the Commonwealth had to take to meet its treaty obligations. The required state legislation, which had been forwarded to the *CO* was, he deemed, 'apparently sufficient'. This lack of precision obscured the fact that the Commonwealth had not considered the need to examine closely, let alone, have Garran review, the states' legislation. Tasmania's belated enactment certainly did not address the issue of procurement. Neither *NSW* nor *SA* had yet adopted new legislation and the latter gave no guarantee that it would. So, Carrodus informed Glynn that, although it 'would appear' the states' legislation covered 'sufficiently' the convention's provisions, the states should be asked to get a 'definite' opinion from their respective law officers, prior to replying to Harcourt. Such advice was also particularly needed because the

⁹² Officials took note of this term. Letter, Fawcett to Cook, 17 November 1913, 1915/5651, CRS A1, NAA. David Rubenstein, *A Different World for Women: The Life of Millicent Garrett Fawcett*, OSUP, Columbus, Oh., 1991.

⁹³ Letter, Atlee Hunt to Fawcett, 20 January 1914, 1915/5651, CRS A1, NAA.

NT, Papua and Norfolk Island were covered, respectively by Queensland's *Criminal Code 1899*, NSW's *Crimes Act 1900*, and SA's *Criminal Law Consolidation Amendment Act 1885*.⁹⁴

So, Cook wrote to the premiers in mid-February 1914, asking whether their respective, existing legislation 'fully meets' the purposes of the convention and, pointedly, 'if not, to learn that you intend taking the necessary measures.'⁹⁵ Over the next month, four states replied about the proposed national inquiry. (Victoria and WA did not respond until mid-year.) SA's acting Liberal Union premier said that prior investigations had revealed the traffic did not exist there, although he would consider further legislation. Tasmania's Liberal premier, Albert Solomon, who was involved in an election campaign (which he would lose to Labour on 6 April), claimed the treaty obligations were met by section 10 of its *Contagious Diseases Act 1881*. This was a careless response, as that section was actually in the principal *Act* of 1879, modelled, as its title suggested, on the now repealed English *Act* of 1864, and was thus directed only against infected women not traffickers.⁹⁶ (The Commonwealth ignored or overlooked this oversight.) NSW's Labour premier, William Holman, promised that his government would introduce, at an 'early date', legislation which, 'it is hoped', would fully meet obligations. He did not. Queensland's acting Liberal premier was more thorough, conveying his legal advice that the state's *Criminal Code 1899*, as just amended in November, met all obligations. Certainly, sections 12, 13 and 14 addressed procurement in principle but it is doubtful the sections on specific offences did. So, this untidy and confusing federal process of treaty-adhesion continued to drag on interminably.⁹⁷ In Australia's male-dominated formal politics, white slavery was not a major issue, for most, but not all.

The annual premiers' conference was due to convene on 31 March 1914. NSW's Labour premier Holman had been strongly lobbied in late 1913 and his journalist wife, Ada, was a reformist, including on women's issues.⁹⁸ He, alone among the premiers, listed the traffic, but only as the 21st of his proposed twenty-five agenda items and preceded by the word 'alleged'. When the states' 50 combined agenda items were consolidated, the traffic was 18th. Cook, who would attend some of the conference, even had Atlee Hunt prepare a briefing paper on the subject. When, however, the final agenda was settled, presumably by the Victorian hosts,

⁹⁴ Memorandum, Carrodus, 11 February 1914, with Glynn's annotated approval, 12 February 1914, vol. 31, CRS A1108, NAA.

⁹⁵ Circular letter, prime minister to premiers, 20 February 1914, vol. 31, CRS A1108, NAA.

⁹⁶ 45 Vict. no. 23 of 1881.

⁹⁷ Note summarising premiers' responses, 27 March 1915, 1915/5651, CRS A1, NAA. *Register*, 26 February 1914; 63 Vict. no. 9 of 1899; 4 Geo. 5, no. 25 of 1913.

⁹⁸ Heather Radi, 'Holman, Ada Augusta (1869–1949)', *ADB*, vol. 9, NCB:ANU, 1983, MUP, <http://adb.anu.edu.au/biography/holman-ada-augusta-6710/text11583>

the item had been removed, altogether.⁹⁹ Meanwhile, WA's government rejected the *Council of Public Morals'* claims that white slavery existed there although, paradoxically, promised to consider an investigation, with women represented, as the *IWSA* had proposed. (In Auckland, the police chief similarly rejected the local *WCTU's* claims.) This sidelining of the issue did not sit well with the more assertive women's groups.¹⁰⁰

Goldstein's *WPA* had started the year in vibrant form, protesting, as an 'affront to women voters', the rumoured appointment of Charles Hobhouse, allegedly a 'bitter opponent' of female suffrage, as governor-general. The *WPA* then decided to make 'careful investigation' of several reported white slavery cases and, next, proposed an internal referendum on five federal and state questions including, as well as equal pay and marriage laws, protection of 'girls against the white slave traffic by placing immigration and emigration under Commonwealth control'. (Goldstein may have meant interstate traffic, as the external dimension was within Commonwealth powers.) The *WPA* also wanted states to raise the age of consent, for both genders, to twenty-one. In Melbourne, days before the premiers' conference opened, the *YWCA* and *GFC*, backed by a Victorian minister, gained approval to place warning placards at railway stations, as the *NVA* did in Britain.¹⁰¹ None of this satisfied the *WPA*, which had just been bolstered days before by the arrival of Adela Pankhurst, 29-year-old daughter of Richard and Emmeline.¹⁰² When Cook deflected the *WPA's* request, as he had the *IWSA's* for a national inquiry, the *WPA* asked William Watt, Victoria's Liberal premier (and president of the premiers' conference) to receive a deputation. (His government had just legislated favourably on some of their concerns.) The *WPA* complained that only three items indirectly affecting women were left on the agenda, while the 'all important' white slavery had been removed and at too late a date to allow them to take any other action. Watt deprecated their proposals as 'inadvisable'. Undeterred, after the conference started, the *WPA* demanded they were 'entitled to be heard', declaring. 'Women are not represented in Parliament, consequently they are not represented at the Conference.'¹⁰³

⁹⁹ 113, CRS AA1972/341 and N326/1/3, CRS A461; undated & unsigned briefing memorandum c. February 1914, vol. 31, CRS A1108, NAA. *Age*, 19 March 1914; *SMH*, 11 March 1914.

¹⁰⁰ *Age*, 19 March 1914; *SMH*, 11 March 1914.

¹⁰¹ *Age*, 31 January & 3 February 1914; *Argus*, 30 March 1914.

¹⁰² Schooled in Manchester, Adela had supported her older sisters' activities in the Independent Labor Party and helped found the *WSPU* to demand female suffrage, so as to influence government policies to address the child poverty she had witnessed. After a family rupture, she emigrated, almost penniless. Her diminutive stature belied her powerful speaking and activism. Now she brought confrontational suffragettist tactics to Australia. Paula Bartley, *Emmeline Pankhurst*, London, Routledge, 2002; Susan Hogan, 'Pankhurst, Adela Constantia (1885–1961)', *ADB*, vol. 12, NCB:ANU, 1990, MUP, <http://adb.anu.edu.au/biography/pankhurst-adela-constantia-9275/text15787>

¹⁰³ *Report on the Resolution, Proceedings and Debates of the Inter-State Conference held at Melbourne, March-April 1914*, Government Printer, Melbourne, 1914, pp. 130-1. Minutes are also on 1963/2248, CRS A463, NAA.

When Watt read this out on the conference's 5th day, it brought interjected protests from Holman and Victoria's other representative, John Murray, that women were, indeed, represented in their parliaments.¹⁰⁴ Watt then resumed, quoting the *WPA*: 'we courteously claim the right to voice our wishes in connexion with a question which may at any moment affect any girl in Australia.' When he asked whether the conference wished to re-consider its decision, Holman and Murray chorused that previous 'careful' investigation revealed 'absolutely no foundation' for the claims. The women, they said, wanted discussion of an issue for which they had not provided the necessary evidence.¹⁰⁵ The *Argus* sniped that what followed was 'a little variety' which altered the mood to 'a militant anxiety', when Goldstein, Pankhurst and over twenty women, 'as a body' 'invaded' the speaker's gallery.¹⁰⁶

Queensland's acting Liberal premier, Walter Barnes, proved their unlikely champion, conceding that his position might be 'somewhat different' from others there.

*We should not forget that there are some women in Australia who think this evil does exist . . . [and] regard the matter as very vital. If they are right I do not know that it is not vital to us. . . many of us, and I know that applies to Queensland, regard the influence of women and their rights and claims as being very strong. We have no desire to do anything that may appear to disregard their request.*¹⁰⁷

So, the former *Cobb & Co.* coach driver asked, 'would it not be possible' or 'would there be any objection', he pleaded, if the conference afforded them a 'limited time' at the end.¹⁰⁸

Watt remained unconvinced, saying that in the closing of past conferences, there was always a 'gallop up the straight'. WA's Labour premier John Scaddan echoed Holman and Murray, insisting that there was no evidence of the traffic in his state: in any case, it was a matter on which the states should deliberate separately not jointly. SA's attorney-general, Hermann Homburg, just wanted to proceed to other business. Donald MacKinnon, Victoria's attorney-general and railways minister, who had previously agreed to women's groups placing warning posters at railway stations, seemed more sympathetic but thought it 'discourteous' to receive the women, only to take no action. He reiterated that it would be more 'business-like' for them to submit written claims. So, Holman proposed successfully that, while the conference was 'indisposed' to receive 'any deputation whatever', if the women submitted information, 'we shall be glad to consider it'.¹⁰⁹

Disappointed but undeterred, Vida and Adela led the women out, only to return two days later, with double their number. Anticipating this, 'some strong, heavy policemen' received

¹⁰⁴ Presumably they meant by men, as there were no female parliamentarians until 1921.

¹⁰⁵ *Report on the Inter-State Conference*, 1914, pp. 130-1.

¹⁰⁶ *Argus*, 6 April 1914. *Register*, 2, 6 and 8 April 1914; *Age*, 6 & 21 April 1914; 1915/5651, CRS A1, NAA.

¹⁰⁷ *Report on the Inter-State Conference*, 1914, pp. 130-1. B. J. Costar, 'Barnes, Walter Henry (1858-1933)', *ADB*, vol. 7, NCB: ANU, MUP, 1979, <http://adb.anu.edu.au/biography/barnes-walter-henry-5603/text8593>.

¹⁰⁸ *ibid.*

¹⁰⁹ *Report on the Inter-State Conference*, 1914, pp. 130-1. Tasmania was not represented.

them: 'The fair ones expostulated, argued, and even threatened, for access', mocked the press, sneering that the 'threats' were not carried out. Watt did grant a private interview to four of them, after which they departed, 'very downcast'. Later, when he left the building, this group 'did their best to raise a hoot' but, as the press crowed, it 'was a miserable failure, and a dismal gurgle was all that could be heard'.¹¹⁰ The WPA did not give up, however, again publicizing its claims, compelling Murray to state that all police reports he had examined showed there was no such traffic. He added that the other premiers, whom he had asked at the conference, agreed that they, too, had failed to find any such traces.¹¹¹

Shortly after this drama, the Commonwealth received confirmation of its treaty accession and that letters of request from foreign tribunals on offences under the treaty were to be made through the respective foreign consul in Australia to the DEA. On 30 June 1914, two days after the notorious assassinations at Sarajevo, the imperial *OiC* arrived, which applied automatically to the adhering colonies, the treaty's extradition provisions to Germany. The Commonwealth gazetted the *OiC* and advised the states.¹¹² As the 'July Crisis', unravelled in Europe, the Commonwealth tried to finalise the steps needed to meet its treaty obligations. On 19 July, Atlee Hunt issued a public proclamation announcing an 'international agreement' for the 'extension of the operation of international extradition laws', so that 'offences relating to the white slave traffic have now been included in the category with murder, arson, and other offences for which persons may be extradited.'

*Fugitive criminals wanted for offences in connection with the white slave traffic will no longer be able to escape the consequences of their crime by fleeing to other countries.*¹¹³

The next day, Cook advised the new governor-general, Sir Ronald Munro Ferguson, that, 'in the opinion' of four states, their existing legislation met the convention's requirements. Probably distracted by the war, he did not forward this for twenty days, until 10 August, while the *CO* did not even reply.¹¹⁴ The Commonwealth's adhesion was formalised on 18 August 1914, two weeks after Britain had declared war and suspended all treaties with Germany.

Given that the DEA explicitly accepted that the Commonwealth had 'General responsibility for the provisions of [the] Convention being carried out', Cook's advice appears to have been rather loose. The responsibility, which the Commonwealth had accepted by its accession, should perhaps, have entailed its attorney-general confirming his assumption with greater certainty. For as Cook conceded, two states had not even given this assurance. One, NSW, had

¹¹⁰ *Register*, 2, 6 and 8 April 1914; *Argus*, 6 April 1914. *Age*, 6 & 21 April 1914; file 1915/5651, CRS A1, NAA.

¹¹¹ *Argus*, 21 April & 7 July 1914; *Age*, 29 April 1914; *Register*, 14 May 1914.

¹¹² For some reason this was done by the strangely indirect and older method of going through the governor-general to state governors, who advised their ministers, rather than the prime minister doing this directly. See vol. 31, CRS A1108 & 1912/275, CRS A1, NAA.

¹¹³ Commonwealth Gazette no. 44, 18 July 1914, vol. 31, CRS A1108, NAA. *Advertiser*, 20 July 1914.

¹¹⁴ Letter, prime minister to governor-general, 20 July 1914, vol. 31, CRS A1108 & 1912/275, CRS A1, NAA.

offered nothing more than Holman saying that it was his ‘intention’ to introduce such legislation at an ‘early date’, which would ‘fully meet’ obligations.¹¹⁵ The other, SA, having again asserted that, ‘it appears’ that there was no such traffic in the state, would only say it was ‘considering’ whether its legislation needed amendment.¹¹⁶ Any chance either of them might have legislated that year was lost, once war broke out. The loss of legislative momentum in respect to the convention was not confined to Australia.¹¹⁷ In the Commons, Chapple’s omnibus crime bill never received its second reading and was shelved, after late July. Newfoundland had been able to pass specific new legislation on the convention in March. NZ promised its amended immigration bill would address not only restriction of Indian immigration but also white slave traffickers. This did not happen. Coincidentally and ironically, the last occasion the CO raised the convention with its colonies in 1914 was notice that Belgium had adhered to it on 30 July, two days before Germany’s ultimatum and four before it was invaded by Germany.¹¹⁸

Unsurprisingly, the war had a similar negative impact on the *Obscene Publications* agreement. In February 1914, the Commonwealth had received a despatch from the president of Berlin’s *Central Depot for the Suppression of Obscene Publications (CBSOP)*--an arm of the German government. This covered a preliminary list of around 400 names and details of those suspected of being involved in international traffic in ‘pornographic literature.’ Atlee Hunt referred the matter to T&C, asking for any information and drafted a circular despatch for Cook to the premiers, asking the same. Victoria, Tasmania, WA and SA replied that there was no evidence of such trade in their respective states, with the latter adding that a small amount came from a Sydney book-selling firm. NSW authorities were aware of an Austrian in Sydney selling obscene pictures. Queensland replied that there were no such importers, although one seller dealt in such books from Sydney and Melbourne, while sailors on foreign vessels brought in obscene material. Meanwhile, the CO had returned all the relevant state legislation the Commonwealth had sent the previous October, reiterating that the treaty provided for direct communication between respective designated ‘central authorities’. Using the list the CO provided, Atlee Hunt organized its correct re-posting. Thereafter, the Commonwealth exchanged such information directly not only with Canada, NZ, South Africa and Newfoundland but also the USA, France, Italy, Portugal and the *Central Depot* in Berlin. The last communication to this office was sent on 31 July, four days before Britain declared

¹¹⁵ Letter, NSW premier to prime minister, 23 March 1914, vol. 31, CRS A1108, NAA.

¹¹⁶ Letter, SA premier to prime minister, 12 March 1914, vol. 31, CRS A1108, NAA.

¹¹⁷ Symbolically, both Snagge and Bullock died in early 1914.

¹¹⁸ Circular despatch no. 513, Harcourt to governors, 25 August 1914, vol. 31, CRS A1108, NAA.

war. Understandably, this international co-operation on the traffic ended until after peace was restored. After Commonwealth adherence, only Tasmania legislated further on the subject.¹¹⁹

Governments were not the only bodies distracted from such issues by the war. Most of the women's organisations, which had campaigned on them beforehand, now turned their main attention to the questions of war and, especially, peace. Yet, Glynn, in early 1915 and now back in private legal practice, was questioned by the *NSW's Women's Liberal League*, as to what action the Commonwealth had taken to fulfil, what it had interpreted, as his promise to act. His private request for clarification from Atlee Hunt is probably what led to the issue being briefly revived despite the war, with Fisher, back as prime minister, sending a reminder to the two recalcitrant states on the white slave treaty.¹²⁰ *NSW* again promised to amend its *Crimes Act, 1900* in its current parliamentary session. Two brief amendments in 1916 and 1918, however, did not address the treaty issues, although *NSW* did nominate a central authority.¹²¹ In September 1915, Victoria replied that it had passed an act amending and consolidating the *Law relating to Crimes and Criminal Offenders*, which directly related to the treaty. (The *Act's* s.52 clearly prohibited procurement, 'within or without Victoria', of women under 21 years, who were not prostitutes or of 'immoral character', to become prostitutes, 'inmates' of brothels or for 'unlawful carnal connexion'.) The Commonwealth passed the required copies of the *Act* to the *CO*. This, and later *CO* advice as to Bullock's successor as the central notifying authority, shows that war did not completely stop the conduct of the treaty.¹²²

The Commonwealth pursued *SA* through the remainder of 1915. Labour premier Crawford Vaughan, who had replaced the Liberals, finally responded to Fisher's last letter in October, that he had not found sufficient evidence of the traffic to warrant legislation—even the prior assurance of further 'consideration' was now dropped. So, when William Hughes replaced Fisher soon after, he tried yet again, pointing out that the other four states had acted and *NSW* had promised to so do. So, he 'suggest[ed] for your consideration', the 'advisableness' of legislation, unless *SA's Criminal Code* met the treaty obligations. He stated, which no Commonwealth official had before, the important point that legislation was needed to cover the offences under the treaty, even when they were committed outside the state. This still had little effect. Vaughan replied after another four months, claiming vaguely, that existing legislation met the treaty's purpose in 'practically the same manner', as that of three other

¹¹⁹ The records are on vol. 27, CRS A1108; file League Obs1, CRS A981, NAA. The *USA* initially posted this to Yass not Melbourne. **Tas:** 8 Geo. 5, no. 11 of 1917.

¹²⁰ 1915/5651, CRS A1; 10 June 1915, vol. 9, CRS A737, NAA.

¹²¹ Letters, *NSW* premier to prime minister, 26 June 1915 & 4 January 1916, vol. 31, CRS A1108, NAA. **NSW:** 7 Geo. 5, no. 80 of 1916; 9 Geo. 5, no. 35 of 1918; **Vic:** 6 Geo. 5, no. 2637 of 1915.

¹²² Despatch no. 1054, *CO* to governor-general, 1 November 1916, vol. 31, CRS A1108, NAA.

states. He did renew the earlier offer of possible further ‘consideration’, which the Commonwealth relayed to the CO.¹²³ Queensland took no further action during the war (or thereafter), nor did NSW, until, in 1924, three years after the *League of Nations’* successor convention on trafficking in women and children. Under pressure from the *Women’s League*, NSW passed legislation which its sponsor, attorney-general Thomas Bavin, explicitly linked to the convention, making procurement of a women under 21 years unlawful. Thus, Australia’s federal system had again demonstrated its tendency to delay inordinately the Commonwealth’s role in treaty making. Even then, it was not certain to the Commonwealth or the imperial government that all states’ legislation met the convention’s obligations.¹²⁴

* * *

There is very little detailed scholarship, none using archival sources, on the treaty developments covered above, yet they laid the foundations for today’s position in treaty and, in many places, domestic law on both treaty subjects. In 1921 and 1923, the *LoN* led the conclusion of the *International Convention[s] for the Suppression of*, respectively, *the Traffic in Women and Children* and *the Circulation and Traffic in Obscene Publications*. In 1933, the *LoN* also led the conclusion of the *Convention for the Suppression of the Traffic in Women of Full Age*. In 1947 the *UN* led the amendment by protocol of both the convention for the suppression of, respectively, *Traffic in Women and Children* and on *Obscene Publications*, which over 40 and 50¹²⁵ governments, respectively have signed and ratified. In 1949 the *UN-GA* approved the *International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*. Entering into force in 1951, in succession to the conventions of 1910, 1921 and 1933, over 80 governments have ratified the convention with over a dozen more having signed, without yet ratifying.

Although Britain was home to possibly the most powerful lobby groups behind the more important of these two 1910 treaties, that on white slavery, its government was not an international leader of their conclusion. The imitative came primarily from France and Germany. Ultimately, under the constant weight of its own public pressure, Britain fully supported the first multilateral treaties dealing with what today is called, transnational crime. The imperial government then sought to bring, as much of its empire, as was agreeable, into support for them.

¹²³ Letter, Fisher to SA premier, 10 June 1915, vol. 9, CRS A737; letters, Hughes to SA premier, 26 November 1915; SA premier to Hughes, 27 October 1915 & 17 March 1916; acting prime minister to governor-general, 7 April 1916, vol. 31, CRS A1108, NAA. SA: *Police Act*, 7 Geo. 5, no. 1257 of 1916.

¹²⁴ *Crimes (Amendment) Act*, no. 10 of 1924. *SMH*, 12 September 1921, 24 October 1923, 9 September & 24 November 1924.

¹²⁵ Only Denmark (1968) Germany (1974) and the Netherlands (1986, for Europe only) have denounced the convention

Although overseas lobby groups, notably Britain's *NVA* and the *USA's WCTU*, started fostering campaigns on these issues in Australia at an early date, the major action on these causes did not really develop until 1910. Although religious leaders played a significant role, the main agitation came from secular women's organisations, notably the *WPA* and internationally linked *NCWs*. Generally, Australian governments did not accept that either of the trafficking addressed by the treaties was a serious problem. The Commonwealth, nonetheless, followed Britain's lead in acceding to the principal conventions and, under significant public pressure, took notable legislative action against white slavery and promised to enforce strictly existing legislation against traffic in pornography. As both treaties imposed obligations, which also fell within the legislative powers of the states, the process of Australia meeting its legislative obligations was drawn out and incomplete. The elimination in 1897-8 of an explicit 'treaty power' in the Commonwealth constitution meant that the federal system greatly complicated treaty making, unlike two comparable federations, the *USA* and *Canada*, in which both federal governments had an explicit if varying treaty power.

PART 4

INTERNATIONAL PROTECTION OF LABOUR

Chapter 6

‘union of indestructible States’: prohibition of women’s night work

Industrialisation developed largely in an era where general doctrines of ‘free trade’ or ‘laissez-faire’ became dominant—or vice versa. State intervention by legislation was increasingly seen in a negative light, despite the fact or irony that ‘free trade’ was instituted by legislation. Such concerns by industry owners and employers were not only with domestic competition and productivity but, also, with the potential negative consequences of one’s own government’s restrictive legislation on their industry’s international competitiveness. So, when other domestic pressures built on governments, in terms of protective labour legislation for employees, governments were reluctant to respond, unless and until they secured similar legislative stances from foreign competitors—through the first labour protection treaties.

In 1788, when the First Fleet arrived in *NSW*, England’s parliament enacted a minimum age of 8 years for chimney sweep apprentices, the precursor to the so-called ‘Factory Acts’, which are generally dated from the *Act* of 1802, on textile factory apprentices.¹ Richard Arkwright’s inventions for cotton spinning, in the late 18th century, largely gave birth to the modern factory. Concern about the parish poor’s health (actually, mortality) in this new employment, was exposed by a Commons committee in 1767. A medical investigation into a contagion in Sir Robert Peel’s cotton works near Manchester, in 1784, condemned children’s overwork generally. Local magistrates resolved that they would not allow, under poor laws, indenture of parish apprentices to mills where children were obliged to work at night or more than ten hours per day. This was a first, in limiting hours of work, but did not have the general application, which the 1802 *Act*—introduced by Peel himself—did. This covered larger textile mills (employing 20 or more), and limited apprentices (not all children) to twelve (the bill had ten) work hours per day and began decreasing their night work, until it was entirely prohibited, by mid-1804.²

Until 1890, labour protection laws were solely domestic. Then, four multi-party protocols were signed at Berlin on several specific labour issues, the first such international agreements. Between 1904-06, seven European governments signed ten bilateral treaties, providing for various forms of reciprocal labour (or social) insurance.³ Britain signed only one such treaty, with France, in 1909. In 1906, the first two multilateral labour protection treaties were signed at Berne. One prohibited night work for women. Britain signed and, then, offered its colonies

¹ 28 Geo. 3, c. 48. K. H. Strange, *Climbing boys: a study of sweeps’ apprentices, 1773-1875*; Allison & Busby, London, 1982. Still the best and most comprehensive account of the successive factory legislation is B. L. Hutchins and A. Harrison, *A History of Factory Legislation*, P. S. King & son, London, 2nd ed. 1911 (1903).

² 42 Geo. 3, c. 73.

³ The parties were Italy, France, Switzerland, Germany, Austria-Hungary, Luxembourg and Belgium.

a choice of adherence, so deeming this new multilateral treaty subject, like transnational crime, ‘commercial’, or, at least, not ‘political’.

The Commonwealth’s constitution left the states with the powers to apply this treaty. So, the Commonwealth, under acting prime minister, John Forrest, initially took the view that its only role was to advise the states, which could then choose separate adherence to the treaty. This approach triggered considerable official discussion over the Commonwealth’s precise power in treaty matters. The fate of Australian accession to the treaty, with adherence never formalised, despite being explicitly desired by the Commonwealth, exposed the limitations on the Commonwealth in responding to such developments in international law.

1. ‘benevolent projects’: origins of international labour protection, 1802-99

Legislation on labour conditions was slower to be seen as a treaty subject than most other areas of public policy. Britain, in particular, was confident in the adequacy of its domestic legislation, until led by Europe, in particular, Germany, to embrace this development.

Robert Peel, a Lancashire mill-owning Conservative, had come under the influence of Scotland’s Welsh-born factory owner and social reformer, Robert Owen.⁴ In 1815, Peel introduced a bill to limit the work hours of all children in mills. Much amended (weakened), this was the first of six more ‘Factory Acts’ (1819, 1825, 1829, 1829, 1831, 1833, 1835) over forty years, which successively limited employment of children to those above nine years and a twelve-hour day (the *Act* of 1833, weaker than Owen’s bill, was further weakened by an amending act); to those under sixteen years, to a twelve-hour day, between 5am and 8pm, and only nine hours on Saturdays, between 5am and 4.30pm, all exclusive of 1½ hours for breakfast and lunch (weakened in other aspects by the 1831 act); to those under 18 years to 12 hours per day and night work (8.30pm to 5.30am) to over 21 years (weakened to cover cotton not all textile mills). The last *Act* extended both twelve-hour limit and night work ban, for under eighteens, to nearly all textile industries, with a maximum 69 hours work per week, and a ban on employing children under nine years, except (as, later inserted into the bill) in silk mills. Instead of the bill’s uniform limit of ten hours per day for children, the *Act* provided for a maximum of a 48-hour week or nine hours per day for under-elevens, increasing, over three years, to under-thirteens. Night-work for under-eighteens in textile factories was banned.⁵

Any legislative restrictions, such as limiting the workday to ten hours, apart from being contested strongly by zealots of *laissez-faire*, could potentially weaken a country’s economic

⁴ He was the father of the later prime minister, also Robert.

⁵ 59 Geo. 3, c. 66; 60 Geo. 3, c. 5 (this amendment weakened the foregoing act); 6 Geo. 4, c. 63; 10 Geo. 4, c. 51 and 10 Geo. 4, c. 63; 1 & 2 Will. 4, c. 39; 3 & 4 Will. 4, c. 103; 4 & 5 Will. 4, c. 1. There was also a further Chimney Sweepers act in 1834: 4 & 5 Will. 4, c. 35.

strength, in increasingly competitive, globalising trade, if other commercial powers did not do likewise. So, as in so many other fields, the idea of some form of international agreements inevitably and inexorably arose. Unusually, the original source was in Britain not Continental Europe. Owen, who had already advocated a ten-hour (1810) and, then, an eight-hour work day (1817), proposed the ‘international fixation’ of industrial conditions to the *USA* and the Concert of Europe, at *Aix-le-Chappelle*, in 1818. There was no official response.⁶

To date, the focus was on protecting children, essentially males. This changed, as markedly more females entered the new mechanized industries. (Possibly, one motive behind such legislation was protecting male jobs not females.) An *Act* in 1842 prohibited the employment underground of children, under age ten, and women in mines and collieries. During the sitting of a royal commission in 1842-3, there was widespread agitation for a universal ten-hour factory working day. Four subsequent ‘Factory Acts’ (1844, 1847, 1850 and 1853) reduced the minimum age of child employment from nine to eight years, prescribed a maximum of ten hours per day or 58 hours work per week for children and women and, then, increased the latter maximum back to 60 hours work per week, while prescribing the permissible times of such employment, including for meals. The ‘normal’ working day was thereby established.⁷

In Australasia, colonies were still either at the stage of early farming and merchant settlement or their commercial activities were largely limited to simple extraction from the land (timber and coal) or sea (whales and seals), apart from the successful, if simple and dispersed, wool industry. So, there was no such legislation nor even a call or need for it: as was also the case in *BNA* and South Africa. The *USA*’s first factory law, in Massachusetts in 1842, limited children’s work to a ten-hour day. A bill limiting female work-hours was defeated.⁸

An inquiry into British factories, in the early 1830s, made comparisons between such employment and the slave trade, with treaties being seen again as the ultimate solution to limiting work hours. Ultimately, the Continent assumed its usual leadership in treaty matters. A French report in 1839, on the poor state of textile workers, especially children, by economist and hygienist Louis-René Villermé, led to public and written appeals to European governments for treaties to regulate conditions of competition, including by economist Jérôme-Adolphe Blanqui and silk manufacturer, Daniel Legrand. The formation of the *Bund*

⁶ The intellectual origins of international labour law was first traced in Continental scholarship, notably, Ernest Mahaim, *Droit International Ouvrier*, Librairie de la société Recueil Sirey, Paris, 1913 and, then, reprised variously in numerous English-language works: Boutelle Ellsworth Lowe, *International aspects of the labor problem*, ColUP, NY, 1918 and *The international protection of labor: International Labor Organization, History and Law*, Macmillan, NY, 1921; Iwao Frederick Ayusawa, *International Labor Legislation*, East-West Center Press, Honolulu, 1920; James T. Shotwell (ed.), *The Origins of the International Labor Organization*, ColUP, NY, 1934. More recent works are merely summaries of these.

⁷ 5 & 6 Vict. c. 99; 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104.

⁸ Annie Marion MacLean, ‘Factory Legislation for Women in Canada’, *AJS*, 5(2), 1899, pp. 172-181.

der Kommunisten in London in 1847, mainly by German *émigrés*, underlined by the 1848 revolutions, gave more radical expression to labour internationalism, whose threat pushed governments towards more reform. Westminster passed seven further acts on factories, shops and mines (1856, 1861, 1864, 1867, 1867, 1870, 1871) with some extending earlier acts to other forms and scale of employment. From 1866, the English workers' voice gained greater united, institutional strength, with the origins of what became the *TUC*. In 1867, one of major electoral reform, a royal commission led to trade unions' legalisation in 1871. Such bodies, like governments, were comprised of adult males and, lacking direct voices in parliament, sought change by industrial bargaining, not legislation, which remained driven by Liberals.⁹

Reaction swept Continental Europe after the revolutions, stalling international developments. The resulting movements towards state unification, however, realised in Switzerland and, later, Italy and Germany, eventually added new voices to the call, previously led by France, for greater multilateralism in policy, including legal reform. In the mid-1850s, in a new cooperative spirit, heralded by the Paris peace settlement, French economic historian, Armand Audiganne, advocated international industrial law. This was also proposed by a Swiss canton to its new Federal Council, Bavaria's delegation to the *Congrès international de Bienfaisance* in Brussels and the revived (after the first two meetings in 1846 and 1847) congress on penal reform, held at Frankfurt in 1857. Swiss-born, Munich professor of constitutional law, Johann Bluntschli popularised this cause, while Owen renewed his call for an international congress, in 1858.¹⁰ While intellectuals tried to influence governments, much working class support was attracted to radical not reformist international solutions to industrialisation's problems.

The *International Workingmen's Association* (or, *1st International*) formed in London in 1864, temporarily united socialists, communists and anarchists, with some early trade unions, which had emerged from relaxation of repressive anti-combination laws. Successive congresses (1866, 1867, 1869, 1871, 1872) in several European cities, attracted large support, before splitting over ideology and dissolving in 1876. This subsidence of radical sentiment did not erase its threat—including, that of the Paris Commune of 1871 and the less revolutionary but still formidable electoral challenge of the *Sozialistische Arbeiterpartei Deutschlands* from 1875. These inclined governments to either repression or further concessions. Through the 1870s, in France, manufacturers, socialists and intellectuals, like Polish-born Louis Wolowski, and professor of industrial legislation, and politician, Jean Baptiste Dumas, called, including in the national assembly, for international action. (The first

⁹ 19 & 20 Vict. c. 38; 24 & 25 Vict. c. 117; 27 & 28 Vict. c. 48; 30 & 31 Vict. c. 103; 30 & 31 Vict. c. 146; 33 & 34 Vict. c. 62; 34 & 35 Vict. c. 104. The legislation on trade unions was 34 & 35 Vict. c. 31.

¹⁰ A. Audiganne, *L'industrie contemporaine: ses caractères et ses progrès chez les différents peuples du monde*, Capelle, Paris, 1856. See also footnote 6.

multilateral treaties, covering postage, telegraphs and universal measurements, were signed in 1874-5.) In Switzerland in 1876, national council president, Emil Frey, made the first formal call for such action, through an unrequited conference invitation to Austria, Belgium, Britain, France, Germany and Italy in 1881. Then, in newly unified Germany, economists Gustav von Schoenberg, Adolph Wagner and Ludwig 'Lujo' Brentano, plus theologian H. W. J. (Heinrich) Thiersch, ultimately persuaded chancellor Otto von Bismarck to introduce the world's first state-run, insurance schemes for accidents and old-age of workers in 1884. Germany would soon push for international agreements on these subjects.¹¹

Meanwhile, the Swiss and German initiatives stimulated French responses, through the 1880s, including not only from socialists and unionists but also such disparate political figures, as *communard* Édouard Vaillant, rising socialist Alexandre Millerand and royalist Catholic, *le Comte* (Albert) de Mun. All called variously for international conferences where work hours, including night work, age and wage minimums, plus workplace health, could be discussed and, possibly, agreed upon. This led to the formation in Paris in 1889 of *l'Association internationale pour la protection légale des travailleurs* and the *Comité permanent international des assurances sociales (CPIAS)*, the latter exploring German-style social insurance. Working class radicalism was also reviving, with two international congresses of socialists and workers in Paris, symbolically on 14 July, which established the *2nd International*. They supported Switzerland's proposal of 1887 for an international congress. One French *département* called on the government to do the same. Switzerland, however, took the lead, sounding out thirteen European governments, including Britain's, before extending a formal invitation in early 1890. Most governments, including Britain's, proved agreeable, before, unexpectedly, Germany proposed a similar conference on 'international regulation' of work hours. The Swiss were surprised and perplexed but found most governments gave priority to this later proposal.

There had been major industrial trouble in Germany in 1889, So, the new Kaiser was 'anxious' to hold the conference, over which he came into public dispute with Bismarck, who wished, instead, to repress militancy, resigning as the congress ended.¹² Wilhelm insisted the conference be 'technical' not 'political' and, so, after some confusion, especially in Britain, 'experts' not ambassadors represented their respective governments. Agenda items included limiting hours of work in mines, especially, of those which were very unhealthy, Sunday labour and hours of work of women and children. Sweden and the Netherlands, especially, were dubious about the conference's value. Sweden argued its climate meant fixed hours for a

¹¹ See footnote 6.

¹² Friedrich Darmstaedter, *Bismarck and the Creation of the Second Reich*, Methuen & Co. Ltd., London, 1948; Jonathan Steinberg, *Bismarck: A Life*, OUP, Oxford, 2011.

whole year were inappropriate. The Netherlands had no mines and held its new laws adequately protected women and children. Yet, neither wanted to offend Germany. France, favouring the Berne conference, agreed with Britain that Berlin should be postponed. Neither, along with Sweden, wanted the work hours of adult males discussed. France and Italy were opposed to the issue of prohibiting Sunday work, on anti-religious grounds. Yet, ultimately, all agreed to attend.¹³

In the post-Commune period, Westminster had enacted further factory legislation (1874, 1878, 1883, 1886, 1888, 1889).¹⁴ The *Act* of 1878 limited female's maximum working week to 56 hours. In Britain's colonies, factory laws followed early industrialisation. Victoria (see below) led in 1873 and 1885. In 1884, Ontario passed Canada's first factory law (amended in 1887 and 1889), adopting England's model of a maximum ten-hour day, exclusive of a lunch hour, and 60 hours per week.¹⁵ There was no such legislation, yet, in South Africa or Newfoundland, dominated respectively by 'coloured' mining and fishing. Eight USA states limited work-hours of children (between under 18 or 16 years) and women (either all or under 21 or 18 years), based variously on the English model.¹⁶

Britain's government, generally, had profound reservations over Germany's invitation. The original draft instructions to its delegation explained that Britain attached the 'deepest importance' to any proposals, which 'promise an improvement in the condition of the great multitude of men who live by labour in factories and mines'. While giving such, their 'most attentive consideration', the delegates should be 'mindful' of two generations of British legislative reform and, thus,

*not be disposed too readily to accept benevolent projects beyond the well-considered limits within which the legislation in this country has uniformly confined its interference.*¹⁷

¹³ FO83/1132, 1133, 1134, 1135, TNA. The 'experts' in Britain's delegation were led by Sir John Gorst (Conservative under-secretary of state for India), appointed presumably to protect British factory-owners' interests in India, although he had a genuine interest in the welfare of the poor and their children. The others were parliamentarians Sir William Houldsworth (Conservative mill-owner) and Thomas Burt (radical *Lib-Lab* and former Northumberland mining unionist); Fred Whympers, factory inspector; John Burnett, appointed in 1886 to the *BoT* to collect labour statistics; Thomas Birtwistle of the *United Weavers' Association* (a trade unionist soon appointed a factory inspector) and David Dale, from the family of the famed Arkwright-influenced, New Lanark cotton magnate and slavery abolitionist of the same name, and, thus, a distant relative of Robert Owen. Raised as a Quaker by his mother, Dale, by then, was a senior executive in mining, steel-making and railway interests associated with the company of Joseph Pease, of the north England Quaker family, notable for its anti-slavery and peace activism. Parliamentary questions asked why government and employer not worker delegates predominated. *HCD*, 20 February 1890, vol. 341 p. 751.

¹⁴ 37 & 38 Vict. c. 44; 41 & 42 Vict. c. 16; 46 & 47 c. 53; 49 & 50 Vict. c. 55; 51 & 52 Vict. c. 22; 52 & 53 Vict. c. 62.

¹⁵ **Canada:** 47 Vic. c. 39; 50 Vic. c. 35; 52 Vic. c. 43.

¹⁶ Annie Marion MacLean, 'Factory Legislation for Women in the United States', *AJS*, 3(2), 1897, pp. 183-205. Specific provision for women was enacted in Minnesota (1858 and 1878), Massachusetts (1874), New York (1886), Maine (1887) and Connecticut (1889). (Rhode Island's female labour protection was not under a 'Factory Act'.) Michigan (1885) and California (1889) enacted some protection for children not women.

¹⁷ Draft and final instructions, Salisbury to the British delegation, 13 & 14 March 1890, FO83/1132, TNA.

Other governments were expected to share this caution over achieving benefits ‘without interfering with the freedom of labour.’ Salisbury substituted ‘more commonplace’ instructions for this ‘too philosophical’ draft, as he could see ‘no good purpose’ in issuing detailed instructions. He insisted his delegates should first seek his approval, before assenting to any proposals, and not to support ‘propositions which involve a change in British law.’¹⁸

The conference went relatively smoothly, except for some ‘drastic’ Swiss proposals, which were generally opposed, including by Britain, as were pleas for exceptions by the ‘Southern countries’, Spain and Italy. Four commissions were formed to study respectively, labour in mines, on Sundays and of children, young persons and women. The parties signed four protocols, including some in advance of existing British law, raising the minimum child labour age to twelve and, in underground mines, to fourteen years, while also providing a four week break in work for pregnant woman. Governments were, however, left at ‘complete liberty to adopt and carry out the views of the conference to extent and in the manner they think fit.’ At no stage did the *FO* consult the *CO* over the conference and, so, no official information, before or after, was shared with the colonies.¹⁹

In the decade after Berlin, labour issues grew in policy significance. Trade union organizations continued to develop national, if not yet, international, institutions, with the formation of, in 1881 in the *USA*, *The Federation of Organized Trades and Labour Unions*, 1890 in Germany, the massive *Generalkommission der Gewerkschaften Deutschlands*, 1895 in France, the *Confédération générale du travail* and, 1899 in Britain, the *General Federation of Trade Unions*. There was, however, as yet, no international organisation of trade unions. Internationalism on labour issues, aside from liberals, was limited to the socialists’ 2nd *International* which, building on its foundation in 1889, held congresses in Brussels (1891), Zurich (1893) and London (1896). Like the anarcho-syndicalist dominated *CGT*, it generally pursued a radical not reformist agenda.²⁰

Numerous governments began to develop labour policies. The *USA* had led with a *Bureau of Labor* in 1884.²¹ In 1891, France created the *Direction du Travail* in the *Ministre du*

¹⁸ Annotation by Salisbury on draft instructions, 14 March 1890; telegraph, Gorst to *FO*, 17 March 1890, FO83/1132, TNA.

¹⁹ Despatches, Gorst & British delegates to Salisbury, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, & 29 March 1890, FO83/1132, TNA. There is some relevant detail in Ulla Wikander, Alice Kessler-Harris (eds.), *Protecting Women: Labor Legislation in Europe, the United States, and Australia, 1880-1920*, UIP, Urbana, Ill., 1995. The four protocols signed are not recorded in British treaty lists but are cited in *FO* files.

²⁰ Suzan Milner, *The dilemmas of internationalism: French syndicalism and the International Labour Movement, 1900-1914*, Berg, NY, 1990.

²¹ J. P. Goldberg and W.T. Moyo, *The first hundred years of the Bureau of Labor Statistics, USBLSB*, no. 2235, *USGPO*, 1985.

commerce et de l'industrie and, in 1893, Britain formed a *Labour Department* in the *BoT*.²² Britain enacted three more 'Factory' (1891, 1895, 1901) and one 'Shops' (1892) acts.²³ The minimum factory employment age was raised from ten to eleven, then twelve, while women were not to be employed, within four weeks of childbirth. In 1893, female factory inspectors were introduced. In northern America, Quebec enacted a maximum 10-hour day and 60-hour week for women in 1894, while Ontario amended earlier legislation in 1895. Both excluded female work between 9pm and 6am.²⁴ Four more *USA* states legislated labour protection.²⁵

Bourgeois labour reform movements continued to grow in strength and influence. The Pope's sanction of reform, after Berlin, was important, because so many European workers were Catholic. In Switzerland, there were successive calls from 1892, including by workers, to the federal council, to convene an official international congress. This was amplified by the first *International Congress for Protective Labour Legislation*, in Zurich in 1897, which discussed female employment. Next month, in Brussels, led by young, Catholic legal and political figures, Henri Carton de Wiart and Ernest Mahaim, a conference of academic and parliamentary 'experts' promoted the same cause. National committees were established in Germany, Austria, Belgium, France, Italy, the Netherlands and Switzerland (not Britain), all advocating a conference for a permanent inter-governmental labour bureau, to coordinate these national bureaux's gathering of statistics and helping to draft laws and treaties.²⁶

Australian colonies, by this time, had strong labour movements, even by world standards, but no body there, apparently, noticed these international developments, before or after Berlin. Yet, that conference had an indirect influence, through Britain's imperial leadership. Victoria, with some manufacturing, mainly in clothing, stimulated by the 1850s gold rush, was Australasia's first colony to legislate on factories and shops. Early coordination of worker action had started with labour parliamentary candidates and formation in 1856 of the *Melbourne Trades Hall Committee*, campaigning to extend the eight-hour workday. Similar bodies were established in *NSW* (1871), Tasmania (1883), *SA* (1884), Queensland (1885) and *WA* (1891). Eight inter-colonial trade union congresses were held between 1879 and 1898.²⁷ Slowly disentangling themselves from original English-like, *Lib-Lab* political alliances, these

²² David F. Schloss, 'The Reorganisation of our Labour Department', and (anon.), 'The Labour Department and the Labour Gazette', *JRSS*, 56(1), March 1893, pp. 44-70 and 56(2), June 1893, pp. 330-3. The government notification stated that 'one lady' worked in the department.

²³ 54 & 55 Vict. c. 75; 55 & 56 Vict. c. 62; 58 & 59 Vict. c. 37; 1 Edw. 7, c. 22.

²⁴ **Canada:** 57 Vic. c. 30; 58 Vic. c. 50.

²⁵ MacLean, *op. cit.*, pp. 183-205. This was done for either all employees (Ohio, 1891) or, specifically, for women. (New Jersey, 1892; Pennsylvania and Illinois, both 1893); with New York (1892), Michigan and Massachusetts (both 1895), extending earlier legislation.

²⁶ Kathleen Canning, *Languages of Labor and Gender: Female Factory Work in Germany, 1850-1914*, CLUP, Ithaca, Ill., 1996, especially pp. 161-2

²⁷ Sydney, 1879; Melbourne, 1884; Sydney, 1885; Adelaide, 1886; Brisbane, 1888; Hobart, 1889; Ballarat, 1891; Adelaide, 1898.

colony-wide trade union federations put forward their own electoral candidates. From 1890, local industrial conflict, rather than Berlin, spurred the formation of distinct labour parties in each colony: approximately, in NSW and SA (both 1891), Queensland (1893), Victoria (1894), WA (1899) and Tasmania (1903). Although an *Inter-Colonial Labour Conference* was held in 1894, there was, as yet, no permanent 'national' organization to connect with overseas unions. The 2nd *International*'s radicalism was also absent.²⁸ Inspired by the USA's example (1884) and led by NZ (1891), Queensland, NSW and Tasmania created labour offices between 1892 and 1893 (the year Britain established its bureau.) The unified call at the 1894 congress, for the same in Victoria, SA and WA, encountered greater resistance or indifference.²⁹

Understandably, Victoria also led with Australasia's 'factory' acts, before the Berlin conference. From 1873, Victorian females were not to be employed in factories more than eight hours a day but night work was not prohibited. Victoria's first general factory act of 1885, prohibited employment of children under thirteen years and females or males under sixteen for more than 48 hours per week (provisions preserved in amending acts of 1887 and 1890.)³⁰ In 1884, Tasmania prohibited employment of children under twelve and limited those over that and females over eighteen to eight and ten hours per day respectively.³¹ After London reports of the Berlin conference in the local press, especially in mining areas, such as in SA, a wave of 'factory acts' were passed.³² Victoria, predictably led, adopting six further acts (1890, 1893, 1896, 1897, 1898, 1900³³), quickly followed by NZ with its first four (1891, 1892, 1894, 1896).³⁴ SA, in 1894, passed its first act (whose application was extended by a second act in 1900), which limited weekly hours to 48 hours, with some exceptions, for 'women' (over sixteen) and 'young persons' (thirteen to sixteen).³⁵ NSW followed with an

²⁸ *SMH*, 23 January 1894.

²⁹ The first Australian call for a governmental labour department appears to have been in Victoria in 1874. In NZ, where liberalism was much stronger than labourism, there was no labour federation until miners formed one in 1908-9 and a Labour party was formed in 1910-16.

³⁰ **Vic**: 36 Vic. no. 466 of 1873; 49 Vic. no. 862 of 1885; 51 Vic. no. 961 of 1887; 54 Vict. no. 1091 of 1890. Richard Johnstone, 'From Catch Up to Innovation: A History of Occupational Health and Safety Regulation in Queensland', in Bradley Bowden (ed.), *Work and Strife in Paradise: The History of Labour Relations in Queensland 1859-2009*, Federation Press, Annandale, NSW, 2009, p. 95; *Weekly Times*, 12 September 1874.

³¹ **Tas**: 48 Vic. no. 20.

³² *The Northern Miner*, 5, 24 February; *Daily Telegraph* (Launceston), 7, 28 February & 1, 13, 17, 25, 31 March & 24 May & 12 June; *Border Watch*, 8 February & 11 June; *South Australian Chronicle*, 8, 15 February & 31 May; *Advertiser*, 24, 27 February & 14, 24 March & 28 May; *Tasmanian News*, 26 February & 10, 15, 21 March & 1 April & 14 May; *Gympie Times and Mary River Mining Gazette*, 27 February; *Maryborough Chronicle, Wide Bay and Burnett Advertiser*, 17 March; all 1890.

³³ **Vic**: 54 Vic. no. 1001 of 1890; 57 Vic. no. 1353 of 1893; 60 Vic. no. 1445 of 1896; 61 Vic. no. 1518 of 1897; 62 Vic. no. 1597 of 1898; 63 Vic. no. 1654 of 1900.

³⁴ **NZ**: 54 & 55 Vic. no. 32 of 1891; 56 Vic. no. 49 of 1892; 58 Vic. no. 31 of 1894; 60 Vic. no. 31 of 1896.

³⁵ **SA**: 57 & 58 Vic. no. 603 of 1894; 63 & 64 Vic. no. 752 of 1900.

Apprentices Act 1894 and its first *Factories and Shops Act* in 1896.³⁶ Queensland's inaugural act was in 1900.³⁷ By federation, only WA had not legislated on factories.³⁸

The 1890s conventions, which framed the Commonwealth constitution, were Liberal dominated, with the labour movement barely represented. The first constitutional draft (1891) did not provide for federal power over any industrial question. In that year's convention, however, in an isolated instance, Kingston unsuccessfully proposed that a federal parliament should have power over industrial arbitration.³⁹ In the 1897 convention, Higgins, re-visited Kingston's call. Although most debate was confined to this specific issue, there were occasional broader references to the appropriate legislative responsibility for industrial questions. These made very clear that the dominant political sentiment, in Australia, on this issue, was, that such responsibility should be retained by the states. *Free Traders* challenged Higgins' proposal. William McMillan objected that it 'goes a step too far', before expounding broadly that the 'object of Federation is, while federating on common matters, not to interfere with the industrial and local life of the States.' His NSW colleague, Bernhard Wise, although generally progressive, warned that to 'give the Federal Parliament power to make laws affecting industrial disputes gives them authority to regulate by penalties every detail of the industrial life of every trade in the colonies,' to which McMillan cheered 'Hear, hear.' Encouraged, Wise continued:

*There is no matter in which varied local development is more necessary or desirable to a State than the development of its industrial conditions . . . I do not think the Federal Parliament or any centralised authority will be as competent as a local authority to deal with the necessary local conditions of trade.*⁴⁰

Now, it was Downer who chorused, 'Hear, hear', after which, Wise 'strongly oppose[d]' a federal parliament having power to override state laws, 'at the dictation of persons in quite other parts of the continent, who know nothing of the local and industrial conditions which gave rise to that development in that part'. Of the *Protectionists*, Barton supported Wise. 'These industrial matters, I think, are distinctly more within the province of the States to deal with than of the Federal Parliament.' Deakin took an ambiguous, halfway position. Higgins's proposal did succeed and became s.51(xxxv): 'Conciliation and arbitration for the prevention and settlement of industrial disputes'. This, the sole Commonwealth industrial power, applied, however, only to disputes 'extending beyond the limits of any one State'.⁴¹

³⁶ *NSW*: 57 Vic. no. 22 of 1894; 59 Vic. no. 37 of 1896

³⁷ *Qld*: 64 Vic. no. 28 of 1900.

³⁸ Voluntary or compulsory industrial arbitration and conciliation were enacted by Victoria (1890), *NSW* (1892), *SA* (1894), *NZ* (1894) and *WA* (1895), but neither Tasmania nor Queensland, between 1890 and 1895. *NZ*: 54 Vic. no. 10 of 1890; *Vic*: 55 Vic. no. 1226 of 1891; *NSW*: 55 Vic. no. 32 of 1892, 63 Vic. no. 3 of 1899; *SA*: 57 & 58 Vic. no. 598 of 1894; *WA*: 59 Vic. no. 13 of 1895.

³⁹ *Official Report, 1891*, (3 April), pp. 688-9, (6 April), 780, 785.

⁴⁰ *Official Report, 1897*, (17 April), pp. 783-6, 792.

⁴¹ *ibid*.

2. ‘internationalism seems to be the word’: federalism and labour treaties, 1901-5

The new Commonwealth’s leadership was firmly committed to leaving regulation of industrial conditions to the states. Accelerating international treaty developments soon after 1901 would challenge that limited approach.

In June 1901, just after federation, Higgins revived the issue of the federal role in industrial matters in federal parliament’s first session, during a debate over the Commonwealth setting minimum wages and restricting hours of work in all its own contracts. The House adopted his resolution that, it was ‘expedient for the Parliament of the Commonwealth to accept (if the States see fit to grant it, [under s.51(xxxvii)] . . . full power to make laws for Australia as to wages and hours and conditions of labour’.⁴² Atlee Hunt advised Barton however, that Victoria’s Liberal premier, Alexander Peacock, had reversed his support at the 1897 convention, for this idea, now deeming it to be ‘impracticable’, at least ‘for the time being’.⁴³ So, Barton sent this resolution to the premiers, while reassuring them that,

*it is by no means the wish of the Federal Government, or the House, to arrogate to themselves any power in this direction, but recognizing the importance of general legislation on the subject, in view of the Inter-State Free Trade which is soon to be inaugurated, the Government merely brings the matter under the notice of the State Governments, so that they may have official intimation that any action on their part, taken in the friendly spirit of the resolution, will be welcomed by this Government.*⁴⁴

Later, Barton privately justified his cautious position. He protested that, his ‘course of full and frank Liberalism’ had been ‘misinterpreted as a pandering to the demands of extreme theorists’. Instead, he explained, it arose from his commitment ‘never [to] be found abandoning the principles on which I fought the battle of federation’. So, it would be the ‘desertion’ of one of the ‘greatest’ of those principles,

if I consented to a proposal which impairs the whole basis of the Federation as a Union of States giving plenary power to the Commonwealth for National self-governing purposes, but preserving at the same time the continuance and the individuality of the States in their own great sphere.

*. . . we decline to conduct a measure perverted from our liberal purposes by the inclusion of a provision not only detrimental to state interests but in our judgment tending to subvert the Constitution.*⁴⁵

Paraphrasing the USA’s Supreme Court in a ruling over secession in 1869, he ended: ‘In short, I cannot consent to undermine “an indestructible Union of indestructible States”’.⁴⁶

⁴² CPD, HR, vol. 24, 4 June 1901, p. 1191.

⁴³ Minute, Atlee Hunt to prime minister, 4 July 1901, 1901/46/1, CRS A8, NAA. *Herald* (Melbourne), 2 July 1901.

⁴⁴ Circular letter, prime minister to premiers, 11 July 1901, 1901/46/1, CRS A8, NAA.

⁴⁵ Barton to William Shiels (former Victorian premier), September 1903, Barton papers, MS51, Series 1, f.1246a, NLA. I have used the stronger original draft not the final posted version; *SMH*, 2 June 1902. The case was *Texas v. White*, 74. U.S. 700.

⁴⁶ *ibid.*

Although Labour, as a minor party, provided decisive parliamentary support for Barton's government, it lacked the strength or, perhaps, desire to contest this view of the federal compact, which, as held by successive prime ministers, greatly influenced the Commonwealth's response to treaties, especially on labour issues. Federation had led to a 'national' Labour Party (only at parliamentary level) but not a 'national' organisation for trade unions, which lacking international engagement, seemingly shared the party's view.

Liberals still dominated state governments (apart from one week in Queensland in 1899). So, the premiers' replies to Barton were predictable. Peacock just expressed thanks and Queensland's Robert Philp, acknowledgement. Elliott Lewis's conservative Tasmanian cabinet 'fully discussed and considered' the matter, deciding it would be 'undesirable' to 'surrender its rights to make its own laws upon the important subjects named in the resolution.' SA's progressive but strongly independent John Jenkins said it not 'expedient'. NSW's John See, a self-made businessman, who would soon pass the state's *Arbitration Act*, enfranchise women and establish a state clothing factory to undermine 'sweating', replied that 'this is a question which should be left to each state to determine.' WA's brief, interim premier, Alf Morgans, from gold-mining Coolgardie, undertook to bring the question before parliament, a commitment his successor, George Leake, did not uphold. His successor, Walter James, a reformer who legalized trade unions and passed *Arbitration* and *Workers' Compensation* acts (1902), belatedly informed Barton that his government thought it was not advisable to 'hand over' such powers but would not 'stand out' alone, and 'interfere' with 'the full operation of legislation', if other states decided otherwise. Labour figures were suspicious of federation and decided, a view probably shared by sympathetic Liberals, that their interests were better protected by the states. This outlook would come under increasing challenge from international developments, for which the Commonwealth, not the states, was responsible.⁴⁷

At Paris' *Universal Exhibition*, just held in 1900, there had been numerous international congresses, including on labour issues. The 2nd *International* indulged in an ideological debate over cooperation with 'bourgeois' governments though, in practical terms, did form a permanent bureau in Brussels. By contrast, hours of work, workplace safety and factory inspections were discussed by nine European governments at the *Congrès International pour la protection légale des travailleurs*, chaired by France's socialist minister of commerce, Millerand.⁴⁸ He had previously supported a Belgian proposal for an international labour bureau and, so, the congress established the *International Association for Labour Legislation (IALL)*, with Swiss lawyer and Catholic liberal political leader, Paul Scherrer, elected

⁴⁷ The premiers' replies are in 1901/46/1, CRS A8, NAA.

⁴⁸ The others represented were Austria, Belgium, Denmark, France, Germany, Hungary, Spain and Switzerland. Millerand was, in fact, the specific subject of that 2nd International debate.

president.⁴⁹ The first general *IALL* meeting, on May Day 1901 in *Bâle*, examined two topics: unhealthy industrial practices, especially the use of lead and white phosphorus in manufacturing and, the effects on industries, in which night work for women had been abolished. To facilitate such investigations, the *IALL* also established a permanent *Office Internationale du Travail (OIT)*, with *Bâle* university's Viennese-educated economics professor, Stefan Bauer, as secretary.⁵⁰ The *OIT*'s initial functions were to collect, report on and distribute foreign labour laws, including those of non-members. Several governments, including Britain's, later provided modest financial support, though, as yet, the *IALL* had no British affiliate. Bauer soon contacted the *CO* for information on colonial labour laws, including those in Australasia.⁵¹

European trade unions had also moved to establish greater international cooperation, though, unlike the *IALL*, separately from government. In August 1901, at a Danish workers' congress in Copenhagen, eight trade union federations (including Britain's) decided to form, what became the *International Secretariat of National Trade Union Centres*, based from 1903 in Berlin.⁵² Growth was slow, though by 1904 it had fifteen affiliates representing 2.5 (up from the original 1.1) million members, with its role initially limited to sharing industrial information and establishing other union federations, leaving politics to the 2nd *International*. Neither organization initially connected with Australia. Then, after the second *IOT* meeting in Cologne in 1902, the *IALL* asked Switzerland to convene an international conference on the two subjects discussed in 1901. In early 1904, the *IALL* forwarded, to various governments, a

⁴⁹ France's professor Albert Métin, not Australian trade unionists as some have suggested, reported on labour legislation in Australasia, after a visit the year prior, researching for France's *Direction du Travail*. The *IALL*'s official title was *Association Internationale pour la protection légale des travailleurs*. For the primary source see *Musée Social*, 5(8), August 1900, pp. 261-296 and also Étienne Bauer, *L'Association internationale pour la protection Légale des travailleurs et L'Office internationale du travail, 1901-1910. Origins, organisation, oeuvre réalisée, documents, rapport présenté au congrès mondial des Associations internationales (Bruxelles, mai 1910)*, Brussels, 1910. Secondary source literature, more theoretical than empirical, includes A. Rasmussen, 'Jalons pour une histoire des congrès internationaux au XIXe siècle: régulation scientifique et propagande intellectuelle', *Relations internationales*, 62, Summer 1990, pp. 115-33 and 'Tournant, inflexions, ruptures: le moment internationaliste', *Mil neuf cent. Revue d'histoire intellectuelle*, 19, 2001, pp. 27-41; J. Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization', *IRSH*, 50(3), 2005, pp. 435-66; Sandrine Knott, 'From Transnational Reformist Network to International Organization: The International Association for Labour Legislation and the International Labour Organization, 1900-1930s' in Davide Rodogno, Bernhard Struck and Jakob Vogel (eds.), *Shaping the Transnational Sphere: Experts, Networks and Issues from the 1840s to the 1930s*, Berhahn Books, Oxford, 2015, pp. 239-58.

⁵⁰ The *OIT* was also known as the *International Labour Office* and the *Internationales Arbeitsamt*. *Advertiser*, 28 April 1899; *Register*, 10 May & 14 October 1899; *Goulburn Evening Penny Post*, 8 July 1899; *The Sydney Mail and New South Wales Advertiser*, 15 July 1899; *Morning Bulletin*, 10 August 1899; *Herald* (Adelaide), 10 August 1901; *SMH*, 17 August 1901. There is a valuable first-hand account of the *ILO*'s operations in S. Bauer, 'The International Labour Office in Basle', *The Economic Journal* 13(51) (Sept. 1903): 438-43; Bauer's biography is in Matthias von Bergen, 'Nationalökonomie und Weltbürgertum. Ein Beitrag zur Biographie des internationalen Sozialpolitikers Stephan Bauer', [Thesis], Bern, 1990. Some secondary sources mention English, USA and Mexican representatives being there but none were officially recorded. The same sources are definitely incorrect in saying Australia and New Zealand were represented.

⁵¹ CO323/475/235-47; CO323/485/268-80; for early British concerns with white phosphorus, see HO45/9850/B12393D, TNA.

⁵² Those represented were from Germany, France, Britain, Belgium, Sweden, Norway, Denmark and Finland.

memorandum on both (with lead now dropped), inspired by France's Georges Alfassa.⁵³ Unsurprisingly, all but one government ignored this.

In mid-1904, Switzerland asked whether Britain was 'disposed' to attend, if the agenda was reduced to the 'narrowest possible limits' and addressed only the two subjects, but would not proceed without British participation, to which it attached 'great importance'.⁵⁴ The *BoT*, concerned not to surrender trade advantages, concurred with the *HO*, however, that Britain could 'hardly refuse', provided a sufficient number of important states attended, only governmental representatives were admitted and discussion was kept 'open', meaning Britain would not be committed 'in any way' on the principle or details.⁵⁵ So, Lord Lansdowne told Switzerland that his representatives would merely inform the conference of Britain's prior legislative measures and report on the proceedings for its consideration.⁵⁶ Britain had not raised this conference with its colonies but related non-governmental international developments had begun to embrace Australia.

NCW representatives from *NSW*, *SA*, Tasmania and *NZ* attended the *ICW*'s 3rd quinquennial congress in Berlin in June 1904, thus ensuring some press coverage in Australasia. The congress continued the *ICW*'s focus on female suffrage, drinking, gambling, divorce laws, peace and the new issue, white slavery, rather than labour concerns.⁵⁷ Yet, Manchester's socialist *The Clarion*, reported in Australia, commended to the *ICW*, that 'all women in sympathy with the claims of labour', should join the *IALL* to help 'level up legislation in all countries' through international agreements. 'Internationalism seems to be the word nowadays', quipped an Australian newspaper.⁵⁸ The *IALL* was also extending its reach. In 1904 Bauer went to Britain and in 1905 helped establish the *British Association for Labour Legislation (BALL)*, which would then reach out to the colonies, including Australasia's. Reflecting the *IALL*'s largely non-industrial and *bourgeois* character, an eventual forty or so affiliated societies included only minor trade unions. Yet, this meant that women were highly involved, notably leaders of the *Women's Trade Union League*, Mary Macarthur (of the *Women's Cooperative Guild*) and Gertude Tuckwell, plus factory inspector, Adelaide

⁵³ Report, Cunynghame & Delevingne to Home Secretary, July 1905, CAB37/80/169 & FO83/55, TNA. His successive addresses to the *IALL*'s congresses of 1903 and 1904 were 'Le Travail du Nuit des Femmes et L'indirection de l'emploi de la céruse et du Phosphore blanc' with Phosphore blanc', *REP*, 17 (7), 1903, pp. 637-659 and 'Le Travail du Nuit des Femmes', *RP*, 5, September 1904, pp. 367-89. See also University of Paris law professor, Raoul Jay, *La Protection legale des travailleurs en France (Extrait de la Revue d'Économie Politique)*, 1903, Librairie de la Société du Recueil Legales Lois et des Arrêts, Paris, 1903.

⁵⁴ Switzerland's memorandum is attached to letter, *FO* to *BoT*, 27 June 1904, B11/2, TNA.

⁵⁵ Letter, *BoT* (H. Llwelllyn Smith) to *FO*, 11 July 1904, B11/2, TNA.

⁵⁶ Letter, Lansdowne to Carlin, 23 July 1904, B11/2, TNA.

⁵⁷ Most members, like its president, the Countess of Aberdeen, were from higher not working-class levels of society. Queen Victoria had felt comfortable hosting some for tea in 1899.

⁵⁸ *Examiner* (Launceston), 30 October 1905; *SMH*, 1 November 1905. The *US* delegate argued that there should now be only a single Commonwealth delegate.

Anderson, linguist, Constance Smith and Sophy Sanger, who accompanied Sidney Webb to Berne in 1905.⁵⁹ (An *IALL* section was established in the *USA* in 1906.⁶⁰)

Meanwhile, Switzerland had formally invited twelve governments ('all Europe', observed British officials), except Russia, the Balkans, Greece and Turkey, to Berne, for what was deemed only a preliminary conference. This opened on 8 May 1905 with the Swiss industry minister presiding. Britain was represented by two relatively junior officials, the *HO*'s legal assistant under secretary, Henry Cunynghame, and principal clerk, Malcolm Delevingne. They were not authorized to enter into binding agreements. Cunynghame later sourly complained that, they were 'hampered' by the adoption, without warning (this was untrue), of French and German as official languages and English excluded. The conference divided into two committees: one, on women's night work, the other on the use of white phosphorus in matches, chaired by France and Germany respectively. They met behind 'closed doors', which Cunynghame said was not at his insistence, as France's press reported. Despite objections that the tabling of two draft conventions went further than the terms of invitation, all but Britain voted in favour.⁶¹ At the end, the committees reported to the whole conference. Statistics presented showed that, of 50 governments, thirteen and twenty prohibited night work for minors and women respectively. Seventeen regulated work hours for women but without provisions on night work. Only Japan had no regulations specifically for female employment. The general rule agreed upon was, that no woman, single or married, should work, 'that is, . . . [be] employed outside their own houses', for more than ten hours in a day, except in great emergencies. So, the *IALL* resolved to 'induce' all governments to prohibit entirely women's night work.⁶²

With no *CO* advice, the only reports in Australia were from London's press, probably originating with Webb and Sanger. These reports had a somewhat dismissive, even, derisory tone, claiming non-official delegates gained only 'glimpses' and 'faint echoes' of the proceedings, held behind 'closed doors', at an official delegate's request. One report described this 'rather remarkable' conference as being 'confined entirely' to the 'women's

⁵⁹ G. Tuckwell, 'The First International Labour Association: The Passing of the British Section', *JCL&IL*, 3rd series 28(3-4), 1946, pp. 53-56. Adelaide Mary Anderson, *Woman in the Factory: An Administrative Adventure 1893-1921*, John Murray, London, 1921.

⁶⁰ This was entitled the *American Association for Labor Legislation (AALL)*. David A. Moss, *The Political Economy of Insecurity: The American Association for Labor Legislation and the Crusade for Social Welfare Reform in the Progressive Era*, Doctoral Dissertation, Yale University, 1992.

⁶¹ Delevingne, a *Huguenot*, for whom this was more than just a bureaucratic task, would later publicly celebrate the conference's achievements. M. Delevingne, 'The Prewar History of International Labor Legislation' in J. Shotwell (ed.), *The Origins of the International Labor Organization*, New York and Washington D.C., 1934, pp. 19-34. Britain, France, Belgium, Germany, Luxembourg, the Netherlands, Norway-Sweden, Denmark, Austria-Hungary, Italy, Spain and Portugal.

⁶² Memorandum for Cabinet, 'International Agreements on Industrial Matters', Akers-Douglas, 9 November 1905, CAB37/80/169 & FO83/55, TNA.

work' of 'feminine workers', though commending the 'practical character' of proceedings, in contrast to Berlin in 1890.⁶³ In the last days of 1905 and Arthur Balfour's Conservative government, Home Secretary, Akers-Douglas, briefed cabinet. He wanted its views not only on these two but, also, likely future international agreements on industrial matters. Immediately after the Conservatives' fall, the Liberal Home Secretary, Herbert Gladstone, placed the identical position before cabinet. Given approval, in March 1906, he advised Switzerland of Britain's 'cordial sympathy' with and willingness, under specified preconditions, to attend a formal conference.⁶⁴ After the Swiss invitation arrived in July 1906, he announced that, despite being 'severely pressed' with other labour matters, the *HO* was arranging for Britain to be 'officially represented' at an international labour conference, for 'the first time'. (He must have meant 'ministerially', in contrast with Conservative's non-ministerial attendance at the 1890 and 1905 conferences.) Earlier, Conservative, Sir Charles Dilke claimed that Britain was 'hopelessly in the rear of every country in Europe' on labour legislation, owing to the 'extraordinary fact' that it, 'never attended any' international conferences on such issues.⁶⁵

Britain accepted the invitation, despite reservations, especially over the white phosphorus issue. Britain's delegation was elevated to ministerial level, not of Gladstone himself, but under secretary, Herbert Samuel, who was granted 'full power', subject to later approval and ratification, to conclude 'any' treaty, respecting 'the well-being of the labouring classes, and the conditions under which their industry is exercised.'⁶⁶ On 26 September, Samuel, who was advised by Delevingne, signed the treaty, whose Article 1 prohibited 'Night work in industrial employment' (of ten or more employees but not family businesses), 'for all women without distinction of age.' (Colonies' 'Native labour' was exempted, as 'impossible to supervise'.) Definition of an 'industrial undertaking' was left to each party but had to include mines, quarries and manufacturing industries. Original non-signatories could also join. Only after this, did the *CO* advise colonies.⁶⁷

Earlier, in the Commons, Conservatives, Chamberlain and Dilke, both very interested in industrial questions, put pressure, framed as questions, as to how far the Liberal government

⁶³ *Chronicle* (Adelaide), 19 March 1898; *Newcastle Morning Herald and Miners' Advocate*, 3 August 1903; *The Sydney Mail and New South Wales Advertiser*, 24 May 1905; *The Mercury* (Hobart), 23 June 1905; *The Herald* (Adelaide), 13 January 1906.

⁶⁴ Letters, *HO* to *FO*, 6 March 1906 & Grey to Carlin, 16 March 1906, FO83/55, TNA.

⁶⁵ *HCD*, vol. 162, 1 August 1906, p. 1107.

⁶⁶ Letters, *FO* to *HO*, 22 August & 8 September 1906, FO83/55; CO323/519/591-2, TNA.

⁶⁷ *International Convention respecting the Prohibition of Night Work for Women in Industrial Employment*, Berne, 26 September 1906. Of the parties there, Austria, Hungary (separately), Belgium, Britain and Denmark signed unreservedly, while France, Italy, Luxembourg, Spain, Netherlands, Portugal, Sweden and Switzerland signed with a declaration of reservation, as to the timing for the convention coming into force. Ultimately, Italy and Sweden ratified after the deadline date, by January 1910. Denmark, Spain and Sweden never ratified.

was consulting the colonies about the coming colonial conference's agenda, in the interests of greater imperial unity.⁶⁸ So, the *CO* asked all other offices for agenda items. As the colonies had already bombarded imperial authorities with suggestions, the *CO* doubted there would be enough time. The *HO*, which had just raised with the *CO* the night work convention, replied, just before the Berne conference, that it had not offered any comments for the previous colonial conference, as it had only discussed general policy. Since then, new issues, many related to treaty developments, had arisen, including that of participation of British dependencies in treaties on 'Labour Questions, especially laws affecting the conditions of work in mines, factories and workshops.'⁶⁹ The *HO* thought it desirable to have more uniform legislation on this, throughout the empire and, even, some new form of permanent imperial machinery to handle such treaty making. Lord Elgin, agreed, well after the Berne conference had concluded, that this was of 'importance' and, although only part of the wider question of the self-governing colonies' treaty adherence, should be included.⁷⁰

At Berne, Britain secured a form of the, by now, common provision in such treaties, that they only applied to dependencies, after the 'mother country' had notified treaty sponsoring governments to this effect.⁷¹ Thereby, colonial choice of adhesion was allowed. The ratification deadline, including for non-signatory states and colonies, was 31 December 1908, two years after which the convention would come into force (while allowing ten years for the beet sugar, open mining, wool-combing and weaving industries.) Adhering parties could not denounce the treaty for twelve years after joint ratification by protocol. Surprisingly, Britain did not seem to consider the potentially unprecedented situation, that this possibly would allow--not of the adhering self-governing colonies separately withdrawing from the treaty, as would be straightforward but--against established readings of the imperial constitution, for adhering colonies to remain party to the treaty, even if the empire's paramount and only treaty-making government denounced it. The alternative--Britain unilaterally denouncing the treaty for those colonies, against their wishes, would be politically fraught.

In a potentially significant development in the international legal system, Britain originally proposed that a permanent commission be established to monitor signatories' treaty obligation performance, modeled on the *Permanent Sugar Commission (PSC)*, established by the 1902 convention. Parties could make submissions to the commission, which could report to other parties on concerns over other parties' policies. Parties could also refer disputes to the *PCA*, which through general arbitration treaties could be made compulsory. This raised 'serious

⁶⁸ *HCD*, vol. 156, 7 May 1906, p. 950; vol. 157, 21 May 1906, pp. 940-1. CO323/516/262-278, TNA.

⁶⁹ Letter, *HO* (Cunynghame) to *CO*, 13 December 1906, CO323/520/329-32, TNA.

⁷⁰ Letter, *CO* (Elgin) to *HO*, 27 November 1906, CO323/520/272-278, TNA.

⁷¹ This is the term used in the treaty text. CO323/519/503-7, 591-3, TNA.

difficulties', over colonial representation on such a commission and the vexed question of colonies and arbitration. The *UPU* was the inspiration for the commission but, with 50 members, its allowance of Britain's four additional colonial votes did not concern others. This commission would have only fourteen members and other parties with dependencies might also seek extra votes. Moreover, possibly, parts of the Australian and Canadian federations or some of the other possessions (all three of which, jointly, had separate *UPU* votes) might not adhere. Adhering British colonies were represented on the *PSC*, in contrast, by a single non-voting imperial delegate.⁷²

Britain's proposals 'sharply divided' the conference, with Germany's 'hostility' leading the opposition. Being wary of internationally well organised socialists pressing for further 'unacceptable' treaties, and thereby threatening sovereignty, Germany opposed, in principle, compulsory arbitration. France and Switzerland, supported by the Netherlands, tried to broker a compromise, while Britain, supported by Portugal, resisted further limitation of these provisions. Ultimately, Britain dropped these proposals, Lucas telling Elgin that the treaty subject was not 'a matter of great importance.' Instead, both provisions were included in an associated resolution, expressly stating that the commission could not investigate governments, adopted by all but Austria, Hungary, Belgium and Germany.⁷³

Later that year, seventeen European governments plus Britain and the *USA*, also signed in Brussels an agreement for the unification of pharmacopoeial formulas for potent drugs. This formalised resolutions embodied in a protocol of a 1902 conference, requiring parties to publish a pharmacopoeia, with common drug formulas and measurements. Britain's accession reserved the right to modify the stipulations for drug formulas, if rendered necessary by advances in science. Although Britain's other reservation was on colonial adhesion, the *CO* had earlier discussed the necessity of advising the colonies, as they did not publish pharmacopoeia.⁷⁴ No such consultation was afforded, before the treaty was signed.

3. 'not of federal concern': the application of the convention to Australia, 1906-08

Australian accession to the women's night work convention, as to that on potent drugs, which was to be decided almost at the same time, confronted the Commonwealth (and imperial

⁷² Letter, Wellesley to Grey, 17 September 1906; minute, Green to Johnson, 20 September 1906; minute, Johnson to Lucas, 20 September 1906; letter, *CO* to *FO*, 22 September 1906, CO323/519/532-50, TNA.

⁷³ Letter, Wellesley to Grey, 22 September 1906; minute, Lucas to Elgin, 20 September 1906; minute, Johnson, 24 September 1906; letter, *CO* (Lucas) to *FO*, 24 September 1906, CO323/519/532, 551-69, TNA. Parliamentary Paper Cd. 3271, Record of the International Conference on Labour Regulation, 1906, vol. 27, CRS A1108, NAA.

⁷⁴ *International Agreement respecting the Unification of the Pharmacopoeial Formulas for Potent Drugs*, Brussels, 29 November 1906. The signatories were Belgium, Bulgaria, Denmark, France, Greece, Italy, Luxembourg, Netherlands, Norway, Russia, Serbia, Spain and Switzerland, with Austria-Hungary, Britain, Germany, Portugal, Sweden and *USA* signing with reservations. Britain's two reservations were on colonial adhesion and right to modify the treaty conditions, if necessitated by scientific progress. CO323/519/16-22; CO323/520/276-81, TNA.

officials) with the fundamental unresolved question as to its powers, relative powers to the states, in treaty matters. An answer but not a solution was raised.

In Australia, through 1905-6, there had been no major press reports on the coming Berne conference. Yet, in July 1906, Tudor, acting on behalf of his Labour colleague, Maloney, asked Deakin in parliament whether he was aware of or had been invited to a conference on 'labour and industrial conditions'.⁷⁵ He added that, 'many' governments had attended 'similar' Düsseldorf (1902) and Vienna (1905) conferences, leading to results of 'great importance', and asked whether representation would be sought. Deakin confirmed Australia had, indeed, been represented (by Sir John Cockburn) at those two prior conferences, seemingly unaware that these were *CPIAS*, not *IALL*, conferences, and thus being on labour insurance, which was not yet a treaty issue for Britain. He knew of the proposed next such *CPIAS* conference in Rome but nothing of 'a Berne conference'. He had consulted Melbourne's Swiss consul, who was equally uninformed. Deakin's confusion confirms how little Australian governments knew of these international developments.⁷⁶

In early February 1907, Deakin, a month before leaving for the colonial conference, asked attorney-general, Littleton Groom, whether treaties, specifically bilateral commercial treaties, to which some Australian colonies had adhered before federation, bound the Commonwealth. This made clear that his main concern was still that, on which he and Barton had previously raised, those treaties which restricted Commonwealth protectionist economic policies, especially those with Japan, which also challenged Australia's immigration restriction legislation. Groom strongly reiterated, two days before Deakin left, the latter's own position of 1902, which the *LO* had equally strongly rejected, that such treaties did.⁷⁷

From 1903, the *CO* sent all treaty adhesion requests solely to the Commonwealth, not the states. One of these concerned the *IISA*, adherence to which Deakin had been enthusiastic since the *CO* had first asked in May 1906. In early 1907, the *DEA* was still pursuing this in London, through Collins not the *CO*, and awaiting confirmation, as to which *IISA* membership category that Canada would join. In May, even before Britain confirmed to colonies its own ratification, the Commonwealth indicated its desire to adhere. That Atlee Hunt, two days before leaving London, advised the *CO* of this, suggests, that it was Deakin

⁷⁵ Maloney (see previous chapter) was recently elected and a medical doctor, who had developed a social democratic outlook from German *emigrés* and his lengthy tours of Europe, and had campaigned for old-age pensions and against 'sweating'.

⁷⁶ *CPD, HR*, vol. 29, 19 July 1906, p. 1524; *SMH*, 20 July 1906; *Daily Telegraph* (Launceston), 23 July 1906; *The Border Morning Mail and Riverina Times* (Albury), 25 July 1906.

⁷⁷ Memorandum, Atlee Hunt to Garran, 4 February 1907; attorney-general's opinion, Groom, 4 March 1907, vol. 24, CRS A1108; letter, *DEA* (Lewis) to Collins, 17 April 1907, vol. 39, CRS A11816; 1170, CRS A6661, NAA. CO323/507/129-31, TNA. Asher Hobson, *The International Institute of Agriculture: An Historical and Critical Analysis of its Organization, Activities, and policies of Administration*, UCP Berkeley, 1931.

not acting prime minister, Sir John Forrest, who was driving this. A month prior, the *CO* had sent its first notification to colonies of the Berne and Brussels treaties, inviting accession on only the former. Unlike the white slavery *projet* of 1904, this was done before Britain had deposited its ratification. Strange, as it might seem about the procedure for such communications, the *CO* sent this to Melbourne, knowing Deakin was in London, where the *CO* had ignored the *HO*'s proposal to discuss the former issue at the colonial conference.⁷⁸ This traditional method did not assist the *CO*'s growing desire for the Commonwealth to speak solely for Australia on treaties.

The *CO*'s two despatches, respectively on the night work and potent drugs treaties, arrived in Melbourne, a few days apart, in May 1907, and, in Deakin's absence, like that on the *IISA*, were passed to Forrest.⁷⁹ That on drugs did not explicitly ask for adhesion, although inviting attention to the colonial adhesion provision. *WA* under Forrest had not been that keen on federation and, now, it seems he wished to reverse, if not federation itself, but the treaty-adhering procedure, which had been well established since then. (Deakin, certainly, would have responded differently.) He observed the typed *CO* note at the top left of both despatches—stating that they had 'NOT' been sent to state governors.⁸⁰ He does not appear to have consulted Atlee Hunt's stand-in, Henry Lewis, and gave both despatches to *T&C*, that on night work, for information, (although it really had no role in this matter) and that on drugs, for advice from the federal analyst, Percy Wilkinson, as the Commonwealth did not have a public health administration.⁸¹ Then, instead of following established practice, of writing directly to the premiers, he 'invite[d]' Northcote to forward both despatches to state governors, without giving any guidance.⁸² The obligations of both treaties did fall exclusively under state, not Commonwealth, powers but Forrest's method would allow states to adhere without reference to, consultation of or even notice to the Commonwealth, which would be bound by their decisions. Northcote, unsure, as how to act, promptly cabled London: 'Am I authorised to?' Ultimately, Johnson gave approval. This led to another long-drawn out,

⁷⁸ This had also been the case with the obscene publications agreement. Letter, *HO* (Cunynghame) to *CO*, 29 August 1906, CO323/520/272-8, TNA.

⁷⁹ Circular despatches, Elgin to governors, 10 & 12 April 1907, CO323/520/186-96; CO323/530/276-281; vol. 39, CRS A11816 & vols. 27 & 29, CRS A1108, NAA.

⁸⁰ This was inserted at the specific direction of Johnson, who had succeeded Sir John Anderson in 1904, as head of the *CO*'s *North America and Australia Department*. Minute, Johnson, c. 10-12 April 1907, CO323/520/189 & CO323/530/278. TNA. The federal analyst, Percy Wilkinson, had been 'on loan' from Victoria since 1903. Age, 23 January 1902 & 12 June 1907.

⁸¹ The minutes are in vols. 27 & vol. 29, CRS A1108, NAA.

⁸² Letters, Forrest to Northcote, 6 June 1907, vols. 27 & 29 CRS A1108 & 39, CRS A11816, NAA. F. K. Crowley, 'Forrest, Sir John (1847–1918)', *ADB*, vol. 8, NCB:ANU, MUP, 1981, <http://adb.anu.edu.au/biography/forrest-sir-john-6211/text10677>

ultimately futile, accession process for both treaties, while the Commonwealth dithered, awaiting long-delayed state responses.⁸³

Chaos now ensued. Deakin returned to Melbourne on 25 June, probably unaware (unless Forrest or Lewis briefed him) that Northcote, three days later, asked state governors about adherence.⁸⁴ Over the next eight months, there were various state responses to either treaty. On the drugs treaty, in late 1907, WA's governor sent to Northcote, for the *CO*, his ministers' ambiguous decision 'to reserve the right of adherence'. NSW advised Northcote but, as to what, is unrecorded. Victoria advised the *CO* directly, without informing Northcote, of its desire to adhere.⁸⁵ In the midst of the fiasco, Deakin became aware of, at least, the drugs convention. In September, the federal analyst, Percy Wilkinson, provided a detailed, persuasive and favourable report in favour of accession. He commended the desirability of greater international uniformity in the matter, proposed federal legislation to adopt the British pharmacopoeia and consultation of the states, which controlled and registered pharmacists and medical persons.⁸⁶ So, in September, Deakin asked the premiers directly about adherence to the drugs but, for some reason, not yet the night work convention. The reason appears to be that strangely, these steps were taken solely through *T&C*, as was also the case with the premiers' replies, about all of which, *T&C*'s acting head, Nicholas Lockyer, informed Atlee Hunt only afterwards.⁸⁷

Settling the question of accession to the potent drugs agreement, initially, was relatively straightforward—to a point. In November 1907, WA was first to advise Deakin that it had already informed its governor. Lockyer interpreted that ambiguous communication to mean it desired to adhere.⁸⁸ Victoria, which had legislated to apply Britain's pharmacopoeia in 1868, only told Deakin of its earlier notice to its governor, without answering specifically.⁸⁹ Queensland, which had legislated on Victoria's model in 1898, also did not answer directly, only stating that Britain's pharmacopoeia could be 'harmon[ised]' with the treaty.⁹⁰ NSW was 'prepared to adhere' and quoted its health legislation, which applied Britain's pharmacopoeia, and, days later, advised Northcote separately.⁹¹ SA, which like WA and Tasmania had not so

⁸³ Cablegram, Northcote to *CO*, 11 June 1907, vol. 39, CRS A11816, NAA; CO418/52/278, TNA.

⁸⁴ Circular letter, governor-general to governors, 28 June 1907, vol. 39, CRS A11816, NAA.

⁸⁵ Reflecting this confused policy process, the state governor's replies are variously in the files of the governor-general (vol. 39, CRS A11816) and the *DEA* vols. 24, 27 & 29, CRS A1108, NAA. The *CO*'s reception of these responses is in CO418/52/510-12; CO418/54/270-272; CO418/55/362-367, 497-501; CO418/62/73-5; CO418/63/3-7; CO862/15/29, TNA.

⁸⁶ Memorandum, Wilkinson to acting comptroller-general of customs, 11 September 1907, vol. 29, CRS A1108, NAA.

⁸⁷ Circular letter, Deakin to the premiers, 25 September 1907, vol. 29, CRS A1108, NAA.

⁸⁸ WA would legislatively apply the *British Pharmacopoeia* by *The Health Act 1911*, 1 Geo. 5, no. 34.

⁸⁹ *An Act to adopt the British Pharmacopoeia 1868*, 32 Vic. no. 333 & 62 Vic. no. 1572 of 1898.

⁹⁰ *The British Pharmacopoeia Adopting Act 1898*, 62 Vic. no. 22.

⁹¹ *Public Health Act 1902*, no. 30.

legislated, agreed to accession. Tasmania did not reply but Deakin did not wait. Victoria's influential Board of Health chairman, Perrin Norris, strongly supported adherence.⁹² In February 1908, Deakin, after consulting *T&C* minister, Austin Chapman, and Atlee Hunt, advised Northcote to notify accession, with the same reservation as Britain.⁹³

On night work, for whatever reason, Deakin did not act similarly, and, so, the accession process continued through the governors, not the Commonwealth. In late 1907, SA's governor's advised the *CO* directly its desire for adherence and, then, informed Northcote. WA's governor only told Northcote, who then told him to advise the *CO*, which he did. Later, after Northcote chased further responses, Victoria and Queensland also advised the *CO* directly, but not Northcote, both attaching detailed reports. The last response, NSW's, in early February 1908, informed both the *CO* and Northcote that, it declined to adhere, claiming that there could be circumstances when women would work after 10 pm. All but NSW requested accession. Tasmania was again silent. Only Victoria mentioned the proposed international commission but saw no need, unlike Canada, to make a comment.⁹⁴ Victoria, Queensland and NSW continued communicating through the governors to *CO*.⁹⁵

Most of the states' responses did not address the treaty's specific legislative requirements. States' factory legislation varied considerably. Since federation, some of the states (and NZ) had passed more 'factory acts': Victoria (1903, 1904, 1905, 1905)⁹⁶; NZ (1901, 1902, 1905, 1906)⁹⁷; SA (1904, 1906)⁹⁸ and WA, its first (1904).⁹⁹ The earlier legislation of three states (like NZ's), plus WA's inaugural 'factory act', addressed, to some degree, the treaty's general requirements. NZ had led the way, first prohibiting (1891) employment of women, irrespective of age, in woollen mills between 6pm and 7am and in factories, between 6 pm and 8 am. The latter was subsequently made applicable to both employments (1901). NSW confirmed that its 1896 *Act* prohibited females, under eighteen years old, working between 7pm and 6 am, except for overtime on certain, specified days. Further legislation to cover all females similarly, was under consideration but NSW was not prepared to adhere until it was confirmed whether overtime would be restricted and, in certain cases, where work past 10 pm, would be permitted. Victoria explained that, its acts had far more drastic restrictions on employment of women, than that required by the convention. The 1896 *Act* prohibited

⁹² Norris would soon be appointed the Commonwealth's inaugural director of quarantine.

⁹³ The five premiers' replies and memorandum, Atlee Hunt, 10 February 1908 & letter, Deakin to Northcote, 12 February 1908 are in vol. 29, CRS A1108, NAA.

⁹⁴ This large correspondence is in vol. 27, CRS A1108 & vol. 39, CRS A11816, NAA.

⁹⁵ The correspondence is in vol. 39, CRS A11816 & vols. 24, 27 & 29, CRS A1108, NAA.

⁹⁶ **Vic:** 3 Edw. 7, no. 1857 of 1903; 4 Edw. 7, no. 1955 of 1904; 5 Edw. 7, no. 1975 of 1905; 5 Edw. 7, no. 2008 of 1905.

⁹⁷ **NZ:** 1 Edw. 7, no. 59 of 1901; 2 Edw. 7, no. 55 of 1902; 5 Edw. 7, no. 60 of 1905; 6 Edw. 7, no. 57 of 1906.

⁹⁸ **SA:** 4 Edw. 7, no. 872 of 1904; 6 Edw. 7, no. 915 of 1906.

⁹⁹ **WA:** 3 Edw. 7, no. 22 of 1904.

employment of 'any woman or girl', after 9pm, without giving a morning start-time. Queensland said its 1900 *Act* met the hours of rest required by the convention with exception of certain 'exempt shops', such as restaurants and hotels. An amending bill currently before parliament would remedy this, though not for barmaids. Queensland, also using the same age qualification, prohibited employment between 6pm and 6am, though exempting restaurants and hotels. WA prohibited employment of all women between 6pm and 8am. Only SA and Tasmania made no such provisions, though the former claimed women there were not employed in night work.

Britain's other self-governing colonies decided more promptly but, overwhelmingly, negatively on this convention. Natal, ORC and Transvaal, where there was almost no industry (apart from 'coloured' mining) and, thus, factory legislation, declined. Newfoundland, where fishing predominated, said the same, though qualifying, 'for the present'. The most industrialised colony, Canada, which not only had factory legislation but a central department and deputy minister of labour, gave an interim reply, that it was consulting the provinces, while indicating some sympathy, by insisting on its representation on the proposed international labour commission.¹⁰⁰ Britain ratified the convention on 24 September 1907, without waiting for its other dependencies.

While Australia's confusing mess built up in the CO, Northcote's query, about forwarding the despatches on treaties to state governors, might have appeared simple but necessitated, as Berriedale Keith told Johnson, a close consideration of the constitutional aspects. In so doing, Keith's lucidity for once deserted him. His rambling advice was distracted by his discussion of the related but, older, irrelevant (in this context) and clearly decided issue of whether the Commonwealth was bound by treaties, to which the states had acceded before federation.¹⁰¹ On this issue, the CO again asked the LO. This cautious approach compromised the CO's own desire, specifically, for the Commonwealth to accede easily to this convention and, generally, to take a more central role in international, especially treaty, matters. Bertram Cox, distinguished earlier LO advice on Canada from the current issue, with respect to Australia. He pointed out that the Dominion parliament was empowered under s.132 of the *BNA 1867* to perform any obligations on it or any of its provinces arising under treaties. So, the provinces had 'clearly no right to contract treaty obligations which were matters for the Dominion.' This view, however, was not 'conclusive', for the 'somewhat different' confederation terms of Australia where, he continued, as its constitution made no such provision. He seemed

¹⁰⁰ CO862/15/27, TNA. Canada's deputy minister for labour served under the post-master general.

¹⁰¹ Minute, Keith to Johnson, 12 June 1907, CO418/52/260-1, TNA.

unaware that the *CO* had had removed two words—‘and treaties’-- from the draft Australian constitution in 1897-8, which arguably would have made such provision.¹⁰²

The starting point in his advice to Lord Elgin was that the ‘Commonwealth was constituted in order to enable Australia to act as one body in matters of external interest.’ So, he could see no reason for the Commonwealth, when in a position to make good any international obligations, to consult the states. The Commonwealth parliament, he added, had ‘inter alia power to legislate’ under s.51(xxix), ‘but that power was apparently merely shared with the States though a Commonwealth law could override a State law.’ So, Cox asked the *LO* two questions, with respect to the binding nature of the empire’s treaties on colonies, if concluded before (which is not relevant here) or after federation. For the latter, he outlined three possible constitutional scenarios, on each of which the *LO* later agreed. First, if the treaty subject matter fell within the Commonwealth’s ‘paramount legislative authority, whether exclusive or concurrent’, accession should be notified on behalf and on the advice of the Commonwealth alone, without reference to the states. The second was, if the subject-matter fell within the exclusive legislative competence of the states, in accordance with the earlier *LO*’s advice of 1902, accession should be notified both on behalf and with the consent of the Commonwealth and those states desiring accession. The third was on such treaties, as women’s night work (and potent drugs), where the Commonwealth had no legislative power and, so, legislation to carry out treaty obligations would have to be taken by the states. In this case, the Commonwealth’s accession would create obligations, which could not be performed without consent of the states and, so, after consulting them, the Commonwealth request accession, both on its own behalf and one or more states alone, if not all states wanted to adhere.¹⁰³

The *LO*’s concurrence arrived in the *CO* at the start of December 1907.¹⁰⁴ Berriedale Keith thought it ‘admirable’ and Elgin approved his proposal to send it both to the Commonwealth and the states.¹⁰⁵ So, Davis, after seeking *CO* lawyer Harold Dale’s greater knowledge of the Commonwealth constitution, advised Johnson and Cox that, there was a ‘chasm’ between the

¹⁰² Minute, Cox, 21 June 1907, CO418/52/261, TNA.

¹⁰³ Letter, Cox to the *LO*, 26 June 1907, CO418/52/280-8, TNA. The *CO* had brought a similar question before the *LO* in mid-1901, over the accession of New Brunswick to a bilateral treaty on real and personal property with the USA. The *LO* had then advised that none of Canada’s provinces could adhere separately to treaties. So, the Imperial government refused to notify accession of Canadian provinces to any treaty, even if the legislative subject matter was purely provincial, unless adherence applied to the whole Dominion. Although commercial and political treaties are not subjects examined here in detail, it is worth noting that running parallel with this policy issue at this time was a somewhat similar one over the procedure for the Commonwealth and the states withdrawing from commercial treaties. The *CO* took a similar if not entirely definite view that such withdrawal was to be made by the Commonwealth for all Australia, after the sanction of the Imperial government, irrespective of whether the states consented. There was also an issue over how political treaties, specifically those arising from the Hague peace conference of 1907, were to be applied to the self-governing colonies. CO532/12/148-152; CO418/70/339-345; CO532/14/173-180, TNA; despatch, governor-general to *CO*, 11 February 1909, vol. 7, CP78/8, NAA.

¹⁰⁴ Report, attorney-general (Sir John Walton) & solicitor-general (Sir William Robson) to Elgin, 2 December 1907, CO418/56/395-405, TNA.

¹⁰⁵ Minute, Keith, 5 December 1907, CO418/56/394; CO418/66/14-33, TNA.

respective legislative powers of the Commonwealth and the states but that, ‘for all we know’, s.51(xxix) of the Commonwealth constitution might offer a ‘bridge’ between them. Yet, he thought that it was not for Britain to say whether ‘such a bridge does not exist’. He also said the *CO* should not use the phrase ‘on the advice of the States’, as it would ‘violate the principles laid down in the “Vondel” case.’¹⁰⁶

So, Elgin briefly set out those principles in his interim reply to *WA*’s request for separate adherence to the potent drugs convention.

*[On] both legal and constitutional grounds it is necessary that adherence to all conventions with foreign powers must be made on behalf of the Commonwealth, whether in respect of all or of one or more of the states.*¹⁰⁷

The other states were sent this, but Berriedale Keith warned that, they should not say any more to them, until the *CO* knew whether the Commonwealth accepted its views.¹⁰⁸

Next, Elgin asked the Commonwealth, whether Forrest’s request, to refer directly to the states their separate adherence to either convention, meant that the Commonwealth did not regard them as being matters of ‘Federal concern’ and, if so, would follow the same procedure for all such future treaties, where their subjects were ‘primarily matters of State concern.’ He conceded that Britain could ‘take no objection’ to such a constitutional procedure, which was, ‘indeed’, in accord with Canada’s. Therefore, the Commonwealth was ‘at liberty’ to, and indeed, should refer such treaties directly to the states, without reference to the *CO*. He foresaw no ‘difficulty’, when all states decided to adhere to a convention, although such notification would only be given on the advice and on behalf of the Commonwealth. For, the imperial government was ‘pledged’ to the view that, as far as,

*relations of Australia with foreign nations are concerned, the Government of the Commonwealth alone can speak, and that for everything affecting external communities the Government of the Commonwealth alone are [sic] responsible to the Crown.*¹⁰⁹

So, Britain would not give notification of accession to any treaty, whatever its subject matter, ‘for which the Commonwealth has not made itself responsible.’¹¹⁰

Elgin explained that, while the *BNA Act* 1867 ‘expressly conferred’ on the Dominion parliament this central role, there was no ‘authoritative’ interpretation of the Commonwealth constitution’s s.51(xxix), which adjudged the same; nor was it for Britain to provide this. In this absence, in simple cases, where the Commonwealth decided a treaty subject was solely a ‘Federal concern,’ then quite ‘independent of the construction’ of s.51(xxix), the ‘Canadian

¹⁰⁶ Minute, Davis to Johnson & Cox, 24 December 1907, CO418/52/509, TNA.

¹⁰⁷ Despatch no. 1, Elgin to *WA* governor, 3 January 1908, CO418/55/499-501, TNA.

¹⁰⁸ Minute, Keith to Davis, 5 December 1907, CO418/57/431, TNA.

¹⁰⁹ Despatch no. 1, Elgin to Northcote, 3 January 1908, CO418/52/515-21, TNA & vols. 24, 27 & 29, CRS A1108, NAA.

¹¹⁰ *ibid.*

rule' 'must be applied.' However, 'until' that section was 'authoritatively interpreted', that 'rule' could 'hardly be applied' in treaties of state concern. Therefore, Britain 'was prepared' to notify treaty adherence 'of the Commonwealth', in respect of one or more states. So, while not requiring universal state adherence, Britain left it 'open' to the Commonwealth 'to impose such a condition', as it be held responsible for meeting treaty obligations. He stressed that the Commonwealth's choice of procedure now, would have to be uniformly applied in future.¹¹¹

Clearly, the *CO* was inviting the Commonwealth to take a more robust view of its 'external affairs' power (which the *CO* had weakened in 1897-8, by removing the express 'treaty power'). Yet, without clear leadership from the *CO*, the Commonwealth was too timid to settle on a single, clear procedure in handling such treaties. While the *LO*'s opinion on pre-federation treaties was sent separately to the Commonwealth alone, in mid-January 1908, their slightly earlier advice, on current and future treaties, was shared with the states, even as the confused process of 'Australian' accession to the night work and potent drugs conventions unravelled. The *CO* had not commented on the states' requests for adherence nor acted on them, instead advising that this must wait the Commonwealth's answer on the broader question. While waiting for that, the *CO* gave the Commonwealth those communications, presumably assuming, with justice, that the states might not so do.¹¹² Similarly, Elgin's only response to the Commonwealth's request for accession to the drugs treaty was to refer to this correspondence, implying the need to answer the general question first.¹¹³ The *CO* was by then growing concerned at the meagre number of its dependencies, which had adhered to the night work treaty. Most declined on the grounds of irrelevance to their non-industrialised societies but, as Green told Cox, the *CO* should get as many as possible of the more developed ones to adhere, to 'avoid foreign criticism'.¹¹⁴ Australian adherence, especially with the inaction of Canada, was thereby, becoming all the more important.

4. 'in respect of the whole of Australia': the treaty failure of federalism, 1907-11

The failure of the Commonwealth to secure accession to the women's night work convention (and simply overlooked potent drugs convention), despite its express wishes, brought into sharp relief the limits of its treaty power, at least as far as its leaders then interpreted it.

In January 1908, Deakin received the first direct communication from the *IALL*'s British section, with Sophy Sanger providing the first English-language edition of its parent-

¹¹¹ *ibid.*

¹¹² These communications are in CO418/54/272; CO418/55/367-8, 499-501; CO418/62/75; CO418/63/7-8, TNA; vol. 24, 27 & 29, CRS A1108 & vol. 39 CRS A11816, NAA.

¹¹³ Despatch no. 101, Elgin to Northcote, 27 March 1908, CO418/65-7, TNA & vol. 39, CRS A11816 & vol. 29, CRS A1108, NAA.

¹¹⁴ Minute, Green to Cox, 31 January 1908, CO323/520/192-3, TNA.

organisation's journal, *Bulletin*. Feeling 'sure' of his 'sympathy' with their aims, she asked him to help make it better known in Australia. She also said they were enrolling Australian members, until an Australian section was established. Deakin had Atlee Hunt, not himself, acknowledge receipt, while enquiring through Collins, in London, about the nature of the organisation and whether it was worth subscribing to the journal. Collins replied positively, saying he personally knew one of the *BIALL*'s executive, Sir John MacDonnell, who had assured him that, with Swiss governmental support, it worked for the 'good' and 'legitimate' public purpose of 'levelling up' internationally, labour, especially factory, laws: 'Really good work' had been done.¹¹⁵

Deakin took no further action on this but, the next month, read Elgin's despatch closely, making several marginal notes, seemingly agreeing with Forrest's judgement, that the two conventions, were 'not of Federal concern'. He, however, disagreed with the *CO*'s assumption, which arose from Forrest's action, that the Commonwealth would consult the states on all treaties, noting 'not necessarily', before adding, seemingly paradoxically, that the Commonwealth was 'obliged', at least, to communicate all treaties to the states. He also raised a possible problem, which the *CO* had considered to be without 'difficulty', cases where all states desired adherence. On this, Deakin noted, 'unless Federal Gov[ernmen]t disapproves'. To clarify these issues, Deakin sought constitutional advice on treaties from Groom.¹¹⁶

In April, meanwhile, there were local press reports that Winston Churchill, as under secretary of state for the colonies, told the Commons that Britain had notified Switzerland of the accession to the night work convention of *NZ* and several other colonies. He had added, perhaps pointedly, that the Commonwealth had been asked for a response.¹¹⁷ This seems to have moved Deakin to action, as he had Atlee Hunt seek all the various state correspondence on the matter, which had bypassed the Commonwealth, and a very detailed summary drafted on the convention and the various relevant state legislation.¹¹⁸ Meanwhile, Groom had been especially busy at this time, writing numerous opinions, including on the long-running

¹¹⁵ Previously, the bulletin had been published only in French and German. Letter, Sanger (*British Association for Labour Legislation* or *BALL*) to Deakin, 3 December 1907; memorandum, Collins to Atlee Hunt, 6 March 1908, vol. 38, CRS A1108, NAA.

¹¹⁶ Annotations by Deakin, 11 & 13 February 1908, on despatch no. 1, Elgin to Northcote, 3 January 1908, & memorandum, Atlee Hunt to Castle, 12 February 1908, vol. 24; other copies of the despatch are on vols. 27 & 29, CRS A1108 & vol. 39 CRS A11816, NAA. Deakin asking Groom was surprising, as probably, no one knew more of the subject than he. *Telegraph* (Brisbane), 18 April 1908.

¹¹⁷ The others were Ceylon, Fiji, Gibraltar, Gold Coast, Leeward Islands, Northern Nigeria, Trinidad and the Ugandan Protectorate. *HCD*, vol. 185, 3 March 1908, pp. 522-3; *Telegraph* (Brisbane), 18 April 1908

¹¹⁸ See the various records for mid-1908 in vol. 27, CRS A1108, NAA.

question of Queensland's continued accession to the Anglo-Japanese treaty.¹¹⁹ So, he did not reply on this convention until mid-June.

Groom found the *CO*'s proposed procedure for notification of adherence to all treaties to be 'quite acceptable' and in accordance with principles laid down by the imperial government, with the Commonwealth's concurrence, over the *Vondel* issue.¹²⁰ A stronger centralist than Deakin, he then pronounced.

*Whatever the subject matter of a treaty may be, and whether it relates to matters which can be dealt with by State legislation or not, compliance with the obligations of the treaty is always a matter of federal concern and federal responsibility, and it is therefore appropriate that the request for adherence should in all cases come from the Commonwealth Government.*¹²¹

He then asserted a view, on which the *CO* had left to the Commonwealth to decide, while probably looking to a future High Court judgement for a more definite authority. In cases where only some states wished to adhere to a treaty, he seemed to concur in the advice, that Isaacs had given as Commonwealth attorney-general in 1906, that the Commonwealth Parliament had power under s.51(xxix) 'to make such legislative provisions as is necessary to secure the fulfilment of treaty obligations.' This was the 'bridge' over the 'chasm', between Commonwealth and state powers, whose existence the *CO* had suggested and was not prepared to deny. The *CO* had left it to the Commonwealth to make the leap and, here, even Groom hesitated at the edge: 'if' [emphasis added], he ventured, this view was correct, then 'the powers of the Commonwealth Parliament in this respect are substantially identical with those of the Parliament of Canada.'¹²²

Groom did 'quite understand' (by which, apparently, he meant, agree with) the principle invoked by the *CO*, as to why it would not accept Commonwealth accessions, when only some states desired adherence. The *CO* seemed to be saying that it would decide to approve

¹¹⁹ Memorandum, Groom, 5 March 1908, pp. 277-9, vol. 1/6, CRS A1497, NAA. This was in response to despatch no. 14, Elgin to Northcote, 17 January 1908, CO418/66/11-34, TNA.

¹²⁰ This was about the arrest of the crew of the Dutch ship *Vondel* in Adelaide in 1902, leading to a dispute between the Commonwealth and SA governments over the 'external affairs power' and, thus, the first official attempt to define that power. Memorandum by attorney-general, Deakin, 12 November 1902, pp. 404-15, vol. 1/2, CRS A1497, NAA.

¹²¹ Memorandum, 'The Adherence of the Commonwealth to Treaties or Conventions, Groom, 19 June 1908, vol. 24, CRS A1108 & pp. 402-6, vol. 1/6, CRS A1497, NAA. Atlee Hunt may have applauded discreetly at this statement. Groom was the son of a transported, Plymouth-born convict who, sentenced again for stealing, this time in NSW, had moved to Queensland, where he eventually achieved great success as the long-standing proprietor of the most powerful newspaper on the Darling Downs and local, then, state politician. He died in 1901, after briefly serving as the region's first federal member, and was succeeded by his son. Afforded opportunities never open to his father, Groom had graduated from Melbourne University, dabbled in journalism and practised as a barrister in Brisbane. In parliament, the now devout Anglican emerged as one of the more radical Protectionists, with his 'New Liberalism' sharing many but not all Labour's views. He also strongly believed—seemingly like Atlee Hunt and Garran—the Commonwealth not the states should be the public's loyalty focus. He supported expansion of Commonwealth powers, especially in industrial relations. David Carment, 'Groom, Sir Littleton Ernest (1867–1936)', *ADB*, vol. 9, NCB:ANU, MUP, Canberra, 1983, <http://adb.anu.edu.au/biography/groom-sir-littleton-ernest-6499/text11145>.

¹²² Memorandum, Groom, 19 June 1908, vol. 24, CRS A1108 & pp. 402-6, vol. 1/6, CRS A1497, NAA.

accession only if the Commonwealth had legislative power over the treaty subject. This did not sit with the broad interpretation of s.51(xxix) that he and Isaacs had upheld, which imposed no domestic limits on the Commonwealth's legislative power, with respect to treaty obligations. In fact, Groom held 'grave doubt' over the 'expediency' of the Commonwealth requesting and Britain accepting, adherence of only some states. Paradoxically, Groom then conceded that he did not foresee that, 'any serious difficulties' were 'likely to arise from partial adherence', in some cases. Yet, he did not base such a distinction on the constitution's division of legislative powers, as both the *CO* and most Australian authorities did. Rather, for him, it rested on a somewhat arbitrary categorisation of treaties. He explained that, when a treaty related to trade, commerce or immigration, Australia 'ought invariably to be treated as one and indivisible'. Where it was 'simply' (as presumably, in the case of the night work and drugs conventions) 'of a scientific or humanitarian character', he thought it 'more difficult to see the absolute necessity for the rule of universality.' He left open the 'important question', for the Commonwealth to decide, whether, 'as a rule of political convenience', it would be 'wise' to accept such exceptions, from the general rule of requiring universal state adherence.¹²³

Groom's advice was referred to a cabinet meeting, four days later but (in the incredible) absence of cabinet records for the pre-war period or related press reports) exactly how members of the government stood on these questions is unknown. The decentralized Australian response to the convention, initiated by Forrest, continued through late 1908, with the head of *NSW*'s Department of Labour and Industry, Charles Alderdice, announcing publicly that the *CO* had told *NSW* that, if it wanted to adhere to the convention, it must so do by the year's end. (Whether deliberately or not, this was not entirely accurate: the *CO* had asked the Commonwealth only.) He explained that accession created a 'necessity', which he thought 'very desirable', for amending the state's 1896 *Act*, so that all women, not just those under eighteen years, were prohibited from working between 7pm and 6am, apart from overtime, which should cease at or before 10 p.m. (This proposal was not acted upon by the government at this time.) Late in the year, the *NSW* government explained to state parliament that its existing restrictions on female night work and why, for the moment, in the absence of further information, it was not willing to adhere to the convention. Deakin, himself, was not so informed. Of the further state 'factory acts' in this period, only Queensland's restricted

¹²³ Memorandum, Groom, 19 June 1908, vol. 24, CRS A1108 & pp. 402-6, vol. 1/6, CRS A1497, NAA.

female night employment further, by extending such provisions to restaurants and some other shops.¹²⁴

Through 1908, the muddle of the night work and drugs treaties merged into the broader question of Britain drafting a 'model' commerce and navigation treaty, for all its self-governing colonies. For the Commonwealth, this had an additional aspect in terms of drafting its navigation legislation. During this process Deakin examined the treaty clause of the Canadian constitution and again asked for Groom's opinion on this wider question. Groom explained that Britain had made it clear that, with all future treaties, irrespective of whether all or only some states desired accession, it would only notify this on the request of the Commonwealth. If the Commonwealth had, like Canada, the power to 'enforce' treaty obligations of the Commonwealth or states, Britain would only notify accession, as with Canada, when a treaty was applied to the 'whole Commonwealth.' If the Commonwealth did not claim such power, Britain would leave it to its ministers to make such a condition for accession. He now asserted that the Commonwealth did have the power 'to enforce compliance', accession only on its request was 'satisfactory' and accession for treaties of 'trade, immigration, etc.' should be 'as a whole or not at all'. For 'mere conventions of a scientific or humanitarian interest', however, ministers would have to make a 'policy' decision as to 'whether the rule of indivisibility should be adopted.'¹²⁵ Two days later, before Deakin could act, he lost office. So, in January 1909, when Crewe's reminder arrived, that Elgin's despatch of January 1908 on treaties was unanswered, it was Fisher, now prime minister, who addressed this long-running issue.¹²⁶

In January 1909, Atlee Hunt extensively briefed his new minister, Batchelor, on both the drugs and night work treaties, with separate reports of the *DEA*'s chief clerk, John Quinlan.¹²⁷ These summarised the respective state responses on the night work treaty (ignoring those on the drugs treaty, presumably and wrongly because they thought adherence was settled), noting that Tasmania had not replied on either, while *NSW* and Queensland appeared negative. Atlee Hunt submitted that Fisher should inform those three of the other states' desires for adherence and ask if they now agreed. So, Fisher asked those premiers for a reply, as soon as possible, 'in order that a decision may be reached as to whether the Commonwealth will apply for permission to adhere as a whole or in part.'¹²⁸ He seemed unconcerned by Groom's earlier

¹²⁴ *Sydney Morning Herald*, 7 August 1908 and 15 December 1908; *Daily News* (Perth), 5 October 1908. **Vic**: 7 Edw. 7, no. 2137 of 1907; **SA**: 7 Edw. 7, no. 945 of 1907 & 8 Edw. 7, no. 961 of 1908; **Qld**: 8 Edw. 7, no. 4 of 1908; **NZ**: 7 Edw. 7, no. 73 of 1907 & 8 Edw. 7, no. 59 of 1908.

¹²⁵ Memorandum, 'Adherence to Treaties', Groom, 11 November 1908, vol. 24, CRS A1108, NAA.

¹²⁶ Despatch no. 416, Crewe to governor-general, 11 December 1908, vol. 39, CRS A11816, NAA.

¹²⁷ Minutes, Quinlan, 22 & 23 and Atlee Hunt, 25 January 1909, vols. 27 & 29, CRS A1108, NAA.

¹²⁸ Circular letter, Fisher to premiers, 10 February 1909, vol. 27, CRS A1108, NAA.

doubts over partial adherence, of which he was aware, as he had just given Lord Dudley his reply to the *CO*'s year-old request for the Commonwealth's view, as to the general procedure for treaty adherence, based on Groom's advice.¹²⁹ (Two weeks later, he received the *CO*'s request, as to whether colonies wished to adhere to the second Berne convention.) So, the *CO* should have reserved more doubt than it did, over the likely speed of the awaited Commonwealth response on this treaty. For Fisher had to pursue three tardy, even, in one case, uncooperative, states and he did not display the same centralist vigor, in completing the adhesion process for the two conventions, as he did over the landing of foreign troops.¹³⁰

On Elgin's general question on treaty accession, of a year prior, Fisher essentially accepted Groom's advice. He said that Britain's intention to notify adherence to treaties, 'only' at the request and on behalf of the Commonwealth, was 'entirely satisfactory'. This accorded, he continued, with views 'consistently expressed' by Commonwealth governments, with respect to 'the conduct of business relating to the External Affairs of Australia.' Requests by the Commonwealth for adherence of part, not the whole, of Australia, could be dealt with 'as occasion arises'. He then distinguished such 'occasions'. Where the treaty subject matter dealt with trade or immigration, or, more ambiguously, had a 'close relation to matters on which Parliament has or may acquire power to enact laws', although 'not precisely' within its 'exclusive sphere', he said it was 'advisable' for the Commonwealth to adhere, 'as a whole or not at all'. In other cases, where there was 'no possibility of interference with inter-state freedom of trade and intercourse', the Commonwealth would not object to requesting partial adherence, when states' opinions differed. He reiterated Groom's view that the

¹²⁹ Although Groom was attorney-general in the previous Liberal government, there is no record that Fisher sought further legal advice.

¹³⁰ Dale shared Berriedale Keith's doubts over Fisher's view (from Groom) of the 'external affairs' power and thought its interpretation may arise, as a major issue if the Commonwealth attempted to invoke it, when adopting legislation to cover the landing of foreign troops, which had recently arisen as a major difference between the Commonwealth and the states. The Commonwealth or, at least, the Labour government took a far more vigorous approach to this question than it did towards treaty adhesion. The *CO*, as usual, tried to broker a compromise outside strict definition of the constitutional grounds. This did not sit well with Labour ministers who described it as 'unworkable and derogatory to the prestige of the Commonwealth'. So Fisher had Dudley urgently advise the *CO*, in a telegram unusual for its length and tone, that his ministers were 'unable to assent to proposals which might involve the Commonwealth Government in the humiliation of having a question in which it is conceded primarily concerns the welfare of the Commonwealth and in regard to which they have given a decision also submitted to State Governments whose determination may be entirely the reverse. Such a course is most likely to give representatives of foreign powers the impression that the power of the Commonwealth is altogether illusory.' Fisher urged the *CO* to withdraw its proposed compromise solution, threatening that his ministers had 'hitherto not been desirous of taking exclusive power of legislation which Commonwealth admittedly possesses'. Unless the *CO* did, his ministers 'will be reluctantly compelled to take what action is within their power to place the procedure on a practicable and satisfactory basis.' Earlier, they had asserted this 'power' rested both on the 'defence' and 'external affairs' provisions of the constitution, although ultimately they relied only on the former for their new regulations, which were framed around a *CO*-brokered compromise. Notably, Fisher did not similarly assert Commonwealth paramountcy over treaty issues. Telegram, Dudley to *CO*, 12 January 1909. CO418/70/27-36, 99-106; CO418/61/422-424; CO532/12/6-7; CO532/17/182-184, TNA; vol. 1/6, 19 June 1908, pp. 399-401, CRS A1497, NAA.

Commonwealth's treaty powers, under *s.51(xxix)*, were 'substantially identical' with Canada's, before promising an early reply on the two conventions in question.¹³¹

In the *CO*, Berriedale Keith, after complaining over how long this reply had taken, conferred with Just, Johnson, Cox and Dale. He said Fisher was 'not in substantial disagreement' with the *CO*'s view [a curious double negative suggesting, perhaps the Commonwealth's position remained ambiguous]. On adherence being made only on behalf of the Commonwealth, he said there was 'no dispute'. On the second point, however, he feared that there was 'room for possible serious difficulty', over the expansive view, which Fisher (really, Groom) had taken of *s.51(xxix)*, supposedly claiming it to be identical to Canada's treaty power. He added that it was 'impossible' for the *CO* to say with any certainty whether this was correct. Firstly, for Australia, the matter had not been decided by the High Court and until it was, 'speculations are not very profitable.' Secondly, for Canada, he was unaware of and had not located any definite decision on the issue. The Dominion did not normally adhere to a treaty, whose subject fell within the exclusive legislative powers of its provinces, unless they consented. If such consent was given, the provinces could then be trusted to legislate as required, thus not necessitating Dominion legislation. He was not saying the Dominion lacked such a treaty power and, indeed, believed it did, although he thought it had never exercised it and its law officers had avoided deciding the question, instead getting 'rid of the matter by a side wind.'¹³² All in the *CO* then agreed to let this question rest for the moment, while Lord Crewe, who had succeeded Elgin, very briefly informed Fisher of his 'satisfaction' over his 'general agreement' with 'their opinions', while pointedly adding that, 'doubtless', a reply on the treaties would be sent 'in due course'. Probably, because he did not name them, Fisher missed that the *CO* did not regard accession to the drugs treaty as finalised.¹³³

Indeed, Fisher was only chasing the states on the night work treaty. After his second request, in March, Queensland soon replied ambiguously, by saying that adhesion would require another amendment of its principal *Act*, which had been 'brought up to date' in 1908 and was, thus, 'far in advance', with one exception of 'not very great importance', of what was 'suggested' at Berne. Such amendment, however, would be a 'retrograde' step. Ultimately, the *DEA* decided this was a refusal. Tasmania took the process from plodding uncertainty to farce, replying in May that it could not locate any prior correspondence, compelling Fisher to detail what had been exchanged two years prior. After two months, Tasmania finally acknowledged that the original records had indeed been received but lost. So, the *DEA* had to

¹³¹ Letter, Fisher to Dudley, 6 February 1909 & despatch no. 30, Dudley to *CO*, 11 February 1909, vol. 24, CRS A1108 & vol. 39, CRS A11816, NAA & CO418/70/101-3, TNA.

¹³² Minute, Keith to Dale, 24 March 1909, CO418/70/99, TNA.

¹³³ Despatch no. 132, Crewe to Dudley, 2 April 1909, vol. 39, CRS A11816, NAA & CO418/70/104-5, TNA.

obtain the correspondence, which had bypassed the *DEA*, from government house, which also drafted a useful summary. Even then, no early Tasmanian response followed, while *NSW* did not answer. Before further steps, at the federal election of 2 June 1909 (and revolving door of Commonwealth politics), Deakin replaced Fisher.¹³⁴

Deakin did not return to the issue, after reclaiming office or attend to the *CO*'s new uncertainty about the Commonwealth's attitude to the second Berne convention.¹³⁵ For another ten months, the *CO*, did not chase the Commonwealth over the treaties, until in December when, pressing the Commonwealth to encourage the states to agree to the second Berne convention, Crewe took 'the opportunity of inquiring when I shall receive' responses on the other two treaties.¹³⁶ The *CO*'s latest weary reminder reached Melbourne in mid-January 1910 and, finally, prompted some action. In the absence of Atlee Hunt, in early March, Maurice Shepherd briefed Groom, the new *DEA* minister. He recommended no further action on the drugs agreement, as the request for accession had already been sent. He seemed unaware that Britain had not notified the Commonwealth's accession, pending an answer on treaty adhesion generally and did not question why the Commonwealth was being asked again. On night work, he suggested that *NSW* and Tasmania should be asked yet again. Queensland's earlier ambiguous or negative response, apparently, was simply accepted. So, again Deakin wrote to the two states.¹³⁷

Now, Tasmania replied promptly, that it would be 'pleased' to adhere. The state was planning its second only 'factory act', which would follow the Victorian model of prohibiting women's night work, beyond 9pm, without giving a morning start-time. (This was not adopted until January 1911 and the *CO* did not connect it with the convention, Johnson deeming that 'apparently nothing of any imperial importance or requiring notice.'¹³⁸) *NSW*'s response confirmed that its failure to reply previously was deliberate. The pugnacious Liberal premier, Charles Wade, was an experienced lawyer, who was generally anti-union and strong upholder of states' rights, even speaking to Deakin of 'hostility' towards the Commonwealth.¹³⁹ The previous December, his government had adopted its long-proposed amendment to its principal 'factory act', restricting female night work hours by one further hour, prohibiting their employment in most industries from 6pm, rather than 7pm, while extending this to all

¹³⁴ The two premiers' replies are in vol. 27, CRS A1108 and see also vol. 39 CRS A11816, NAA.

¹³⁵ Despatch no. 168, Crewe to Dudley, 4 May 1909, vol. 39, CRS A11816, NAA.

¹³⁶ Despatch no. 443, Crewe to Dudley, 16 December 1909, vol. 39, CRS A11816, NAA.

¹³⁷ Memorandum, Shepherd, 4 March 1910, vol. 27, CRS A1108, NAA.

¹³⁸ 1 Geo. 5, no. 57 of 1910. Minute, Johnson, 28 February 1911, CO418/93-6-8, TNA.

¹³⁹ John M. Ward, 'Wade, Sir Charles Gregory (1863–1922)', *ADB*, vol. 12, NCB:ANU, MUP, 1990, <http://adb.anu.edu.au/biography/wade-sir-charles-gregory-8938/text15707>

females, not just those under eighteen years.¹⁴⁰ The *CO* sanctioned the *Act* without connecting it to the night work convention.¹⁴¹ Then, in early April 1910, clearly prompted by Deakin's inquiry, Wade gave the governor, Lord Chelmsford, a very detailed minute comparing *NSW* legislation with the convention, pointing out where provisions differed. While it had been found not 'practicable' to meet all those of the convention, he claimed that *NSW*'s 'liberal' legislation fully complied with the convention's 'spirit', if not 'strict' requirements. He did not expressly ask to accede.¹⁴² Then, a week later, he briefly replied to Deakin, merely saying that a 'report of legislation' had been sent through Chelmsford to the *CO*.¹⁴³ At the month's end, two days before the federal election, Shepherd briefed Groom on the overall states' responses, noting that Queensland's was negative and *NSW*'s unknown. Immediately, after the election, Fisher asked, not Wade, who was in a rival party, but government house, for the *NSW* governor's despatch to the *CO*. More confusion, farce or obstruction followed, when Dudley asked Chelmsford for the 'report', he had not been sent it. Chelmsford replied that he had only received a 'minute', which he did not then provide, not a 'report', which he claimed had been sent earlier to Dudley. When Dudley's official secretary, bewailing this 'very unsatisfactory state of things', denied receipt of this, Chelmsford insisted he had and still did not provide the 'minute'. Finally, six weeks after the original request, Dudley obtained a copy for Fisher, who immediately told the *CO* he would 'expedite' Commonwealth accession, blaming the states for the delay.¹⁴⁴ This communication crossed--prompted by *NSW*'s April dispatch--with one from the *CO*, in which a plainly exasperated Crewe asked, again, whether the Commonwealth was now, 'yet in a position', to request adherence and, if so, for which states.¹⁴⁵ Drafting this and advising Crewe not to notify *NSW*'s separate accession, given the treaty policy on which they had agreed earlier that year, Berriedale Keith shrugged resignedly over 'the difficulty of applying the Convention to the Commonwealth': a major understatement.¹⁴⁶

Coincidentally, a little earlier, the first English-language *IOT* bulletin arrived, sent by the *BALL*'s Sanger, who asked for copies of local legislation. Atlee Hunt agreed to provide any relevant future Commonwealth acts but added that, 'owing to the division of legislative duties', there were not likely to be many. He suggested the *IOT* ask the states' agent-generals

¹⁴⁰ 9 Edw. 7, no. 28 of 1909.

¹⁴¹ Minutes, Keith to Johnson, 15 February 1910, CO418/80/15, TNA. He only noted its discriminatory provisions against Chinese.

¹⁴² Minute, Wade to governor, attached to despatch, governor to Crewe, 6 April 1910, CO418/80/40-3, TNA.

¹⁴³ Letter, Wade to Deakin, 11 April 1910, vol. 27, CRS A1108, NAA.

¹⁴⁴ These records are in vol. 27, CRS A1108 & vol. 39, A11816, NAA.

¹⁴⁵ Despatch no. 193, Crewe to Dudley, 25 May 1909, vol. 27 CRS A1108 & vol. 39, CRS A11816, NAA; CO418/80/44, TNA.

¹⁴⁶ Minutes, Keith to Johnson, 15 May 1910, CO418/80/40, TNA.

in London for their legislation, a curiously non-centralist approach by him.¹⁴⁷ In late July, after resuming leadership over policy advice, Atlee Hunt briefed his new minister, Labour's Lee Batchelor, on the 'difficulties' over Commonwealth accession. He suggested that Queensland's objection was not significant as, like Britain, its existing legislation established a higher standard than the convention required. He seemed to advise accession, without explicitly so saying, by claiming (questionably) that NSW was now agreeable and Queensland legislation sufficient, despite its refusal, and set out the crucial constitutional and treaty issues clearly, as no official had before.

*It is, however, an obligation on the part of each contracting State to take the administrative measures necessary to secure the strict execution of the terms of the Convention within its territories. In view of the fact this Government has no power to enforce industrial legislation on a State, the Minister may feel some reluctance to commit the Commonwealth to obligations which will be difficult if not impossible of fulfillment.*¹⁴⁸

Batchelor sat on this open-ended advice for a month, before replying simply: 'Adhere.'¹⁴⁹ So, Fisher advised Dudley to ask the CO to adhere 'in respect of the whole of Australia'.¹⁵⁰ This process had taken over three years but was still far from finished.

Berriedale Keith found Fisher's response 'somewhat inadequate'. He explained to Johnson that, while three states were in a position to adhere, (from what the CO had learned from the respective governors, not the Commonwealth), NSW was only 'almost, but not quite' and Queensland, 'not at all' (although he deemed its legislative position as quite similar to NSW's). Of Tasmania, he said 'we know nothing' because it relied on regulations which, unlike legislation, were not routinely brought to notice of the CO. Being the 'least advanced' industrially, he doubted its legislation was compliant. So, as the CO was still unsure whether all states agreed to accession, further confirmation was advisable. The fundamental 'difficulty', he correctly assessed, while reflecting on the wider issues, was that 'labour regulation is not a matter in which the Commonwealth Government has direct legislative control.' The only possible solution he saw, was that, if such control was conferred on the Commonwealth by its 'external affairs' power, but the CO's view, set out in early 1908, was that that power 'probably' did not extend to enforcing treaty obligations, where the Commonwealth did not itself have legislative power. The Commonwealth, 'evidently', thought it did have 'full power', not only on trade, immigration and any subject, which had a

¹⁴⁷ Letters, BALL (Sanger), 15 January 1910 & Atlee Hunt to Sanger & Atlee Hunt to Collins, 15 March 1910, vol. 38, CRS A1108, NAA. Thereafter, NSW, Victoria and Queensland, like Ontario, Natal and Transvaal, dealt directly and separately with the IALL.

¹⁴⁸ Memorandum, 'Berne Convention for the Regulation of Night Work for Women', Atlee Hunt, 27 July 1910, vol. 27, CRS A1108, NAA.

¹⁴⁹ Annotation by Batchelor, 26 August 1910, on the above, vol. 27, CRS A1108, NAA.

¹⁵⁰ Letter, Fisher to Dudley, 30 August 1910, vol. 27 CRS A1108 & vol. 39, A11816, NAA. Despatch, Dudley to Crewe, 6 September 1910, CO418/79/213, TNA.

‘close relation’ to subjects, on which it had or even may acquire legislative power but, also, on ‘whatever subject matter’, covered by a treaty, to which it became party. The Commonwealth thereby held it could adhere to a treaty for all Australia and it was unnecessary even to consult the states.¹⁵¹

Although the *CO* was sensitive to intervening too far into the domestic affairs of a self-governing colony, Berriedale Keith warned that, allowing accession in such form would be a ‘precedent which we cannot get explained away’. So, the *CO* had to decide

*whether we will accept the will of the Commonwealth to adhere on a matter on which they have no power to legislate, apart from the power they think they have under [s.51(xxix)] . . . but as to which there is very grave doubt as to their possession.*¹⁵²

He did ‘not think for a moment’, that the Commonwealth had such power and urged informing it that, since 1867, there had been no case, of which he knew, which had held that Canada had power to legislate on treaties, by virtue s.132 of the *BNA*. The Dominion’s practice had been not to adhere, without the provinces’ consent. So, the *CO* should not facilitate the Commonwealth to [?] act differently, which would not be ‘proper constitutionally’. Finally, he added that, although Dudley had ‘not thought fit’ to inform the *CO*, he knew the Commonwealth was planning to amend its constitution to give itself full powers over trade and regulation of labour. So, he thought it best, if the states had not yet agreed, to delay notification of adherence, until the constitutional amendment had been ‘approved by the electors’. He suggested this could be put to the Commonwealth, citing ‘against them’, if disputed, its own actions, in not yet adhering to navigation treaties, on the grounds that, although having full power on this subject, it had yet to legislate. Johnson agreed but, as there was ‘no hurry’, thought best to send a detailed reply by confidential post not telegram, which might become public.¹⁵³

Crewe essentially adopted this advice and also ‘asked’, rhetorically, whether ministers had connected this accession with Elgin’s points of January 1908 on the broader question to this accession question. He continued, ‘if so, I presume . . . [you] will desire to follow the constitutional practice in force in Canada in these matters, especially in view of the more independent position of the States.’ He added that he would be ‘glad to learn’, if the states had actually agreed to adherence. He then ‘suggest[ed]’ pointedly, that should the Commonwealth desire to act in this matter without obtaining the states’ assent, ‘it might be desirable’ to wait until the proposed constitutional change, to the Commonwealth’s power over labour legislation, had been ‘ratified by [the] electorate’. He was sure that a ‘failure to adhere’ now,

¹⁵¹ Minute, Keith to Johnson, 20 October 1910, CO418/79/211-212, TNA. His evaluation of the states’ various legislation was not entirely correct.

¹⁵² *ibid.*

¹⁵³ Minute, Keith to Johnson, 20 October 1910, CO418/79/211-212, TNA.

would not ‘appear to affect injuriously’ the Commonwealth’s interests and deferral was the same grounds, on which the Commonwealth had deferred its adherence to the bilateral navigation treaties with France and the *USA*.¹⁵⁴

With Christmas 1910 five days away, this despatch had not yet arrived in Melbourne, when Atlee Hunt reminded Batchelor of his mid-year advice and the *CO*’s original views on the wider issue of the Commonwealth’s accession to treaties. He asked, perhaps rhetorically, that in view of the approaching referendum, which might decide whether the Commonwealth could assert its paramountcy over, among other things, international labour questions, whether he thought it was now best to defer the decision to accede, until afterwards. Batchelor may have given the issue much thought or just followed his experienced adviser. Irrespective, he replied early in the New Year with, again, just a one-word instruction, this time, ‘defer’.¹⁵⁵

The referendum was held on 26 April 1911. Eligible Australians were asked: ‘*Do you approve of the proposed law for the alteration of the Constitution entitled Constitution Alteration (Legislative Powers) 1910?*’ A ‘yes’ vote would extend the Commonwealth’s power in respect of trade and commerce, the control of corporations, labour and employment and combinations and monopolies. Only the lesser-industrialised WA voted clearly in favour of the amendment, while the most industrialized states, Victoria, NSW and SA (with its mining) had the strongest votes against, totaling 60%. This possibly reflected parochial views of local labour movements, which assumed that they had more influence over state rather than central governments, even with a Labour party in power in the latter.¹⁵⁶ Soon after, the *OIT*’s Bauer contacted the Commonwealth for the first time, seeking small financial support. The new external Affairs minister and former Cornish miner, Josiah Thomas, said he was ‘in sympathy’ and secured funds. Atlee Hunt probably intended no irony but it was there, when he advised Bauer that ‘all industrial matters are under control of the State governments’: the core problem on this treaty.¹⁵⁷

When the *CO* learned the referendum result, Johnson advised that there should be no further action on the Commonwealth’s adherence, until it was raised again.¹⁵⁸ The Commonwealth never did and never adhered (or to the forgotten drugs treaty). During 1912, Victoria legislated in a way, which seemed to move away from the convention, prohibiting employment of females between 6pm and 6am but only for those under sixteen years of age.

¹⁵⁴ Despatch no. 420, Crewe to Dudley, 28 October 1910, vol. 27, CRS A1108, NAA & CO418/79/214-216, TNA.

¹⁵⁵ Annotation, Batchelor, 2 June 1911 on minute, Atlee Hunt, 20 December 1910, vol. 27, CRS A1108, NAA.

¹⁵⁶ Scott Bennett, *The Politics of Constitutional Amendment*, Research paper no. 11, Parliamentary Library of Australia, Canberra, 2003.

¹⁵⁷ Letters, *OIT* (Bauer), 18 December 1911 & Atlee Hunt to Bauer, 26 January 1912, vol. 38, CRS A1108, NAA.

¹⁵⁸ Minute, Johnson, 2 June 1911, CO418/79/212, TNA.

NSW's legislation preserved an exemption for overtime work. The *CO* sanctioned both without comment.¹⁵⁹ Although the female night work (and drugs) treaty dropped out of Commonwealth policy from 1911, developments in the international system and the Commonwealth's responses to them would soon revive related subjects, if not adhesion to the convention itself.

* * *

As with the pre-war treaties on transnational crimes, the First World War only stalled not halted international labour protection through domestic legislation associated treaties. At Versailles, in 1919, as the peace settlement was being drafted, so too was the constitution of the fully governmental *International Labour Organisation (ILO)* in succession to the semi-official *OIT*. Beginning in October 1919, as an agency of the *LoN*, the *ILO* led the drafting of 67 labour conventions before war broke out again in 1939. The fourth (C004) and sixth (C006), in 1919, were on night work, being one revised for women and one new for young persons, which had been under preliminary governmental discussion before that war. The former was revised by a new convention in 1934 (C041).¹⁶⁰ (All would be abrogated by the *ILO* in 2017.) After the Second World War, under the *UN*, both subjects were revised and superseded with conventions in 1948 (C089), the former with 67 ratifications, of which 23 have since denounced. In 1990, a protocol (C171) amended the night work convention.¹⁶¹ To date, 190 *ILO* conventions and six protocols have been concluded. As with transnational crime, the treaty foundations for today's international protection of labour were laid before the First World War, by the conventions examined here.

The initiative for these foundational conventions came from Europe, with Britain slow to engage. Ultimately, Britain deposited its ratification of the night work convention on 24 September 1907. *NZ* adhered in less than three years. For Australia, despite the Commonwealth's decision to adhere being made only six months after *NZ's*, the internal process for accession would drag on, until 1911, when the Commonwealth decided to defer a decision and, apparently, then forgot about both this convention and the potent drugs agreement. The former was ultimately overtaken by the conclusion of the new *ILO*

¹⁵⁹ **Vic:** 3 Geo. 5, no. 2386 of 1912; **NSW:** 3 Geo. 5, no. 39 of 1912. CO418/112/2-5; CO418/116/9, 18, TNA.

¹⁶⁰ *Convention concerning Employment of Women during the Night*, ILO no. 4, Washington, 28 November 1919; *Convention concerning Employment of Women during the Night (Revised 1934)*, ILO no. 41, Geneva, 19 June 1934; *Convention concerning Employment of Women during the Night in Industry (Revised 1948)*, ILO no. 89, San Francisco, 9 July 1948; *Protocol of 1990 to the Convention concerning Night Work of Women Employed in Industry (Revised 1948)*, PO no. 89, Geneva, 26 June 1990.

¹⁶¹ *Convention concerning Employment of Women during the Night*, ILO no. 4, Washington, 28 November 1919; *Convention concerning Employment of Women during the Night (Revised 1934)*, ILO no. 41, Geneva, 19 June 1934; *Convention concerning Employment of Women during the Night in Industry (Revised 1948)*, ILO no. 89, San Francisco, 9 July 1948; *Protocol of 1990 to the Convention concerning Night Work of Women Employed in Industry (Revised 1948)*, PO no. 89, Geneva, 26 June 1990.

convention in 1919. By then, Australia, like Canada and South Africa, had still not acceded to the original convention. Despite the Commonwealth's long-standing desire to so do, it did not adhere to this successor convention and only adhered to the next such convention, of 1934, in 1973, and has not yet adhered to the later convention of 1948 or the protocol of 1990. (Accession to the potent drugs treaty appears to have been simply overlooked by the Commonwealth (and, later, the *CO*), after the *CO* did not notify its accession in 1908. In 1952, the Commonwealth finally became party to the successor treaty of 1929.¹⁶²)

The Berne night work convention exposed considerable difficulties for Australian adherence to treaties, arising from its federal system and limited, in treaty matters, constitution. The *CO*'s advice to the Commonwealth on this question may have been constitutionally correct but it was a recipe, if not for chaos, then, certainly for delay, confusion and frustration, in answering imperial, let alone foreign, governments. The cautious approach of most Commonwealth political leaders, in contrast sometimes with that of their official advisers, in not challenging this limited constitutional view, was unchanged for many years. Treaties on labour questions have proven particularly difficult for the Commonwealth, being a federation, without an express constitutional power over such issues or an express 'treaty power' of the Canadian type. This largely explains Australia's relatively meagre record of acceding to *ILO* conventions. One solution, Groom's robust view of the 'external affairs' power in 1908, would not be embraced by Commonwealth policy and law-makers for around seven decades.

¹⁶² *International Agreement respecting the Unification of Pharmacopoeial Formulas for Potent Drugs*, Brussels, 20 August 1929; *Protocol for the Termination of the Brussels Agreement for the Unification of Pharmacopoeial Formulas for Potent Drugs of 29 November 1906 as revised on 20 August 1929*, Geneva, 20 May 1952.

Chapter 7

‘a most beneficent measure’: prohibition of white phosphorus matches

The main focus of early international labour protection through legislation was on working conditions, notably on hours of work. Once again led by German reform initiatives, dating from the 1880s, the issue of protection or, better, compensation to workers for injuries sustained through accidents in the workplace became a matter of policy debate in various countries, although, by the start of the 20th century, no concrete treaty proposal. In 1897, Britain enacted the *Workmen’s Compensation Act*, which reversed the previous legislative obligation of employees to prove an injury was caused by an accident at work.¹ Diseases supposedly acquired through employment were not included. So, for the moment, reformers addressed legislative methods to prevent such diseases at work.

The second of the first two multilateral labour conventions, signed at Berne in September 1906, prohibited the manufacture, sale and importation of matches containing white phosphorus. The initiative, as was common then for multilateral treaties, came from Continental Europe, notably France, Germany and Switzerland. Britain followed slowly, especially on this convention, signing it later than half of the original fourteen conference parties. Britain was the home of major match manufacturers, which, for a time, had successfully lobbied their government not to move too severely against usage of the deadly substance. Ultimately, in late 1908, Britain signed the convention and asked its colonies in early 1909, whether they wished to adhere. Although, as was constitutionally procedural, the convention was brought before the Commonwealth by the imperial government, the former, surprisingly, had acted prior in one respect, by banning imports, days ahead of Britain’s own import ban. Then, however, the limited nature of the Commonwealth’s powers, in implementing many of the new multilateral, ‘law-making’ treaties, especially on labour matters, became apparent. The Commonwealth took nearly a decade to secure the state legislation, required for accession to the convention, for which constitutionally it lacked power—to ban manufacture and sale. In 1917—well behind the accessions of Britain (1908), South Africa (1910), NZ (1911) and Canada (1914)—the Commonwealth asked Britain to notify its adherence, only to be told that, this should now wait until the end of the war. Finally, soon after the creation of the *ILO* and days before 1919 closed, the Commonwealth acceded to this ground-breaking treaty.

Among the wave of ‘factory acts’, enacted in the 19th century, concern extended from hours to conditions of work. Industrial accidents led the way but the more contentious issue of industrial diseases also arose. Production with lead, arsenic, mercury and anthrax were some

¹ 60 & 61 Vic. C. 37.

of the main concerns, which also included, in the manufacture of matches, the use of white (or yellow) phosphorus, which was orally poisonous and caused *necrosis* or ‘phossy jaw’ in workers. The disease began with toothaches and swollen gums, before jawbones, unless removed, abscessed, while glowing in the dark and smelling unpleasantly, as rotting bone tissue discharged. Organ failure, including brain damage, and death followed. The first domestic restriction of its use was in Austria in 1846. Commercial interests strongly resisted restrictions and, only in the 1870s, were the first, few national steps taken, through either prohibition or punitive taxes. Internationally, workplace health issues were first discussed at an inter-governmental conference at Berlin in 1890 and, soon after, more governments began to take restrictive measures, urged by the *IALL*, after its formation in 1900.

1. ‘notoriously deadly trade’: international concern over white phosphorus, to 1900

The Continental-led drive for reform of labour conditions, after Berlin in 1890, included making financial provision for workers injured at work. Britain’s 1897 legislation on ‘**workmen**’s [emphasis added] compensation’ was a considerable reform but was confined to male-dominated heavy industries and did not cover workplace diseases.² This would change.

Europe’s discovery of tobacco in the *New World* in the mid-16th century led to widespread smoking, chewing and snuffing by the 18th century. Cigarettes were hand-rolled and, thus, expensive. By the late 19th century, a machine, which dramatically increased production, led to phenomenal growth in smoking. Growing opposition to tobacco consumption, from religious groups, long campaigning against alcohol, was joined by the first anti-tobacco campaigns based on modern if, early, scientifically-based health concerns.³ Even before then, another related but separate concern arose.

Initially, cigarettes were lit by non-portable, naked flames or awkward flint-strikers. In France, a self-igniting match was invented in 1805, which required dipping chemical compound-coated match-heads into an asbestos bottle containing sulfuric acid: dangerous and expensive. Other chemical mixes followed over the next twenty years, using the friction of rough surfaces to ignite. None proved suitable for mass production. A Durham chemist invented the first successful friction matches—*congreves*--in 1827, leading, *via* a Glaswegian inventor, to mass production in London of the dangerously explosive *lucifer*. In France, in 1830, yellow (or white) phosphorus replaced the previously used, antimony sulfide.⁴ In 1838,

² *The Workmen’s Compensation Act 1897*, 60 & 61 Vict. c. 37.

³ Iain Gately, *Tobacco: the story of how tobacco seduced the world*, Grove Press, NY, 2001; Ina Baghdiantz McCabe, *A history of global consumption: 1500-1800*, Routledge, Abingdon, Oxon, 2015, pp. 53-86; James F. Hancock, *Plantation Crops, Plunder and Power: Evolution and Exploitation*, Routledge, London, 2017, pp. 127-40.

⁴ M. F. Crass, ‘A history of the match industry,’ Part I, *JCE*, 18(3), 1941, pp. 116-20; Edward Irving Carlyle, ‘Walker, John, 1781-1859’, *DNB, 1885-1900*, vol. 59, Smith, Elder & Co., London, 1903, pp. 77-8; Tony Holden,

Viennese reports disclosed that, as well as being highly flammable, white phosphorus caused *necrosis* or ‘phossy jaw’. After the *International Congress of Natural Science* in Nürnberg focused on this, an Austrian provincial government enacted the first restriction of its use in 1846. Soon, Swedish and Austrian chemists developed and patented safer (though still explosive in production) but more expensive red phosphorus alternatives.⁵

Meanwhile, in London in 1843, two Quakers, William Bryant and Francis May, formed *Bryant and May (B&M)* and began mass importing such matches from pine-rich Sweden. Next year, chemist Arthur Albright added white phosphorus to potassium chlorate, then being used for the match industry, at the chemical company, near Birmingham, of the Sturges, his fellow Quakers and brothers-in-law. In 1850, the operation moved to Oldbury, West Midlands, and began mass production. Albright then demonstrated a version, less given to explosion—the ‘safety’ match—at the *Great Exhibition* at London’s Crystal Palace in 1851. Sweden’s *Lündström* brothers (Carl and Johan) bought the patent, won an award at the Paris Exhibition of 1855 and established, what was almost, a world monopoly in safety matches, while also still manufacturing with white phosphorus. In 1856, Albright, having broken with the Sturges, who had declined to use phosphorus, formed *Albright & Wilson*, with a Quaker merchant and, soon to be, brother-in-law, mass producing safety matches, as well as less expensive white phosphorus matches. In London in 1861, *B&M* also began mass production of safety matches, mainly employing young females.⁶ Having bought the British patent from Sweden, they became a major match exporter, mainly throughout the empire, including to Australia, from 1884.⁷

Thus, by the 1870s, match producers could choose to use either red or white phosphorus, the latter a third cheaper. Competing factors of cost and safety determined that they continued to produce both. Numerous factory fires in several countries highlighted the latter’s immediate dangers. There was also growing concern over *phossy jaw*. Most governments, however,

Holden's Ghosts, The Life and Times of Sir Isaac Holden: Inventor, Woolcomber and Nonconformist Radical Liberal M.P., Leen Editions, Nottingham, 2015.

⁵ W. F. Dearden, ‘The causation of phosphorus necrosis’, *BMJ*, 2, 1901, pp. 408-10; Thomas Oliver, ‘Poisoning by Phosphorus, by Sulphuretted Hydrogen and by Carbon Monoxide’, *Archives of the Public Health Laboratory*, Public Health Series No. 1, Sherratt & Hughes, Manchester, 1906, pp. 1-17 and *The Diseases of occupation from the legislative, social, and medical points of view*, New Library of Medicine Series, Methuen, London, 1908. C. Proskaur, ‘A civil ordinance of the year 1846 to combat phosphorus necrosis’, *BHM*, 11, 1942, pp. 561-575; Moritz Kohn, ‘The Discovery of Red Phosphorus (1847) by Anton von Schötte’, *JCE*, 21(11), 1944, pp. 522-54. Donald Hunter, *The Diseases of Occupation*, 6th ed., Hodder & Stoughton, London, (1956), 1978, pp. 373-7. Jaime Wisniak, ‘Matches-the Manufacture of Fire’, *IJCT*, 12, May 2005, pp. 369-80. A populist account is John Emsley, *The shocking history of Phosphorus: a biography of the Devil's element*, Macmillan, London, 2000.

⁶ William’s eldest son, Wilberforce, became general manager in 1861 and May left the partnership in 1864. Richard E. Threlfall, *The Story of 100 years of Phosphorus Making 1851-1951*, Albright & Wilson Ltd., Oldbury, 1952, ch. IV; Patrick Beaver, *The Match Makers: The Story of Bryant & May*, Henry Melland Ltd., London, 1985; Mike King, *Quakernomics: An Ethical Capitalism*, Anthem Press, London, 2014, pp. 55-59.

⁷ Matches were first produced in Australia by a Hungarian émigré family, named Wortman, in Victoria between 1843 and 1857.

followed Sweden's 1870 lead of only—its industry being too important economically--imposing supposedly greater regulatory control on white phosphorus factories, rather than a ban. Neighbouring Finland and Denmark, which did not share Sweden's huge, match export trade, were the first two countries, in 1872 and 1874 respectively, to ban its use. No government followed over the next two decades.⁸

In England, with electric lighting not yet widely available, the matchmaking industry was an influential lobby, and thereby largely protected from the interference of safety legislation. Until 1880, the doctrine of 'common employment' in English common law did not allow an employee to hold his employer responsible for injuries in the workplace, caused by negligence of a fellow worker or foreman. The *Employers' Liability Act* of that year, after three years of parliamentary debate, changed that. The *Act's* provisions were limited, with the onus of proof in suits on employees. So, some firms relied instead on compensation from benefit plans, funded jointly by employers and employees. Workplace accidents but not diseases were covered. All Australasian colonies passed similar laws between 1882 and 1895, with Victoria the only government using the different title, *Employers and Employés*, perhaps, to emphasise that the responsibility was mutual.⁹

Meanwhile, further industrial unrest would bring industrial diseases to the fore. The prominent *Fabian*, Annie Besant, spoke at a mass assembly of London's unemployed in 1887, which became 'Bloody Sunday'. Now further radicalized, the next year, she was drawn into the famed 'match-girls' strike' at B&M's London factory.¹⁰ The main issues were women's hours and conditions of work but *phossy jaw* was also raised. In the absence of protective legislation, William Booth's *Salvation Army* established its own London factory, nearby, in 1891, to provide a safer workplace for home-based matchmakers, many of them children. Paying better wages and using the more expensive red phosphorus, it was supported by some consumers, who took temperance-like pledges not to use white phosphorus matches. Unsurprisingly, it struggled financially.¹¹

⁸ P. W. J. Bartrip, *The Home Office and the Dangerous Trades: Regulating Occupational Disease in Victorian and Edwardian Britain*, Rodopi B. V., Amsterdam, 2002, pp. 171-232.

⁹ **UK**: 43 & 44 Vict. c. 42; **NSW**: 46 Vic. no. 6 of 1882; 50 Vic. no. 8 of 1886; 57 Vic. no. 6 of 1893; 61 Vic. no. 28 of 1897; **NZ**: 46 Vic. no. 20 of 1882; 54 & 55 Vic. no. 10 of 1891; 56 Vic. no. 21 of 1892. **SA**: 47 & 48 Vic. no. 325 of 1884. **Qld**: 50 Vic. no. 24 of 1886; 52 Vic. no. 3 of 1888. **Vic**: 54 Vic. no. 1087 of 1890; 55 Vic. no. 1219 of 1891; 62 Vic. no. 1581 of 1898; 1 Edw. 7, no. 1757 of 1901. **WA**: 58 Vict. no. 3 of 1895. **Tas**: 59 Vic. no. 25 of 1895.

¹⁰ In 1884, B&M formed a public company with matchmakers Pace & Sons and J. H. Hunt & Co, taking over the four factories of Bell & Black next year.

¹¹ *Times*, 10 July 1888; *Telegraph* (Brisbane), 22 September 1894. Lowell J. Sartre, 'After the Match Girl's Strike: Bryant and May in the 1890s', *VS*, 26, 1982, pp. 7-31; J. Fairbanks, *Booth's Boots*, Campfield Press, St. Albans, 198, p. 120; Anne Taylor, *Annie Besant: a biography*, OUP, Oxford, 1992. She was London-born but of Irish origins, and had given up her parents and minister husband's Anglican faith, evolving into strident support for women's and workers' rights, freedom of expression, socialism and Irish Home Rule. Louise Raw, *Striking a Light: The Bryant and May Matchwomen and their Place in History*, Continuum UK, London, 2009.

While Britain's government was not yet acting, Europe's were. Workplace health issues caused by both white phosphorus and lead in manufacturing were discussed at the first, official international conference on labour legislation in Berlin in 1890. Two years later, Russia imposed a heavy tax on the former's use, virtually eliminating it by 1895, when even Sweden banned its local sale, as from 1 July 1901, but not its lucrative manufacture and export. Switzerland (1896 and 1898) and France (1897 and 1902), respectively, legislated monopolies and bans, neither having any export trade. Belgium, which did, banned local use in 1898 and offered a rich prize for invention of an alternative. French chemists had just achieved this with *sesquisulfide*. The Netherlands (having earlier declined over damage to exports) and Germany legislated bans, respectively, in 1901 and 1903, the latter to take effect in January 1907, with a patented alternative made available to all producers. Austria, Spain and Norway (after independence in June 1905), imposed stringent controls, restricting the amount used, so as to make it financially unviable.¹²

In the USA, cases of *necrosis* in matchmakers had been reported since 1855. A merger in 1881 had created, in Ohio, the *Diamond Match Company (DMC)*, by far the USA's largest and, hence, most influential.¹³ Like *B&M*, it claimed improved factory conditions had solved the problem but did buy the USA patent on the safe French alternative in 1898. The only restrictive legislation was in Ohio, covering only child workers. There was no relevant federal law. Japan, another major exporter, also had no relevant legislation.¹⁴

Europe, as usual, also led on compensation for workplace injuries. At the *Exposition Universelle Internationale* in Paris in 1889, the inaugural *Congr s international des accidents du travail* had formed the *CPIAS*, which issued a bulletin from 1892 and convened congresses in Berne (1891), Milan (1894), Brussels (1897) and Paris (1900). Following Germany's lead, Italy (1886), Portugal (1891) and Belgium (1894) introduced similar workers' insurance schemes. Sweden-Norway and Finland (1895), Denmark and France (1897) also legislated on this issue.¹⁵ A *Museum for the Prevention of Accidents and Diseases in Factories and Workshops* was established in Amsterdam.

¹² Bartrip, *op. cit.*, pp. 194-5. M. F. Crass, 'A history of the match industry,' Part I, *JCE*, 18(3), 1941, pp. 116-20; Part III, 18(6), 1941, pp. 277-82; Part 5, 18(7), 1941, pp. 316-9; Part VIII, 18(8), 1941, pp. 380-4; Part IX, 18(9), 1941, pp. 428-32.

¹³ Herbert Manchester, *The Diamond Match Company: A Century of Service, Progress and Growth 1835-1935*, The Diamond Match Company, NY, 1935.

¹⁴ J. S. Felton, '200 years of occupational medicine in the U.S.', *JOM*, 18(12), 1976, pp. 809-817; Alice Hamilton, *Industrial Poisons in the United States*, The Macmillan Co., NY, 1925, pp. 308-16 and *Exploring the Dangerous Trades: The Autobiography of Alice Hamilton, M.D.*, Little, Brown, & Co., Boston MA., 1943. p. 117. Alice B. Sicherman, *Alice Hamilton: A Life in Letters*, HUP, Cambridge, MA., 1984, pp. 154-158.

¹⁵ Maurice Bellom, *L'assurance ouvri re et la fin de si cle*, Berger-Levrault, Nancy, 1901; Michel Dreyfus, 'Mutualit  et organisations politiques et sociales internationales (1889-1939)' and Rainer Gregark, 'Le mirage de l'Europe sociale: Association internationales de politique sociale au tournant du si cle', *Vingti me si cle: revue d'histoire*, 48(1), 1995, pp. 92-118.

In Britain, in 1893, a bill was introduced, which differed from its German inspiration, by relying on private ‘friendly societies’, not just state support. Nevertheless, factory interests were strongly opposed and had it blocked in the Lords. Then, in 1897, Liberal Unionist Joseph Chamberlain, in coalition with Salisbury’s Conservatives, designed a scheme, enacted as the *Workmen’s Compensation Act 1897*.¹⁶ Now, employees only had to prove that they had been injured at work. In Australasia, at this time, only the most liberal colonies, both with strong mining industries and where women already had a strong political voice, soon followed Britain, with NZ (1900) first, and, then, SA (1900) and WA (1902). Queensland followed in 1905 and the other three colonies, much later.¹⁷ This type of legislation only covered industrial accidents not diseases, whose existence, nature and causes could be more easily denied.

The *HO* had declared in 1891 that, white phosphorus, along with some other materials, was ‘dangerous or injurious to health’ but *phossy jaw* cases had almost disappeared, due to better regulation of processes.¹⁸ Some further restrictive regulations were introduced in 1892 and 1894, nonetheless, as public concern continued to grow, fuelled by the publication of Dr John Arlidge’s *The Hygiene, Diseases and Mortality of Occupations* (1892), which reported disturbingly on *phossy jaw*. The startling claims by crusading newspaper, *The Star*, that *B&M* concealed *phossy jaw* cases from factory inspectors and sacked employees, who exhibited symptoms or reported them, galvanized opinion. So, in 1895, the *HO* sent factory inspectors, including Adelaide Anderson, one of the first female inspectors, appointed two years prior, to review European match factories. In France, where *phossy jaw* cases were much more extensive than in Britain, new regulations had started to reduce its incidence and the government was funded research into alternative chemicals.¹⁹ The *HO* was not sympathetic to such steps, its (male) chief factory inspector minimizing the incidence of *phossy jaw*. In one small advance, the *Factory and Workshop Act 1895* required notification of diseases, caused by manufacturing with lead, arsenic, anthrax and white phosphorus.²⁰ Both Liberal and Conservative governments’ first priority remained, however, to protect the matchmaking industry and, thus, continued white phosphorus usage, which was, later, officially described

¹⁶ 60 & 61 Vict. c. 37. Lee K. Frankel and Miles, M. Dawson, *Workingmen's Insurance in Europe*, Charities Publication Committee, NY, 1911; David G. Hanes, *The First British Workmen's Compensation Act of 1897*, YUP, New Haven, Conn., 1968. Ontario’s earlier (1886) *Workmen’s Compensation for Injuries Act* was really an ‘employer’s liability’ enactment.

¹⁷ NZ: 64 Vic. no. 43 of 1900. SA: 63 & 64 Vic. no. 739 of 1900; 4 Edw. 7, no. 857 of 1904. WA: 1 & 2 Edw. 7, no. 5 of 1902. Qld: 5 Edw. 7, no. 26 of 1905.

¹⁸ HO45/9850/B12393D, TNA

¹⁹ J. T. Arlidge, *The Hygiene, Diseases and Mortality of Occupations*, Percival & Co., London, 1892.

²⁰ 58 & 59 Vict. c. 37.

as an ‘important ingredient’.²¹ *B&M*, by then, employing 2,500 workers, led an association of matchmakers in contesting changes in legislation or policy, which required arbitration between them and the *HO*.²²

In 1898, Anglican priest, Basil Wilberforce, grandson of the anti-slave trade reformer, and his wife called a public meeting in the *Jerusalem Chamber* at *Westminster Abbey*. Their supporters, including aristocrats, were far removed socially from many suffragette and women’s rights groups, campaigning on other major reform issues of special interest to women, such as white slave, opium and bird plumage traffic. The meeting called for the total prohibition of white phosphorus matches, sale only of Salvation Army matches and more stringent inspection of factories, especially by women. The group’s pedigree ensured a meeting with the Conservative Home Secretary, Sir Matthew White Ridley, not much more. He expressed doubt over prohibition and insisted health problems were caused more by the ‘animal spirits’ of the female workers, who did not look after their own teeth: which daily inspections would solve. He defended *B&M* against populist claims, that they were ‘fiends in human form’. He opined that, while it was ‘useful’ for ‘duchesses and countesses’ to support reform, the questions were ‘somewhat technical’ and official bodies, which included women, were more experienced in such matters.²³

Under this public pressure, the *HO* conducted an ‘exhaustive enquiry’. Inventors’ offers of alternatives (for purchase), though, were rejected. Instead, Ridley decided in 1899 not on a ban but ‘strict’ regulations, applied under the *Act* of 1891, which would go beyond the regulations of 1894. (*B&M* courted government and public favour, by supplying matches to troops in the Boer War.) These would require better factory ventilation and cleanliness, separation of dangerous processes and periodic dental examinations.²⁴ In arbitration with the industry (workers were not included), the *HO* refused most matchmakers’ proposed amendments. Some weakening of regulations did result but much was retained. An

²¹ Parliamentary Paper Cd.3271, Memorandum of the International Conference on Labour Regulation, 1906, p. 5, vol. 27, CRS A1108, NAA.

²² Bartrip, *op.cit.*, pp. 195-6, 201-6. Adelaide Mary Anderson, *Women in the factory: an administrative adventure, 1893 to 1921*, E. P. Dutton and Company, NY, 1922.

²³ *The Express and Telegraph & Chronicle*, (both Adelaide), 17 September 1898; *Mercury*, 18 October 1898. The meeting included the fabulously wealthy philanthropist, Baroness (Angela) Burdett Coutts, known for her work, especially with young women, including prostitutes, in London’s East End; the Duchess of Sutherland (Millicent Sutherland-Leveson-Gower), known derisively as ‘Meddlesome Millie’ for her successful campaign over lead-poisoning of workers in the Potteries, near the family seat in Staffordshire; the Duchess of Westminster (Katherine Grosvenor), whose wealthy husband was a relative of Millicent’s husband and head of the NVA; Lady (Alice Taylour) Bective, widow of an Anglo-Irish Conservative politician. Of the few men, there was Conservative Lord Hugh Cecil. Providing the only whiff of Nonconformity, was Lady Portsmouth (Beatrice Wallop), daughter of the famous Edward Pease, the Darlington Quaker who had led the anti-opium campaign. Barbara Harrison, ‘The Politics of Occupational Health in Late Nineteenth Century Britain’, *SHI*, 17(1), 1995, pp. 20-41 & *Not Only the Dangerous trades: Women’s Work and Health in Britain, 1880-1914*, Taylor & Francis, London, 1996.

²⁴ Parliamentary Paper Cd. 3271, Memorandum of the International Conference on Labour Regulation, 1906, p. 5, vol. 27, CRS A1108, NAA.

unintended consequence was that the *Salvation Army* factory, now restricted to using child labour and only producing safety matches, was absorbed in 1900 by *B&M*. Next year, *B&M* merged with *DMC*'s Liverpool subsidiary, which, established in 1895, had carved out a large slice of Britain's market, due to a superior matchmaking machine.²⁵ This expansion made *B&M*'s chairman, Wilberforce Bryant's promise, of 1900 to cease (voluntarily, he boasted) production with white phosphorus from 1901, more significant.²⁶ So, although that year's 'factory act' regulated not banned white phosphorus, public opinion, if not governmental action, was proving effective.²⁷

The problem, though, with such unilateral voluntary not regulatory, bans was that commercial interests, now increasingly globalised, ensured that they would suffer the same fate as the *Salvation Army*'s self-prohibition. Only national legislation could prevent such developments but governments, such as Britain's, were unwilling to pass such restrictive legislation, if it offered advantages to foreign commercial interests at the expense of the local economy. Companies could also move to places with less restrictive regulations and/or escape their own public opinion. Thus, in 1895, the *DMC* had opened a factory in Britain and *B&M* in Brazil. International agreement on such subjects was thus a prerequisite for effective prohibition. The *IALL* congress at Paris in 1900 noted that, while several governments had already legislated prohibition, many, including Britain, Greece, Italy, Japan, Russia, Sweden-Norway (not entirely correct), the *USA* and others, had not. Hungary blankly refused because it competed with Japan over the large Asian market. The first formal *IALL* meeting in 1901 in *Bâle*, discussed unhealthy work practices, including manufacturing with lead and white phosphorus. The lead issue was dropped for the next conference at *Köln*, in 1902, but, next year, the *IALL* asked Switzerland to convene an official international conference, on both white phosphorus and women's night work. The main support was from France and Germany.

There were no British representatives at Paris in 1900, although that congress inspired calls, including by Sir Charles Dilke in the Commons, for 'international action' (as well as on lead).²⁸ The *IALL* distributed to governments a memorandum, compiled by the *OIT*, on both subjects. On white phosphorus, this concluded that the only way to stop injury was total prohibition: there was a safe, viable alternative but international agreement was necessary. The *HO* said that this ignored Britain's revised 1900 regulations, which it claimed were

²⁵ This was the *British Diamond Match Co.*

²⁶ *B&M* had purchased options on the French invention, which did not use white phosphorus, on-selling it to competitors for a lucrative fee.

²⁷ 1 Edw. 7, c. 22. Evans Austin, *The Law Relating to Factories and Workshops*, Knight & Co., London, 1901. Bartrip, *op. cit.*, pp. 207-10. *HCD*, vol. 78, 30 January 1900, pp. 66-7; vol. 82, 27 & 30 April, 7 May 1900, pp. 115, 252, 985-96; HO45/9850/B12393D, TNA.

²⁸ *HCD*, vol. 85, 13 July 1900, pp. 1475-534, especially 1485-7, 1497, 1503-4, 1506, 1509, 1527-8.

untried in other countries and diminished rates of phosphorus poisoning by dental inspections. Home Secretary, Akers-Douglas, fended off claims in the Commons over further cases.²⁹ Although diffident about Switzerland's conference invitation of mid-1904, Britain felt compelled to attend, albeit, with non-diplomatic representatives, who were not authorized to enter agreements.³⁰ Even Dilke seemingly agreed with this position, congratulating the government for accepting the invitation, though 'in a very guarded form'.³¹ As with opium and white slave traffic, Britain's established position on labour legislation was being challenged by international forces.

2. 'in the interests of public safety': the Berne conferences and convention, 1905-6

The international labour conferences in Berne in 1905-6 induced Britain's incoming Liberal government to extend worker's compensation from accidents to diseases generally, while also specifically banning white phosphorus matches. The Commonwealth, for once, acted with alacrity, within its limited sphere, banning the importation of such matches just prior.

Britain's delegates at Berne in 1905 were under instruction not to vote for anything. After Britain (alone) abstained on the night work convention, France, Germany, Denmark, Netherlands and Switzerland reported that they had legislated total prohibition of white phosphorus usage, as tighter regulations of usage were insufficient. Hungary--a major exporter--expressed concern over Japan's large, competing trade in India, China and other parts of the 'East', adding that bans would be inoperative, without Britain's agreement. Cunyngame repeated what Lord Lansdowne had already told the Swiss. Britain, having been concerned for 'years', had overseen closure of six 'inferior' factories, leaving only those with 'safer' methods. The 'risk' had thereby been reduced to a minimum and, with new regulatory provisions for regular dental inspection; poison cases were now 'very infrequent'. So, there were no convincing grounds for total bans and he had no authority to negotiate one, 'in any manner whatsoever'. Sweden-Norway (before separating), unsurprisingly, supported Britain, saying its enhanced regulations meant that the problem almost did not exist, plus there was no viable substitute effective in both hot and cold climates. Germany disputed Britain's statistics, pointing out that it might take many years before injuries, missed by first inspections, were detected. Ultimately, the majority resolved to draft an international agreement to end manufacture, sale and importation by January 1911. This would only come into effect, if all parties, plus Japan, ratified. Britain, Sweden-Norway and Denmark (in deference to its larger

²⁹ *HCD*, vol. 104, 28 February 1902, pp. 28-9.

³⁰ Switzerland's memorandum is attached to letter, *FO* to *BoT*, 27 June 1904; see also letters, *BoT* (H. Llwelllyn Smith) to *FO*, 11 July 1904 & Lansdowne to Carlin, 23 July 1904, all B11/2, TNA. Fourteen governments were represented: Austria, Belgium, Britain, Denmark, France, Germany, Hungary, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden-Norway and Switzerland.

³¹ *HCD*, vol. 135, 8 June 1904, pp. 1065-6; vol. 139, 4 August 1904, pp. 1008, 1040.

neighbour, as it had a pre-existing ban) abstained. So, Britain's position was being isolated internationally.³²

Even Cunynghame (Delevingne, a *Huguenot*, was always sympathetic) seemed influenced by the tone at Berne. They reported that there was 'no very strong case' for retaining the manufacturing use of white phosphorus, as it was not an indispensable ingredient and several firms had voluntarily stopped its use. In any case, the industry was relatively small and Britain's export trade had already shrunk considerably, following the new rules adopted from 1900. The proposed international agreement would remove the 'chief difficulty', which was foreign competition, still using white phosphorus. They pointed out that under s.83 of the *Factory and Workshop Act 1901*, the home secretary had power to prohibit by regulation any dangerous material. The *Act*, however, required prior public consultation, through a formal enquiry, before such a measure. They conceded that proving the case for total prohibition would be 'difficult' at present, as there had been no apparent health problems. Against the German argument that those might appear, years after employment in the industry had ceased, they noted that Britain's position was that the medical examination, required by legislation would detect the injury. The two, then added, that three recent cases showed the 'danger' did exist, so strict adherence to the rules was required. Thus, they thought it 'may be admitted', that the case for trialing the German approach, of providing all producers with a patented safety match and prohibiting white phosphorus, was 'favourable'. This would require 'special' legislation, which should be enacted, only if it could be ensured, that British producers could compete fairly both within and outside Britain. Thus, despite their necessarily cautious, even convoluted, language, they had tentatively endorsed the proposed white phosphorus convention.³³

There were other factors affecting Britain's stance. *B&M*, competing with cheaper foreign imports using white phosphorus, started to see advantages in a legislated not voluntary ban. Dilke raised in the Commons reports of further *phossy jaw* cases, thereby undermining the principal *HO* argument against a ban. He questioned Akers-Douglas over the abstaining vote at Berne and, whether at the next conference, Britain would be represented again, 'by mere Home Office clerks, bound up by definite instructions to agree to nothing?'³⁴ When the home secretary briefed the Conservative cabinet in late 1905, on Switzerland's invitation to the next conference, he explained that total prohibition of white phosphorus raised a 'serious difficulty', which could not be overcome, without an inquiry into the industry in Britain,

³² Report, Cunynghame & Delevingne to Home Secretary, July 1905, CAB37/80/169 & FO83/55, TNA.

³³ Report, July 1905, CAB37/80/169 & FO83/55, TNA. The *Act* was 1 Edw. 7, c. 22 of 1901.

³⁴ *HCD*, vol. 147, 2, 7 & 20 June 1905, pp. 569-70, 929-30, 1098-9; vol. 150, 2 August 1905, pp. 1351-5, 1384, 1397-1400.

consultation of Japan and new legislation.

In early 1906, his Liberal successor, Herbert Gladstone, placed exactly the same position before his cabinet. With its approval, he had the *FO* tell the Swiss that, while Britain would participate in drafting the night work treaty, on white phosphorus, inquiries were still proceeding and, so, with 'regret', Britain must defer its answer. Yet, he and cabinet apparently left open the door for Britain's eventual agreement, in some circumstances. Gladstone elaborated that the white phosphorus issue was especially relevant to Britain's general concern with respect to any future international labour treaties; that is, all countries whose 'competition' in industries was likely to be affected seriously by such a treaty, had to be parties to it. Indeed, even those non-attending countries, which, 'possibly', might start such an industry, 'must be taken into consideration'. He wanted the proposed conference to consider imposing a time limit on the convention (for unstated reasons but, presumably, to allow parties to withdraw from the treaty, if unhappy). Britain also required, both generally and, that with particular reference to a white phosphorus convention, all signatories must give adequate assurances that the convention's restrictions would be 'fully enforced'.³⁵

Gladstone's last point, although understated, is of significance in the development of international law. In connection with ongoing assurances of each party's enforcement and imposing a time limit on the convention, he wanted an international tribunal established to consider 'allegations' that a signatory was not enforcing agreed regulations and also the modification of the convention in the light of new chemical or mechanical discoveries. (This was similar to Britain's proposal on the night work convention, strongly opposed by Germany.) The only permanent international organization of scrutiny and sanction, then, was the *Permanent Sugar Commission*, created in 1902, which could impose penalties of 'countervailing duties' for treaty violations. While, behind the scenes, the *FO* ascertained through its embassies what was the current state of the white phosphorus question in those five countries, which had banned its use, Switzerland was ascertaining the views of all conference parties. Overall, responses were 'less favourable' than on female night work. Nonetheless, Switzerland thought that those interested could still proceed with a convention with a limited number of states. (Only Norway, just separated from Sweden, declined to attend.) This time Britain did send a ministerial representative with plenipotentiary powers but it was not Gladstone himself but his junior, Herbert Samuel.

This building international momentum was augmented by developments in the *USA*, which (like Japan) was not party to the convention but home to the *DMC* and other major

³⁵ Memorandum for cabinet, Gladstone, 22 January 1906, FO368/55, TNA.

matchmakers. In 1902, federal investigators reported several *necrosis* cases indicating, contrary to earlier industry claims, that there was a problem. The *AALL*, just established in 1906, took up the issue. The *Bureau of Labor* commissioned the *AALL* to investigate, which would take four years.³⁶ That year, the influential Wilberforce Bryant died.

At Berne in September 1906, all fourteen delegations signed the night work convention but divided evenly over that on white phosphorus. Samuel initially presented a predictably negative position. He claimed that, since Britain's new factory regulations of 1900, there had only been five *phossy jaw* cases in five years, of which, three were mild and, of the two deaths, one victim had blatantly violated safety rules; consumers were also used to the matches. Britain would only sign the convention, if ready to legislate against imports but that would mean postponing other social reform legislation. If *phossy jaw* was prevalent then, perhaps, this would be justified, but clear statistics suggested that the regulations had effectively suppressed the problem. So, there was no adequate justification for a British ban. In any case, Britain would only agree to ban if, assured that there would be no foreign imports into Britain or foreign competition, using white phosphorus, flooding into 'neutral' markets (presumably both foreign and within the empire). This assurance would need to cover not only all producing countries but also those likely to start production. There was no chance of this at present, he warned, particularly with respect to the *USA*. Having said all that, Samuel softened. Britain did not wish an abstaining vote to hinder those, whose situation (presumably, he meant those lacking Britain's effective factory laws) made such a ban desirable. It would, in fact, be a 'source of much regret' to Britain, if otherwise possible general agreement at the conference, failed because its refusal induced other states not to sign, fearing British competition. So, he was authorized to agree to total import bans on condition that this was unanimously endorsed, not only by all present but, also, by Japan. Austria, Hungary and Belgium, white phosphorus match exporters, agreed with this, while Sweden, Spain and Portugal refused unconditionally (as did Japan). Britain's pre-condition was not met, probably as hoped, and, so, it was free to abstain, while hopefully avoiding the appearance of obstruction. Then, however, the remaining seven--Denmark, France, Germany, Italy, Luxembourg, Netherlands and Switzerland--signed nonetheless, which was awkward for Britain.³⁷

³⁶ J. S. Felton, '200 years of occupational medicine in the U.S.', *JOM*, 18(12), 1976, pp. 809-817. Joseph P. Goldberg and William T. Moye, *The first hundred years of the Bureau of Labor statistics*, U.S. Bureau of Labor Statistics, Bulletin No. 2235, U.S. Government Printing Office, Washington D. C., 1985, pp. 1-79.

³⁷ Letter, Wellesley to Grey, 17 September 1906; minute, Green to Johnson, 20 September 1906; minute, Johnson to Lucas, 20 September 1906; letter, *CO* to *FO*, 22 September 1906, CO323/519/532-69, TNA. Parliamentary Paper Cd.3271, Memorandum of the International Conference on Labour Regulation, 1906, FO368/55; vol. 27, CRS A1108, NAA.

The convention text was brief. Under Article 1, the signatories bound themselves ‘to prohibit in their prospective territories the manufacture, importation and sale of matches which contain white (yellow) phosphorus.’ Article 2 provided that it was ‘incumbent’ for signatories ‘to take the administrative measures necessary to ensure the strict execution of the terms of the present Convention within their respective territories.’ All were to share, ‘through the diplomatic channel’, their respective, relevant laws and regulations, existing and future, plus reports thereon. Ratifications were to be deposited with Switzerland by 31 December 1908 and the treaty would enter into force three (unlike two for the night work convention) years afterwards. This time limit was extended to five (again, unlike two for the night work convention) years from the subsequent accession of original non-signatory states. Under Article 6, adhering governments could denounce the treaty after five years (unlike twelve for the night work convention). Article 3 was the same provision as in the night work convention: the treaty would ‘only apply to a colony, possession or protectorate when a notice to this effect shall have been given on its behalf’ by the ‘mother country’. Britain insisted on this last provision although not prepared to sign.³⁸

Just prior to Berne, the *HO*, *FO* and *CO* had discussed colonial adherence to these two labour conventions, as part of a wider discussion of future such treaties. The *CO*, however, did not take up the *HO*’s suggestion to discuss this at the imperial conference of 1907.³⁹ Instead, on 10 April 1907, five days before that conference opened, with all colonial prime ministers in London, the *CO* sent a circular despatch, inviting adherence to the night work convention but noting that, although some countries had signed the other convention, Britain ‘have not so far felt themselves justified in adhering to it.’⁴⁰

This was only the second time that the Commonwealth had been officially advised of both the conference and convention. There had not been, there, the same great concern, as in Britain and Europe, on the issue, with only some sporadic reports in the local press, especially in mining areas, where labour influence was strongest, on the overseas debate. In Australia, since 1894, an English firm, *R. Bell & Co.*, employed 30 males and 150 females in Melbourne (with another factory in *NZ*), originally producing wax *vestas*. Wooden matches were mainly imported, with cheap white phosphorus matches reducing *B&M*’s original market dominance and leading the local company to use white phosphorus. The first press reports started in 1898, on reactions in London to the *B&M* scandal and subsequent tightening of factory regulations. That company’s ‘voluntary’ decision in January 1900 to stop using white

³⁸ *International Convention respecting the Prohibition of the use of White (Yellow) Phosphorus in the Manufacture of Matches*, Berne, 26 September 1906.

³⁹ CO323/520/272-8, 329-31, TNA.

⁴⁰ Circular despatch, Elgin to governors, 10 April 1907, CO323/520/186-96, TNA; vol. 39, CRS A11816 & vol. 27, CRS A1108, NAA.

phosphorus was widely reported. Even Australia's otherwise skeptical press thought the proposed prohibition was 'very desirable', to avoid risks to health when safer alternatives were available.⁴¹ Most Australian reportage was over the 1905 Berne conference, with, curiously, less so on 1906's conference.⁴² In 1907, with Deakin and Atlee Hunt in London, Forrest had Northcote send the CO's despatch to the states, without any guidance, as to what was expected.⁴³ T&C publicized the despatch, specifically mentioning white phosphorus. Thereafter, there was little in the local press.⁴⁴

If Forrest gave no guidance as to how the premiers should respond, if at all, to the CO's despatch, some of the latter, equally, do not appear to have given any advice to their own officials. For two replied on the white phosphorus issue, although the despatch made clear Britain had neither signed the convention nor was seeking any response. Queensland, nonetheless, provided a report to the CO, that it was not making any comment on the question, because there was no such factory there. Victoria's response was more interesting. The chairman of its Board of Health, (William) Perrin Norris, advised that there had not been *phossy jaw* cases at the Melbourne factory, which he said was due to the good climate, allowing work to be done outdoors. There was 'no doubt', however, that elsewhere in the world, the material had caused 'injury to health'. (He was also concerned about 'strike-anywhere' matches in bush-fire prone Australia.) So, he offered his opinion, that it was only a 'matter of time before Britain will fall into line' with the seven who had signed at Berne. Neither state shared its report with the Commonwealth.⁴⁵

Although Britain had not signed the convention, it did not ignore the issue (or public concern) completely. In March 1906, just before Berne, Gladstone had introduced a bill, which he told the Commons, would

*extend workmen's compensation to industrial diseases. That involves a new departure. Of all the casualties to which the industrial army is unfortunately liable, those arising from disease are the most pitiable and disastrous. The Committee did not recommend that industrial diseases should be included in the Bill, but the Government thought the case was so strong that, although the difficulties were great, they thought a strong effort ought to be made to surmount them. Therefore, we propose to include in the Bill the following diseases: Anthrax, lead poisoning, mercury poisoning, phosphorus poisoning, arsenic poisoning, and ankylostomiasis.*⁴⁶

⁴¹ *Herald*, 5 October 1894; *SMH*, 26 January 1900; *Age*, 30 November 1901.

⁴² *Mercury*, *Telegraph* (Brisbane), and *West Australian*, all 18 May 1905; *Examiner* (Launceston) 30 October 1905; *SMH*, 1 November 1905; *Brisbane Courier*, 7 December 1906.

⁴³ The Australian correspondence is in vol. 27, CRS A1108 & vol. 39, CRS A11816, NAA.

⁴⁴ *Telegraph* (Brisbane), 12 June 1907.

⁴⁵ Memoranda, Norris to minister for health, undated, attached to despatch no. 66, governor of Victoria (Talbot) to CO, 10 December 1907 & Director of Labour (John J. McGhee) to secretary of chief secretary's office, undated, attached to dispatch no. 6, governor of Queensland (Chelmsford) to CO, 13 January 1908, vol. 27, CRS A1108, NAA; CO418/55/362-8; CO418/63/3-8, TNA. Norris had studied public health in Europe.

⁴⁶ *HCD*, vol. 154, 26 March 1906, pp. 886-934; vol. 166, 5 December 1906, pp. 974-1020.

The *Workmen's Compensation Act 1906* was given assent at year's end.⁴⁷ Although not required by the convention, which Britain, in any case, had not yet signed, this legislation clearly arose from the treaty making process, inspiring and shaping colonial legislation.

Through 1907 and early 1908, the convention was kept before the British government, by questions in parliament by Dilke and Earl Lytton, over further reports of *phossy jaw* deaths. Gladstone denied that Britain was 'isolated' in its stand at Berne, noting that six other governments had refused to sign. Then, the *HO* had a change of mind. The decisive factor appears to have been a shift in the position of manufacturers. *B&M*, having moved to producing only safety matches, no longer led the opposition to reform. Managing-director, Gilbert Bartholomew, was advised by Gladstone that manufacturers would have to choose between very expensive factories' upgrading, especially on ventilation, or accept a ban. With a ratification deadline of 31 December, there was no longer time to delay. So, after this meeting, Gladstone, supported by Samuel, introduced a bill into the Commons, in late July, to 'prohibit the manufacture, sale and importation of matches made with white phosphorus'. The second reading was ordered for 12 October but took place a week after, before the bill was referred to a standing committee.⁴⁸

The *CO* had not advised the colonies of this step nor the now obvious intention to sign the convention before the deadline. So, the only way the Commonwealth learnt of this policy reversal was through some very limited local press reports. As there were, as yet, no local bodies actively lobbying on the cause, this is the only explanation for the Commonwealth's unusual initiative. Almost certainly, it was Nicholas Lockyer, who had just succeeded his father-in-law, Harry Wollaston, as comptroller-general of customs, who must have read such reports and briefed his minister. (The influence of Norris should not be discounted, as he worked closely with *T&C* on quarantine.⁴⁹) For it was Robert Best, acting *T&C* minister, who brought before the executive council on 20 October, certainly with Deakin's, if not also cabinet's, approval, a proclamation, under the *Customs Act, 1901*, providing for a total ban on the importation of matches made with white phosphorus from the start of 1909. The *HO*'s bill was still being debated in the Commons when, the Commonwealth's order was signed by Lord Dudley, on 10 November, two days after Deakin's ministry had lost office to Labour's Andrew Fisher. (This was only the Commonwealth's third import ban. All related in various

⁴⁷ *The Workmen's Compensation Act, 1906*, 6 Edw. 7, c. 58.

⁴⁸ *HCD*, vol. 169, 26 February 1907, p. 1414; vol. 173, 25 April 1907, pp. 179-85; vol. 178, 18 July 1907, pp. 999-1001; vol. 185, 9 March 1908, p. 1111; vol. 193, 30 July 1908, p. 1774; vol. 194, 16 October 1908, pp. 613-4; vol. 195, 29 October 1908, pp. 488-9, 513; 30 October 1908, pp. 637-8; 2 November 1908, p. 796; 6 November 1908, p. 1556; vol. 197, 1 December 1908, pp. 1255-6; 3 December 1908, pp. 1746-54; vol. 198, 8 December 1908, pp. 205-6. Bartrip, *op. cit.*, pp. 214-6.

⁴⁹ *Barrier Miner*, 25 May 1909. D. I. McDonald, 'Lockyer, Sir Nicholas Colston (1855-1933)', *ADB*, NCB: ANU, Vol. 10, 1986, <http://adb.anu.edu.au/biography/lockyer-sir-nicholas-colston-7219/text12495>.

ways to treaty matters: first, in 1905, on opium; second, in 1908, on bird plumage.) Although gazetted, this order, for some reason (possibly due to businesses lobbying to allow time for entry of stock already ordered and *en route*) was almost immediately superseded by a second, brought to council by the new *T&C* minister, Tudor. Signed on 8 December, this preserved the ban but delayed its start by six months, until 1 June 1909.⁵⁰

The Commonwealth briefed the press on this import ban. If this was intended to smooth its acceptance by stressing its consistency with the imperial government's forthcoming legislation, this did not convince everyone. Brisbane's chamber of commerce 'ridiculed' it, arguing injuries only arose in manufacture, only a state concern. (It apparently did not understand that restriction of local import and export trade constricted international trade and, therefore, demand for production anywhere.) *T&C* responded to their challenge, saying the Commonwealth was acting in accordance with the Berne convention. This only provoked the chamber to ask for clarification as to what match brands were banned. Its chairman later taunted that local merchants had ordered more white phosphorus matches from 'home', to beat the Commonwealth's 'extraordinary' ban, noting several European governments had not even legislated a manufacturing prohibition. There was some public support for the ban. A Sydney newspaper, reporting the outcry in Italy when its senate rejected legislation to ban white phosphorus because of its value as export trade, claimed that this was 'a case for international interference', pointing out that, 'Most civilised countries' had abolished the 'notoriously deadly trade'.⁵¹

Lockyer, who administered Commonwealth customs through offices in each state capital, recognized the importance of enlisting the states' co-operation. On his recommendation, Fisher wrote to the premiers, just before Christmas, with apparent deference, acknowledging the states' jurisdiction in this matter. So, he asked them, in view of the imminently impending English bill, to consider legislation prohibiting the manufacture, supply and sale of matches with white phosphorus.⁵² The surprising speed and ease of the Commonwealth's earlier action, banning imports, belied the practical problems with the federation's participation in much treaty making. As with opium and bird plumage traffic, the Commonwealth only had relevant constitutional powers over external commerce, that is, imports and exports. Legislation to repress local practices within Australia could only be passed by the states. This inevitably involved delay — sometimes of years — caused by inaction and, even, opposition. Of

⁵⁰ Regrettably, the original *T&C* and *DEA* file or files appear to have been destroyed. For a copy of the proclamations see C2000/148, CRS A425 & vol. 26, CRS A1108, NAA. *Customs Act 1901*, 1 Edw. 7, no. 6. *Colac Herald*, 9 October 1908. A fourth import ban, also signed on 8 December, was on clothing made by prison labour, not treaty-related.

⁵¹ *Sunday Times*, 28 March 1909.

⁵² Circular letter, Fisher to premiers, 21 December 1908, vol. 26, CRS A1108, NAA.

the premiers, most merely acknowledged the ban's notification, with observations made only by WA and, notably, Victoria, where the Liberal premier, John Murray, commended this step, as 'in the interests of public safety'.⁵³

There was a very understandable reason for Murray's greater enthusiasm. In 1905, *B&M*, now voluntarily confined to safety matches, had surrendered its majority shareholding to acquire the assets of the *DMC*'s Liverpool subsidiary, to expand production, not just for export but also within other imperial markets, claiming it would rather pay good wages than customs duties on exports. That year, *B&M* acquired substantial interests in two factories in South Africa and ownership of the *Irish Match Co.*⁵⁴ Despite a favourable preferential tariff, competition from Sweden and Belgium, plus, more recently, Japan, with cheaper white phosphorus matches, was flooding Australia's market. So, *B&M* partnered with *R. Bell & Co.* to rebuild the latter's Melbourne factory, as the *Empire Works*, along characteristically Quaker 'model' lines, employing 50 male and 300 female employees (thus doubling the female workforce). This investment was so important, that Bartholomew, himself, visited Australia in early 1909 to lobby for a favourable legislative context. He asked Murray to ban white phosphorus match-production (but not sales) to complement the Commonwealth's import ban. If done, he promised the factory would not use the material, as long as no others did. Murray promised 'favourable consideration', which Bartholomew embellished to the press as 'full support'.⁵⁵

Meanwhile, in Westminster, the *HO*'s bill was reported from committee with minor amendments on 25 November; then considered and returned by the Lords on 3 December, before receiving royal assent on 21 December, as the *White Phosphorous Matches Prohibition Act 1908*.⁵⁶ Britain's ban would come into effect at the end of 1909. On 28 December, three days before the deadline, Britain finally signed the treaty, stressing that this was for Britain only. With the treaty to come into effect in three years, the *CO* sent a circular despatch, on 21 January 1909, advising about the *Act* and Britain's treaty accession and asking whether colonies also wished to accede.⁵⁷ This was Britain's first official intimation to its colonies of the steps it was taking on this international question. Although the Commonwealth, unusually, had acted (just) before this legislative lead and notification, much of the legislative power in Australia for meeting the treaty obligations resided, as was often

⁵³ The premiers' replies have not survived but the brief details of their responses are in folios 08/4298 & 08/5064, vol. 5 and 09/3, 09/81, 09/150, 09/189, vol. 6, CRS A48, NAA.

⁵⁴ The Lion Match Co.

⁵⁵ *Register*, 13 February 1909; *Advertiser*, 19 February 1909; *Age*, 16 March 1909; *SMH*, 25 February 1909.

⁵⁶ *JHC*, Session 1908, vol. 163, pp. 384, 505, 513. *White Phosphorus Matches Prohibition Act 1908*, 8 Edw. 7, c. 42.

⁵⁷ Despatch no. 21, Crewe to Dudley, 21 January 1909, CO532/7/334-341, TNA.

then the case, with the states.

3. 'a slow business': Australian responses to the convention, 1909-12

The Commonwealth's prompt import ban in 1908 belied the tortuous federal process, which would follow, as it, with imperial encouragement, attempted to secure legislation by its states sufficient to allow it to ask for accession to the convention.

One week after Bartholomew's meeting with Murray, the *CO*'s circular despatch of January 1909, asking for the colonies' decisions on accession, arrived in Melbourne.⁵⁸ Fisher referred it to Tudor, where Lockyer recommended that he inform the *CO* of the Commonwealth's lack of jurisdiction over sales and manufacturing. This Fisher did, also providing his proclamation but adding that only two states had commented on its notification. He did not confirm whether the Commonwealth desired accession.⁵⁹ Fisher's reply was one of the earliest but most ambiguous the *CO* received, leaving Crewe no wiser. He wrote back: 'I presume' the Commonwealth did not wish to adhere, 'at present'?⁶⁰ Before receiving this, Bartholomew's visit does seem to have led in mid-May 1909 for the Commonwealth to act, as Fisher could have done, with a little more initiative, in December. At Tudor's (probably Lockyer's) suggestion, Hughes wrote on Fisher's behalf to the premiers, referring to 'representations' made to the Commonwealth over the dangers to workers of *phossy jaw*, in connection with the presence in Australia of 'agents of certain English firms', planning a match factory. So, he 'invite[d]' their 'attention to the desirableness' of prohibiting white phosphorus manufacturing. This, he explained, would assist in restricting its 'widely-recognised' 'evils' and, thus, 'bring Australia into line' with those other countries, which had decided it was 'essential' to so legislate.⁶¹

Before Fisher lost office to Deakin on 2 June 1909, all states except WA had responded but merely by acknowledging the request, without indicating any future action. Queensland, replying to the earlier communication on the night work convention, had said it could offer no opinion on this convention, as it was unaware of any factory using white phosphorus. WA belatedly advised at the end of June, that it had the necessary power, under its 'factory act' of 1904, to make regulations, which it was drafting, prohibiting the use (but, like Victoria, not sales) in manufacturing but did not intend to legislate.⁶² There was one public call, invoking *B&M*'s initiative, to assert the need for 'coordinated legislation' in Australia, even if it meant

⁵⁸ Despatch no. 21, Crewe to Dudley, 21 January 1909, vol. 39, CRS A11816 & vol. 26, CRS A1108, NAA.

⁵⁹ Letter, Fisher to Dudley, 18 March 1909, vol. 39, CRS A11816 & vol. 26, CRS A1108, NAA.

⁶⁰ Despatch no. 168, Crewe to Dudley, 4 May 1909, vol. 39, CRS A11816 & vol. 26, CRS A1108, NAA. CO532/11/327-333 TNA.

⁶¹ Circular letter, Hughes to premiers, 12 May 1909, vol. 26, CRS A1108, NAA.

⁶² Again, the premiers' letters have not survived, so see folios 09/2038, 09/2136, 09/2144, 09/2161, 09/2310, 09/2409, 2641, vol. 6, CRS A48 & vol. 26, CRS A1108, NAA.

abolishing the states. There was some other minor public discussion of the issue but nothing like attended to other treaty matters at this time, including on opium, white slave and bird plumage trafficking.⁶³

Deakin returned to office in June 1909 to read the *CO*'s request for clarification on the Commonwealth's accession. He then decided to become a little more activist, having *T&C* issue notices to customs offices in the states' principal ports, which explained the method for detecting white phosphorus in match imports. He then told the premiers that he thought it 'advisable' for Australia to have similar legislation to Britain, by which he meant on sales and manufacturing, not just import, bans. He said that he would be 'pleased' for their cooperation in 'tak[ing] such steps' to regulate the industry in the best interests of '**our citizens**' [emphasis added], which the states employed, so as to enable the Commonwealth to join the convention. To secure 'uniformity', he thought it 'convenient' to 'take advantage' of *s.51(xxvii)* and 'remit' the matter to the Commonwealth parliament. He suggested, as an alternative, 'if for any reason that course is not deemed suitable', that each state should legislate, as had Britain, plus including a provision that either state or Commonwealth officers could enforce the bans.⁶⁴

The first proposal, to use what has now become known as the 'referral power', was then unprecedented. Deakin had not consulted his attorney-general, Littleton Groom, beforehand but, then, did anyone still in parliament know more than he about these constitutional issues? In May 1906, he had read Isaacs' opinion that the Commonwealth could not use its external affairs power under *s.51(xxix)* to compel the states to legislate in fulfillment of the former's treaty obligations. Isaacs had argued, however, that the referral power did allow the Commonwealth to legislate concurrently, where the issue was not constitutionally exclusive to state powers.⁶⁵ In this case, Deakin probably accepted sale and manufacturing were matters exclusive to the states, hence, his proposed alternative.⁶⁶

Lord Dudley had earlier informed the *CO* about the states' suspicion of the Commonwealth expanding its power over them. Now, either because of evasion or misunderstanding, no state seemed interested in agreeing to Deakin's 'remit' proposal. Two replied immediately. Victoria, without discussing referral, said it had already decided to legislate—Bartholomew's

⁶³ *Ovens and Murray Advertiser*, 5 June 1909; *Herald* (Adelaide), 19 June 1909.

⁶⁴ Circular letter, Deakin to premiers, 17 June 1909, vol. 26, CRS A1108 & folio 09/3211, CRS A48, NAA. Later in the century, the 'referral power' would become more significant and controversial with legal debate mainly over two issues, including whether: first, states could later revoke such a referral or whether it represented in effect a constitutional amendment, albeit in a less formal manner than by referendum; second, the referral granted exclusive or concurrent power, the latter allowing states to continue to legislate on the issue as well as the Commonwealth.

⁶⁵ Opinion of the attorney-general, Isaacs, 5 May 1906, vol. 1/5, CRS A1497, NAA.

⁶⁶ *SMH*, 16 July 1909.

promise was decisively enticing. Tasmania said it would cooperate with the other states in adopting uniform legislation and asked whether any of the convention's signatories had legislated import bans--to which the answer was 'no'. In early September, WA replied that there was 'no necessity' for such referral, as there was no probability of a match factory opening there. This ignored or misunderstood that, for the Commonwealth to adhere to the convention, the required legislation had to be adopted whether or not the proscribed activity existed. The other states did yet not reply.⁶⁷

In Victoria, Murray proved true to his word to Bartholomew. He personally introduced a bill in early December to amend existing factory legislation, which passed easily and was adopted on Christmas Eve, receiving the governor's assent in early 1910.⁶⁸ The *CO* 'sanctioned' it, without noting that its new s.33 prohibited the use of white phosphorus in match manufacture, subject to a fine of £10, and provided for compulsory inspections of the factory at any time.⁶⁹ Being a 'factory act', this did not prohibit sales. Murray's action proved very timely. For, on 15 December, while the bill was still under debate, he was among a large crowd in Church Street, Richmond, where 'Pattie' (Elizabeth) Deakin ceremonially opened *B&M*'s new factory. With Tudor representing the Labour opposition, Deakin used the grand occasion to sing the praises of his protectionist policies, having just formed the anti-Labour *Fusion* government with the *Free Traders*.⁷⁰ Prominently noted in the press, as had been in the period preceding, was the promise that white phosphorus would not be used. *T&C* finished the year by urging Deakin's office to chase replies from the remaining three states.⁷¹

Deakin's Christmas Eve 1909 reminder finally brought responses from the other three states—all, unsatisfactory. Both *SA* and Queensland pointed out that there was no match manufacturing there but, if the use of white phosphorus were proposed, they would enact prohibition. *NSW* also vaguely indicated it would act. All, thus, had evaded answering the specific question on referral. None, except Victoria (and even then, only on manufacture not sales), were definite on imminent legislation.⁷² So, the Commonwealth had no sound basis to notify the *CO* of a desire for adhesion. The last of these responses arrived on 19 January. Next day, Dudley received a despatch from Crewe. He said that Gladstone wanted the Commonwealth to make, unless it held objections, 'representations' to the states, expressing the 'desirability' of them prohibiting white phosphorus sale and manufacture, so the

⁶⁷ Folio 09/4361, 20 July 1909, vol. 6, CRS A48; minutes, Atlee Hunt to T&C, 27 July & 11 September 1909; summary of states' responses, vol. 26, CRS A1108, NAA.

⁶⁸ 9 Edw. 7, no. 2241 of 1909; 3 Geo. 5, no. 2386 of 1912.

⁶⁹ CO418/82/404, 414, TNA.

⁷⁰ *Age*, 16 December 1909; *SMH*, 15 September & 15 December 1909.

⁷¹ File note, vol. 26, CRS A11808, NAA.

⁷² Summary of states' responses, vol. 26, CRS A1108, NAA.

Commonwealth could adhere to the convention. He added that he 'fe[lt] sure', that all Australian governments would 'desire, if possible, to meet the wishes' of the imperial government.⁷³ Successively, over the next three months, the Commonwealth received notice from the *CO* of the accession of France's colonies, Tunisia and the Netherlands East Indies to the convention, subtle encouragement for its accession.⁷⁴ (Fiji queried the Commonwealth's position and adhered in June 1910.⁷⁵) So, a week before the federal elections of April 1910, which would be lost to Labour, Deakin told the premiers that he would be 'glad' if the legislation on sale and manufacture, which he understood each to be 'contemplat[ing]', was submitted at 'the first opportunity', so that Australia could be 'brought into line with the leading civilized nations of the world.'⁷⁶

The states' latest responses were little more helpful than before. *NSW* promised to introduce legislation at the 'first practicable opportunity' but wanted the exact terms of Crewe's dispatch. *SA* just reiterated that further legislation was unnecessary. Victoria pointed to its recent enactment and asked if legislation against sales was necessary. *WA* simply repeated its 1909 position, that no further legislation was planned. Queensland only asked for Crewe's dispatch. (The Brisbane chamber of commerce's endorsement of implicit criticism of Victoria's legislation by a local agent of a Melbourne matchmaker, hinted at what lay behind this indifference.) The only positive note was that Tasmania arranged for *NSW* premier, Charles Wade, to draft a model bill for the states, upon the completion of which, the former promised to act 'without delay'.⁷⁷ This idea of 'model' legislation was also proposed for the opium traffic and had been employed in the *USA* and within the empire.

If the Commonwealth felt frustrated by this meandering federal process, then the *CO* must have shared this twice over, as it dealt with its many dependencies. For Newfoundland was not interested. Canada said nothing. In South Africa--just prior to union--only the *ORC* clearly agreed. Transvaal said it was 'unnecessary'; Natal something similar; the Cape asked for more time. Of the others, five of ten African colonies agreed and, in the Caribbean, only four small islands out of eleven colonies. In the Mediterranean, Cyprus said 'yes'; Malta 'no'. In the East, Ceylon, Mauritius and Seychelles agreed but not Hong Kong, *Wei-hai-wei* or the Straits Settlement. In the Pacific, Fiji but not the Western Pacific agreed. *NZ*, like Canada,

⁷³ Despatch no. 443, Crewe to Dudley, 16 December 1909, CO532/13/440-6, TNA; vol. 39, CRS A11816 & Int284, CRS A981, NAA.

⁷⁴ Circular despatches nos. 444, 40 & 120, Crewe to Dudley, 17 December 1909, 4 February & 31 March 1910, vol. 39, CRS A11816 & vol. 26, CRS A1108, NAA.

⁷⁵ The empire's earliest accessions were Mauritius, Seychelles, Uganda, North and South Nigeria, South Africa, Fiji, Gold Coast, Sierra Leone, British East Africa, Gambia (all 1910), Southern Rhodesia (1911) and Bermuda (1912).

⁷⁶ Circular letter, Deakin to premiers, 23 April 1910, vol. 26, CRS A1108, NAA.

⁷⁷ The premiers' replies, of May-June 1910 and a summary thereof, are in vol. 26, CRS A1108 & folio nos. 09/833, 09/1052, vol. 6, CRS A48, NAA.

had not replied before the year's end.⁷⁸ The *CO* also had to deal with representations from *B&M*. These led the *CO* to send a circular dispatch in mid-1909 to all Crown colonies and protectorates to clarify apparent 'misapprehension' that legislation only on the manufacture of white phosphorus matches, not also on sale and imports, was required for adherence to the convention, which it encouraged them to so do. The *CO* also pointedly reminded the Commonwealth that its December 1909 despatch remained unanswered. On receipt of this in May, a month after the change of government, Atlee Hunt advised Fisher to blame the states' for the delay in his reply to the *CO* (which he did) and remind the tardy premiers. He believed, perhaps over-optimistically, this would finally bring Queensland around.⁷⁹ By year's end, the *HO* was anxious to complete the process but the only significant colonial adhesion was that of the *ORC*. For the other South African colonies, the *CO* decided to await their union, but remind Canada and *NZ*, while suggesting that the Commonwealth pursue the matter with the states.⁸⁰

There was some positive news for the *CO*. Victoria's early, if halfway action had been an anomaly. Australasian colonies, which had previously led on reform issues, were those with strong mining industries and, related to this, female political voices—*NZ*, *SA* and *WA*. In late 1908 *NZ*, led by Joseph Ward's Liberal government, had been the first to follow the English lead, by including industrial diseases, including *necrosis*, in workmen's compensation legislation.⁸¹ Next, in 1910, just after *B&M* acquired the Wellington match factory of *R. Bell & Co.*, *NZ* passed the *Phosphorus Matches Act 1910* which prohibited importation, manufacture and sale, exactly as the *CO* had requested, although it took a further year to establish whether *NZ* agreed to adhere to the convention. In October, the new, united South African government responded to the *CO* saying, despite the fact that previously three of its now-constituent colonies had not adhered to the convention, it could see 'no reason why such adherence should not be given if it would simplify matters'. This would not effect, it added, match factories already established, a reference to the *B&M* factory, established in 1905, which was only making safety matches.⁸² In Canada, Mackenzie King, inaugural deputy labour minister, introduced a bill on 24 November 1910, which would ban importation and manufacture of the matches within a year. This encountered, however, what the *CO* called, 'some constitutional difficulty': stalling after its second reading. At least this federation did have a treaty power, which potentially could be used to meet such treaty obligations.⁸³

⁷⁸ The colonies' response are briefly detailed at CO862/15/194; CO532/11/327-333; TNA.

⁷⁹ Despatch no. 149, Crewe to Dudley, 21 April 1910; minute, Atlee Hunt to Shepherd, 4 June 1910; letter, Fisher to Dudley, 14 June 1910, vol. 39, CRS A11816 & vol. 26, CRS A1108, NAA; CO532/17/266-267, TNA.

⁸⁰ CO862/15/262; CO532/13/440-446; CO532/14/42-423, 477-481, 657-660, 669-72; CO532/21/3-6, TNA.

⁸¹ 8 Edw. 7, no. 248 of 1908; CO209/271/349-354, TNA.

⁸² CO532/28/235-240, CO532/30/271-277; TNA.

⁸³ 1 Geo. 5, no. 4; CO323/565/186-189; CO532/18/216-219; CO532/30/344-349, TNA.

The dawdling Commonwealth now received prods to act from a new source. In November 1910, Scherrer and Bauer, in their first direct contact, expressed to Fisher the *IALL*'s 'most cordial thanks' for the Commonwealth's 'most beneficent measure', of banning imports. Perhaps uncertain of the proper protocol for communicating with such semi-official international bodies, Fisher did not reply personally. Shepherd merely acknowledged this, without further comment, let alone commitment.⁸⁴ Then, as Fisher was trying again to corral the states into a uniform (positive and timely) response, Crewe, wrote yet again, advising not only the Netherlands' ratification but also pointing out that he had not received a reply to his previous dispatch. Fisher, understandably, blamed the delay on the states but assured Crewe that steps were 'being taken in the direction of expediting the necessary action' by them. This last sentence was NOT in the advice submitted to him by Atlee Hunt and was far from a realistic assessment of the situation. The *CO*, not any wiser, accepted it without demur. The real picture only later emerged. While the painfully slow process of coordinating legislative action within the Commonwealth dragged on, the Imperial government received better news from other major colonies, where federalism was not an issue.

At the start of 1911, the *CO* was pushed to try and bring the remaining colonies into line by the *IALL* raising the matter directly with the imperial government. Newfoundland, however, had originally said, like most Australian states, that there was no need for legislation. The *CO* did not foresee any problems with that colony eventually legislating and thus adhering but, when nothing had been heard by early 1911, decided to send a reminder. (Newfoundland never adhered.) The *HO*, anxious to settle the matter finally, suggested that it be placed on the agenda for the Imperial conference scheduled for May-June 1911.⁸⁵ Treaties were certain to be discussed but essentially only of the bilateral, commercial kind, plus the *London Declaration* of 1909 on naval prizes. The main issue was to get a wary Fisher to agree to imperial defence policy. So, the *CO* decided against the *HO*'s proposal, although agreeing the matter could be raised with individual colonial ministers.

In March 1911, Lewis Harcourt, now colonial secretary, advised the Commonwealth that South Africa had adhered, to take effect retrospectively from May 1909 (when *ORC* had acceded). As this was a reply to Fisher's promise of mid-1910, it appears a subtle reminder for him to 'expedite' adhesion.⁸⁶ At this point, the *CO*'s Berriedale Keith commented that the

⁸⁴ Letters, Scherrer to prime minister, 21 November & Shepherd to Scherrer 30 December 1910, vol. 26, CRS A1108, NAA.

⁸⁵ Letter, *HO* (E. Blackwell) to *CO*, CO532/30/345, TNA.

⁸⁶ Circular despatch no. 111, Harcourt to Dudley, 10 March 1911, CO532/28/235-41, TNA; vol. 26, CRS A1108, NAA.

white phosphorus convention posed ‘decidedly very difficult’ constitutional issues: the states were ‘very touchy’ on such matters. He counseled that

*we shall have to be careful as they themselves had laid down the rule that the states should be consulted and, indeed, consent, to any such actions.*⁸⁷

He did recognize that this soft, federal approach caused problems for the imperial, as well as the Commonwealth, government, musing it would be ‘much simpler’, if the proposed alterations to the Commonwealth constitution on the trade and commerce power were realized by the referendum scheduled for April 1911. Then, said, Lewis Harcourt, the Commonwealth could proceed ‘irrespective of the wishes of the states’. (This seems to be exactly what Fisher had in mind.⁸⁸) This optimistic assumption proved ill-founded, as the proposed constitutional change was soundly rejected.

The frustration with the limits of Commonwealth powers in labour questions was not only held in the *CO. T&C* subsequently reported to Tudor on instances where state laws did not support the Commonwealth, notably on white phosphorus matches, as well as white lead indoor paints and grain bags too heavy for safe handling. The report concluded that

*so far as the safeguarding of the public is concerned, much of the good effect of the Customs work is nullified owing to the fact that the State laws give little or no support in these matters.*⁸⁹

The report received support from some pro-labour press, one sneering at how the states ‘cheerfully permit their workers to be poisoned by deleterious compounds and crushed down with back-breaking burdens.’ Then, in later 1911, some states began to act.

Tasmania’s Liberal premier, Elliott Lewis, led the way in late September 1910. He explained to his *LA* the origins of the convention in Berne, Britain’s resulting legislation and, so, the necessity of bringing the states ‘into line’ with the Commonwealth’s action. Incorrectly stating that all other states had already banned white phosphorus manufacturing (in fact, only Victoria had), he said if Tasmania did not act, producers might move into the state. In the Council, the chief secretary was equally loose with background details, suggesting Britain could not ‘join’ the convention without the states legislating, all the other ‘Dominions’ had acted similarly and that this would bring Australia ‘into line with all the other countries of the world’, against the ‘universally known’ dangers. Despite some public murmurs against the ban on sales, the bill passed without amendment and *The White Phosphorus Matches Prohibition Act, 1911* received assent at the end of October, which Lewis then reported to Fisher. The *Act* provided for a heavy £100 penalty for manufacture, ten-times that of Victoria, but nothing other than forfeiture for sales. Provision for factory inspection was made. The

⁸⁷ Minute, Keith to Robinson, 23 February 1911, CO532/30/344-8, TNA.

⁸⁸ Annotation, Atlee Hunt, 7 January 1911, on covering minute, Shepherd to Atlee Hunt, 30 December 1910, vol. 26, CRS A1108.

⁸⁹ *The Worker* (Wagga), 26 December 1912.

CO, understandably, wondered why this *Act* did not cover imports, which was done possibly at the insistence of B&M.⁹⁰

In SA, Liberal premier, Archibald Peake, had rejected legislation on the issue as currently unnecessary, although suggesting he would act if a match-factory opened. He lost office a month later and United Labour's John Verran moved at almost the same time and manner as Lewis in Tasmania. During the second reading of the bill in his Assembly in early October, he also referred to the Berne convention (reported as dating it, wrongly, as 1897), the Commonwealth's agreement to it and so the necessity for the states to act similarly. He conceded the legislation would have little effect, as there was no such manufacturing in the state. Sales would incur a fine of up to £10, while for manufacturing at £50 it was five-times greater than Victoria's but half that of Tasmania's. After reading a long dissertation on *phossy jaw*, he explained the difference between the white and, preferable, red phosphorus match, at which point Peake, as opposition leader, quipped: 'The colour suits your side.' Turning next to a mining bill, the Liberal's Hermann Homburg called out to the former, Cornish-born miner: 'You are more at home in this.' This levity reflected the low importance of the bill, which sunk to the bottom of the government's program and was eventually dropped. Labour did amend the *Workmen's Compensation Act 1900*, as had NZ, on English lines to cover industrial diseases, including *necrosis*. After early 1912, when the political crisis brought on by Council's refusal of an appropriation bill brought Peake back into office, the Liberals did not take up the matter.⁹¹

Tasmania's Lewis's did advise the Commonwealth of his legislation. This led Atlee Hunt to review the whole situation and, in early 1912, advised Fisher to remind NSW and Queensland of their promise to legislate. Queensland's Liberal government, under William Kidston, had previously said in 1910 the matter was under consideration but now, led by Digby Denham, made clear it was no longer interested. The chief secretary had already indicated he would not act in the coming parliamentary session and then replied more definitely that he did not propose to take any action, as such matches were not manufactured in the state. As for importation, he said, Commonwealth Customs officials had the power over this. As with SA, this state did not legislate, until Labour returned to power during the war. NSW's Labour premier James McGowen told Fisher he hoped to legislate in the coming session and, indeed, announced his intention to do so when parliament opened in July 1912. Yet, over a year later, when Fisher asked again, he 'regretted' that there had been insufficient time to secure its passage.

⁹⁰ The premiers' responses are in vol. 26, CRS A1108, NAA. *Mercury*, 29 September & 25 October 1911; *Daily Post* (Launceston), 29 September 1911; 2 Geo. 5, no. 4; CO418/93/66-68, TNA.

⁹¹ *Register*, 21, 26, 29 September & 6 October 1911. 1 Geo. 5, no. 66 of 1911.

The only other positive response was from WA, led by Labour's John Scaddan. The previous non-Labour government had promised to introduce regulations under its principal 'factory act' (1904) but not legislate further. Scaddan, born in SA to, like Verran, a Cornish-mining family, had a convivial personal meeting with Fisher in Melbourne during January 1912. Promising 'hearty cooperation' with the Commonwealth in its plans to replace 'colored' with white labour in the state's pearling industry and protect plumage birds, Scaddan also said he would introduce legislation on white phosphorus as soon as possible. He duly introduced the bill in July. Against a call for remote regions to be exempted, Scaddan countered that the bill was a copy of the 'Imperial Act' designed to prevent the 'malignant disease'. In fact, it was more a copy of Tasmania's, leading to questions over the lack of fines and only forfeiture for sales. Given assent on 3 September 1912, this came into effect year later, when Scaddan at least informed the Commonwealth, the day before that fellow Labour government lost power. On recommending the *Act* for 'sanction', Berriedale Keith commented ruefully that the Commonwealth's attempt to secure the state legislation to allow its adherence to the convention was proving a 'slow business'. This comment proved true if not also greatly understated.⁹²

Another federation addressed this issue more effectively (and promptly). The *USA* had not been invited to Berne. In early 1910, the *AALL* had reported to the *Bureau of Labor* on *necrosis* in the local match industry. The sixteen matchmaking companies and their respective state governments opposed uncoordinated, individual state legislation because it could allow some firms to continue using white phosphorus while others could not. They told congress they would not invest in alternative matches unless laws in all states made this necessary. Yet, the federal government, like the Commonwealth, lacked an explicit constitutional power to impose a ban on manufacture or sale. It could not use its clear treaty power, which the Commonwealth did not have, as the *USA* was not party to the convention. The *AALL*, in conjunction with the *DMC*, confidentially persuaded president William Taft, to support enactment in April 1912 of the landmark *Esch Act*, imposing a punitive tax on interstate commerce in the matches, which rendered the trade unviable. (Using its taxation power—which the Commonwealth also did not yet have—for non-revenue purposes, would be repeated over opium traffic.) Meanwhile, Taft had the *DMC* share its safe alternative patent with the other firms, in the 'interests of humanity'.⁹³

⁹² *Melbourne Herald*, 24 January 1912; *West Australian*, 25 January 1912 & 26 May 1913; 3 Geo. 5, No. 25 of 1912; Vol. 26, CRS A1108, NAA; CO418/105/6-7, TNA.

⁹³ John B. Andrews, 'Report of work 1910', *ALLR*, 1(1), 1911, pp. 95-106 and 'Phosphorus Poisoning in the Match Industry in the United States', *Bulletin*, 86, *DCLBL*, January 1910. R. Alton Lee, 'The Eradication of Phossy Jaw: A Unique Development of the Federal Police Power', *The Historian*, 29(1), November 1966, pp. 1-24; D. A. Moss, 'Kindling a flame under federalism: progressive reformers, corporate elites, and the phosphorus match

4. 'esteem it a favour': the Commonwealth, the states and the convention, 1913-19

Due to the frustratingly slow legislative responses of the states, albeit further hindered by the war of 1914-18, the Commonwealth did not accede to the convention until the second last day of the decade, which was more than a decade after its accession was first invited.

So, by early 1913, four years after the *CO* had asked, only Tasmania and WA, following NZ, had legislated on both sale and manufacture. Victoria, induced by *B&M*'s investment, had acted only on the latter. In July 1913, just after the federal election, Atlee Hunt and Carrodus briefed their new minister, Patrick Glynn, on the stalled process of accession. He detailed the various actions and inactions of the states and, noting that the Commonwealth would have five years, after notifying adherence, to bring the convention into force by full legislation in Australia, he recommended accession. Glynn agreed.⁹⁴ Shortly, in late July, Cook asked Denman to pass this advice to the *CO* and advised the premiers of this action, asking the three, which had legislated, to provide copies of their respective acts, for forwarding through the *CO* to the current nine signatories, plus South Africa, as required by the convention.⁹⁵ (Carrodus had overlooked NZ.) He also asked NSW for copies, once its long-promised bill was passed, and for SA and Queensland to legislate, if any match factories were opened there. Those three states, which had legislated, complied promptly, enabling Cook to send the acts to the *CO*.⁹⁶ Of the others, SA promised to legislate but only if a factory opened, while Queensland did not reply. NSW's Holman had intimated to the Commonwealth, even before his enquiry, that he planned to try again to pass a bill, a commitment he made public. By the close of the parliamentary session in October, he again advised that 'other important business' had not made this possible. So, this seemingly, never-ending story started a new chapter.⁹⁷

The arrival in the *CO* in September 1913 of the Commonwealth's request for accession saw debate there on how best to handle the colonies' accessions. Dale noted to Just that the *CO* had given notice of the accession of the *ORC* and, then, South Africa, even though neither had the required legislation in place at the time. There was, perhaps, less concern over South Africa, where the Union's constitution gave the central government sufficient power. Australia, however, was another matter. Dale explained that the requisite legislation was a

campaign', *Business History Review*, 68(2), 1994, pp. 244-275; Melvin L Myers and James D McGlothlin, 'Matchmakers' "Phossy Jaw" Eradicated', *AIHAJ*, 57(4), April 1996, pp. 330-2. For the wider context, although the white phosphorus issue is not covered, see Kimberley S. Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929*; PUP, Princeton, N.J., 2007

⁹⁴ Memorandum, Carrodus, 4 July 1913 & annotation, Glynn, 8 July 1913, vol. 26, CRS A1108, NAA.

⁹⁵ Letters, Cook to Denman and premiers, 23 July 1913 & dispatch no. 178, Denman to CO, 28 July 1913, vol. 26, CRS A1108 & 1915/59, CRS A11804, NAA.

⁹⁶ Letter, Cook to Denman, 1 September 1913 & dispatch no. 213, Denman to CO, 4 September 1913, vol. 26, CRS A1108 & 1915/59, CRS A11804, NAA.

⁹⁷ The premiers' replies are in vol. 26, CRS A1108, NAA. *Sunday Times*, 13 July 1913; *SMH*, 8 August 1913; *Age*, 13 August 1913.

sine qua non of the convention and it made no difference whether white phosphorus matches were actually being manufactured or sold: 'The Convention must be strictly observed'. So, assurances from SA and Queensland, relayed by new prime minister, Joseph Cook, were irrelevant. (He initially added Victoria, until Berriedale Keith informed him of its 1910 legislation; only later was it noticed it had not prohibited sales.) So, despite the precedent on South Africa (which he said, should be reminded it had until 3 May 1914 to legislate), Dale was 'inclined to stipulate for legislation in advance' for Australia but suggested seeking the views of the *HO* and *FO*.⁹⁸

Sir Hartmann Just did not commit the *CO* to Dale's position when he wrote to those offices.⁹⁹ The *HO* had no objection to immediate notification of the Commonwealth's adhesion, provided assurances were received that necessary legislation would be passed by all states prior to the convention coming into effect for Australia.¹⁰⁰ So, Harcourt now emphasised to the Commonwealth that adhesion to the convention gave rise to an obligation under its Article 2 to take steps for 'strict execution' of Article 1's provision for 'formal prohibition' of manufacture and sale, whether or not these were taking place. Pointing out that the convention would not come into effect for Australia, until at least 1918, he asked whether the imperial government was 'at liberty to act' (notify the Commonwealth's adhesion) on the 'understanding' the remaining four states would legislate fully. This was a curious request because the problem remained that the Commonwealth, under its current constitutional stance, could not give such an unequivocal assurance. South Africa also caused additional concern, reporting an intention for its draft factory act to prohibit the use of poisons in manufacturing and consider an import prohibition of such poisons. The *CO* noted that the draft bill, which had just been gazetted, 'expressly contemplates the continuance of the system'. (Perhaps *B&M*, with their factory there, may have influenced the Union's stance.) As that gazette preceded this reply by a few days, the *CO* decided to assume the Union would legislate as required. The *CO* was also waiting for Canada to legislate.¹⁰¹

In late November 1913, Cook, just relayed *verbatim* the bulk of Harcourt's despatch to the premiers of SA, Queensland, Victoria and NSW. He asked the latter three to 'kindly take steps to have the necessary legislation passed'; implicitly suggesting he was only acting on Harcourt's behalf. He helpfully suggested Tasmania's *Act* be used as a model. To NSW, he merely said he would be 'glad' if Holman 'would be so good' as to confirm if the current

⁹⁸ Minute, Dale to Just, 15 September 1913, CO532/52/622-626, TNA.

⁹⁹ Letter, Just to *FO* & *HO*, 18 September 1913, CO532/52/627-628, TNA.

¹⁰⁰ Letter, *HO* (W. P. Byrne) to *CO*, 29 September 1913, CO532/60/213-4, TNA.

¹⁰¹ Despatches nos. 421 & 589, Harcourt to governor South Africa and Denman, 4 & 8 October 1913, CO532/60/215-7, TNA; vol. 1912/59, A11804 & vol. 26, CRS A1108, NAA.

NSW bill contained provisions against both sale and manufacture.¹⁰² Holman quickly confirmed this was the case. Liberal premier William Watt was able to pass Victoria's first *Workers' Compensation Act*, which followed Britain, NZ and SA by including industrial diseases, such as *necrosis*.¹⁰³ Yet, he expressed 'regret' to Cook, that no ban on white phosphorus could be introduced in the current session, but would be considered during the recess. SA's Liberal premier, Peake, promised to introduce legislation in the current session, while Queensland only replied vaguely that 'necessary steps' had been taken for a bill's 'preparation'.¹⁰⁴ In March 1914, Cook simply packaged these replies together and relayed them to the CO, without answering the key question of Harcourt's October despatch over accession.¹⁰⁵ If the CO was frustrated by this lazy response, it was not recorded. Harcourt merely replied that he 'gather[ed]' that the Commonwealth did not yet wish to adhere to the convention, until the respective legislation had been completed.¹⁰⁶

By this date, time was running out, not only on this and most other treaty making, for the future belligerents in the war that was about to break out. Then, there was finally some positive news to the CO, this from Ottawa. In mid-March 1914, the Dominion re-introduced complying legislation, which after some debate over the potential financial implications, was passed in May, to come into effect at the start of the next year.¹⁰⁷ In late July, just days before Britain declared war on Germany, Canada's request for adhesion arrived. So, the main issue now for the CO was to finalise Australia's response. In Melbourne, a week after Britain declared war, Cook again attempted to wrap up matters by asking the premiers again whether they had yet legislated.¹⁰⁸ NSW's Holman managed to have his bill passed by the LC, where it was strongly supported by two medical doctors, Henry Doyle, who spoke of his experience treating *phossy jaw* in London, and the nominated non-Labour John Creed, who wanted to ban all but safety matches to prevent bush- fires. In the LA, Frederick Flowers, minister of health, spoke on its second reading, explaining that the Commonwealth was pressing for this law to comply with the Berne convention (which he wrongly said was signed in 1913), reflecting a 'world-wide desire' to protect workers from its 'disastrous' effects'. After this promising start, the bill stalled, as Holman explained to Cook, when parliament's 'business' was interrupted by 'the present crisis'. SA merely replied that the matter had 'not yet been

¹⁰² Circular letter, Cook to premiers, 24 November 1913, vol. 26, CRS A1108, NAA.

¹⁰³ 4 Geo. 5, no. 2496 of 1914.

¹⁰⁴ The premiers' replies are in, vol. 26, CRS A1108, NAA.

¹⁰⁵ Letter, Cook to Denman, 2 March 1914 & despatch no. 77, Denman to CO, 6 March 1914, vol. 26, CRS A1108 & 1912/59, CRS A11804, NAA.

¹⁰⁶ Despatch no. 236, Harcourt to Denman, 22 April 1914, CO532/66/240-242, TNA; vol. 26, CRS A1108, & 1912/59, CRS A11804, NAA.

¹⁰⁷ The Canadian Act was 4 & 5 Geo. 5, c. 12. CO532/53/695-698; CO532/60/213-216, TNA.

¹⁰⁸ Circular letter, Cook to premiers, 11 August 1914, vol. 26, CRS A1108, NAA.

dealt with', while Victoria was just as unhelpful, saying there was 'no prospect' of such legislation in the current session. Queensland, as was becoming habitual, did not reply.¹⁰⁹

The Commonwealth's distracted state after the outbreak of war was shown when Carrodus wrongly advised that NSW had, in fact, passed its legislation, when he drafted yet another summary of the states' legislation.¹¹⁰ After Fisher replaced Cook as prime minister, he again took up the issue with the four states in December 1914.¹¹¹ Three, this time including Queensland, again promised imminent legislation, with two delivering. In February 1915, NSW's Holman finally succeeded with the session's first *Act*. (At the end of 1916, after Holman had joined the new Nationalist Party, he was also able to enact a new *Workmen's Compensation Act*, including industrial diseases, again on the Westminster model.) In SA, where the United Labour government had returned to power, the new premier, Crawford Vaughan, had a bill, which he justified as merely following the legislation of Britain and other states, passed easily in November 1915, with only minor amendment. The only negative response to Fisher was Victoria's, where Alexander Peacock's Liberal government reiterated that there was 'no prospect' of legislation in parliament's current session.¹¹² Shortly after, on receipt of advice on SA's legislation, William Hughes, who just taken over from Fisher as Labour prime minister, was prompted by his new minister of external affairs, Hugh Mahon, to write to Peacock, stating that his was the only state (overlooking Queensland) not yet to have legislated fully on the issue. He pleaded that he would 'esteem it a favour', if he would 'be so good' as to 'expedite' legislation. Despite this deferential language, Peacock merely replied briefly that the question would be considered before parliament's next session.¹¹³

Six months later, in mid-1916, Hughes raised the question again. This time, Peacock finally introduced a specific bill prohibiting both sale and manufacture. Like the other states' acts, there was no fine, only forfeiture, for violations. The fine for manufacture remained at the low £10. The government's leader in the Council, William ('WL') Baillieu, explained that both the original 1910 enactment and now this new bill had been introduced at the wishes of the Imperial government, with the latter necessary to allow adherence to the convention. The bill passed without any opposition at the beginning of November 1916 and was included, as a matter of routine, by the governor in his usual despatch on the session's legislation for sanctioning in London.¹¹⁴ Victoria, however, saw no need to inform the Commonwealth, even

¹⁰⁹ *SMH*, 30 July 1914. The two premiers' replies are in vol. 26, CRS A1108, NAA.

¹¹⁰ Memorandum, Carrodus, 25 September 1914, vol. 26, CRS A1108, NAA.

¹¹¹ Circular letter, Cook to premiers, 18 December 1914, vol. 26, CRS A1108, NAA.

¹¹² This correspondence is in vol. 26, CRS A1108, NAA. The legislation was NSW: 6 Geo. 5, no. 1 of 1915 and 7 Geo. 5, no. 71 of 1916; SA: 6 Geo. 5, no. 1202 of 1915. The CO's sanctioning of these acts is at CO418/135/83-86; CO418/138/219-224; CO532/72/445-447, TNA. *Register*, 8 & 22 October 1915.

¹¹³ Letter, Hughes to Peacock, 21 December 1915, vol. 26, CRS A1108, NAA.

¹¹⁴ 7 Geo. 5, no. 2845; *Age*, 13 September 1916.

though prime minister Hughes had now broken with the Labour Party. Indeed, an enquiry about the current position from William Watt, acting for Hughes, went unanswered by Victoria.¹¹⁵ So, in early December 1916, when Atlee Hunt (now head of *Home Affairs*) revived with Maurice Shepherd the question of the Commonwealth's adherence to the convention, he was unaware of Victoria's legislation (or, probably, that Queensland had promised, the previous September, to prepare legislation). So, he suggested it be ascertained if the two states had legislated and, if so, advise the *CO* of the Commonwealth's desire for adherence.¹¹⁶ So, Watt wrote for the Commonwealth's tenth (but not last) time to the premiers to finish this seemingly endless saga once and all.¹¹⁷

Queensland was by now under the strong Labour government of 'TJ' (Thomas) Ryan. Just days before receiving Watt's letter that government had acted. Unlike the other states, however, it did not introduce specific white phosphorus match legislation. After considering amendment of the *Sale and Use of Poisons Act, 1891*, the government decided instead to amend the *Health Acts, 1900 to 1911*, making the manufacture, sale or supply of white phosphorus matches unlawful, though with no penalty except forfeiture: the weakest of all the states' acts. Although there was some concern as to whether storekeepers would be compensated for stock already bought, the bill passed smoothly, with clear acceptance of the dangers of white phosphorus, and received assent in mid-February 1917. Queensland at least promptly advised the Commonwealth of its legislative plans and the passage of the *Act*, two months later (just AFTER the governor had sent it to the *CO* for sanctioning.) Symbolic of the haphazard nature in which this whole issue had progressed, Ryan forgot to include the promised copy of the *Act*, which Hughes had to chase up.¹¹⁸ Immediately, on receipt of Queensland's advice, Hughes again wrote to Victoria, unaware it had sent its *Act* direct to the *CO* for sanctioning some three months prior. Only now did he get a reply and copy of this *Act*. So, finally, in mid-1917, over a decade since the convention was first signed and almost as long a time since Britain had become a party to it, the Commonwealth was in a position to request adherence, which Watt, acting for Hughes, formally requested in May 1917.¹¹⁹ Yet, the inordinate delay in sending this request now led to anti-climax.

During the war, white phosphorus acquired a new value, in that the British military

¹¹⁵ Minute, Atlee Hunt to Shepherd, 1 December 1916, vol. 26, CRS A1108, NAA.

¹¹⁶ This letter is not on file but is cited in the premiers' replies.

¹¹⁷ 55 Vict. No. 31; *Health Amendment Act, 1917*, 7 Geo. 5, No. 13; CO48/161/26-28, TNA. *Young Witness*, 17 November 1916; *Register*, 13 December 1916; *Telegraph* (Brisbane), 31 January 1917; *Brisbane Courier*, 8 February 1917.

¹¹⁸ The premiers' replies in 1917 are in vol. 26, CRS A1108, NAA.

¹¹⁹ Vol. 26, CRS A1108, NAA; *Young Witness*, 17 November 1916; *Register*, 13 December 1916; *Telegraph* (Brisbane), 31 January 1917; *Brisbane Courier*, 8 February 1917; 55 Vic. No. 31; *Health Amendment Act, 1917*, 7 Geo. 5, No. 13; CO48/161/26-28, TNA.

authorities, probably like other belligerents, employed it in weaponry development. This may have been coincidental (perhaps, as the enhanced wartime value of glycerin coincided with the stall in consideration of a whale preservation treaty) but the *FO* now told the *CO* that it was better to hold off the Commonwealth's adherence until the conclusion of peace: some of the parties to the convention were enemy states and the required exchange of domestic legislation with such parties was out of the question during the war. The imperial government was considering the whole question of revision of such pre-war treaties and, so, unless there were special grounds, nothing further should be done.¹²⁰ This advice was passed to Melbourne later in 1917, with the *CO* adding that 'doubtless' the Commonwealth would inform it after the conclusion of the peace whether adhesion should then be notified.¹²¹

Australia's federal system had greatly complicated this treaty making. Although there was no constitutional change on these matters before the peace conference, Australia was invited to participate separately. The states did not seek their own representation, nor were they

¹²⁰ Letter, Watt to Munro Ferguson, 15 May 1917, vol. 26, CRS A1108, NAA.

¹²¹ Despatch (confidential), Walter H. Long to Munro Ferguson, 17 Jul 1917, vol. 26, CRS A1108, NAA; CO418/150/234, 240; CO418/161/26-28; CO532/100/469-473, TNA. Coincidentally, a few days before this despatch arrived in Australia, a young, aspiring, northern NSW country politician and future (albeit, brief) prime minister, Earle Page addressed a crowd at Grafton on the 'Unification of Australia'. Like his father and grandfather, he had argued for the separation of this region from Sydney-dominated NSW. His wartime experience, however, had deeply effected him, like many other Australians: 'Our soldiers are fighting as Australians, not as Victorians or Tasmanians' and 'a man from Tamworth and a man from Toowoomba are fighting together in the trenches and sharing their common ration and common hardship' — 'Their union has been cemented in blood, and their sentiment has become Australian and national'. The only course which would meet with the approval of those 'fighting for us', he declared, was to make the Commonwealth 'powerful enough to deal with all questions of national importance', those 'essential to the preservation and development' not 'destruction' of Australia. Page had just returned home *via* Canada and the *USA*, where he had admired their respective hydro-electric national development projects. He now argued the federal structure of large states was holding back Australia's national development. He called for Australians to admit, what 'every one outside knows', that they made a mistake in their Constitution; its 'weaknesses' evident before the war. He contrasted Australia with Canada, formed with imminent danger from the 'South' and not, while 'leisurely in peace'. Australia's states had 'so spoked the wheels of Federal machinery as to almost imperil national existence'. If the repeated attempts to enlarge federal powers had not failed in referenda, they had been struck down by the High Court: change was 'imperative', he said. There should be more not less 'provincial' subdivision but with strong, centralized national not state government. Page was a doctor not a lawyer and, so, some of his specific legal observations, unlike his overall point, were not entirely sound. He said it was 'doubtful' the Commonwealth could legislate on extradition—which, of course it had in 1903—(albeit, more cautiously than Canada in deference to the states). He added that the 'vital difference . . . in the whole aspect of their Constitutions is their attitude on external affairs. In Canada, no doubt was left about the Federal Government alone being concerned with the ultimate power. But in Australia the issue was left so indefinite that the power of the Commonwealth has been repeatedly challenged.' He cited *Vondel*, in the details if not by name, and *SA's* obstruction. He said the states had to issue their own proclamations of war, along with the Commonwealth, to give a legal basis to the international law of prize courts. Then, he continued: 'the Commonwealth cannot make a treaty without the concurrence of the States. It could not agree in an International Conference to prohibit the manufacture of phosphorus matches without securing the assent of the States on its return. Its powers for dealing with international affairs is strictly limited by the sovereign rights of the States.' He said that in the peace negotiations the Commonwealth was currently only empowered to make 'provisional contracts'. So, would 'we', he asked rhetorically, 'allow our Commonwealth to be represented at these deliberations as a nation with no power of decision? Should we not have a Government representing us with power to make contracts that will be binding?' He was not arguing for Australian independence. Indeed, he hoped for and expected some form of Imperial federation or 'partnership' for which greater federal powers were an 'absolute necessity'. He finished to applause, saying the Commonwealth had to be powerful enough to uphold 'the status of our land among the nations.' A first step towards this hope was realized two years later when the Commonwealth, without the states, gained separate representation at the peace conference of Versailles. *Daily Examiner* (Grafton), 1 September 1917.

consulted in advance on the wide-ranging treaty issues, on which the Commonwealth would sign, with the other self-governing colonies, alongside Britain, including the establishment of an intergovernmental *ILO* (now including the *USA*). In preparation for that new body's inaugural conference in Washington, in October, the *USA* asked proposed members several questions, with answers to be used at that conference. The last of these was about the legislation members had already taken on white phosphorus matches and whether those, not yet signatories to the convention, would be willing to adhere. The *USA* later suggested the conference should consider further steps on this subject. In May 1919, the *CO* passed these on to the Commonwealth, which elicited answers from each state with much more speed than they had adopted the required legislation. After this, the *FO* suggested it was finally time for the adherence to the white phosphorus convention of both the Commonwealth and India, which the *CO* facilitated by asking the former whether its request for adherence in 1917 still held. The Commonwealth replied 'yes', without further consultation of the states.¹²² Both governments' accessions were finally formalized with Swiss authorities on 30 December 1919. India and Japan banned white phosphorus matches that year and the *ILO* adopted *The White Phosphorus Recommendation No. 6*. Tasmania (1920) and WA (1925) were the last two Australian states to amend their existing workers' compensation legislation to include industrial diseases such as necrosis.¹²³

* * *

The fact that the white phosphorus convention of 1906 has been somewhat lost to history is a measure of its great success. Before the Second World War another twenty-two governments acceded to the convention, making it truly multilateral.¹²⁴ So, there was no need for a further convention but this one soon inspired measures such as the *ILO* conventions on white lead paint in 1921 (C013) and occupational diseases in 1925 (C018) and 1934 (C042), and, much later, asbestos in 1986 (C162). Less obvious, is the success of the 1906 convention in leading to various domestic legislation that covered industrial diseases, as well as accidents, for workers' compensation.

The British government, balancing the respective pressures of its major match manufacturers and zealous reformers, moved slowly at first, resisting enacting adequate domestic protective

¹²² Telegram, *CO* to governor-general, 21 November 1919 & letter, Shepherd to Steward, 16 December 1919, 1925/448, A11804. See also vol. 26, A1108, NAA. CO532/132/95-103, 150-156; CO532/133/95-99, 173-174, 445-447, 502-05; CO532/136/301-311, 423-435; CO418/183/103-105, TNA. *Register*, 14 October 1919.

¹²³ *Tas*: 10 Geo. 5, no. 29 of 1920. *WA*: 15 Geo. 5, no. 40 of 1924.

¹²⁴ Sweden (1920); Austria, Czechoslovakia, Danzig, Finland, Japan, Poland and Romania (1921); Belgium (1922); China and Estonia (1923); Hungary and Palestine (1925); Bulgaria and Irish Free State (1926); Morocco (1927); Yugoslavia (1929); Chile (1930); Egypt (1932); Persia and Turkey (1933); Argentina (1936).

legislation. Once the 1906 convention was concluded by a sizeable number of governments, however, Britain soon fell into line and sought the widest possible colonial adhesion.

Australia, lacking any significant match-making industry and, hence, major public reformist press, was not initially engaged with the subject. The lack of such an industry, however, made it easier for the Commonwealth's prompt imposition of an import ban in December 1908, days even before Britain had so done. Accession to the 1906 Berne convention, however, proved a different matter, due to the federal system, and came eleven years after Britain's, a decade after South Africa's and eight years after NZ's. Even the other main federation in the Empire, Canada, had acceded five years previous to Australia. The final delay imposed by the imperial government in 1917, notwithstanding, the complexity of Australia's treaty making, arising from the federal system, was starkly exposed. Denied the specific treaty-power of Canada's constitution by the *CO*'s intervention over the draft constitution in 1897 and too timid to use the 'external affairs' power robustly, the Commonwealth struggled to respond promptly, even when disposed to act positively, to this and other of the new types of multilateral treaties being concluded at this time. In this case, although Liberal-dominated Victoria (1909 & 1916) and Tasmania (1911) legislated first, the Commonwealth had to wait for Labour governments in WA (1912), NSW (1915), SA (1915) and Queensland (1917), for appropriate legislation. So, at least, in this instance, unlike that of the night work convention, the Commonwealth could finally adhere to this foundational labour treaty in 1919.

PART 5
SUMMARY & CONCLUSIONS

Chapter 8

‘and treaties’: from 1901 to Versailles, 1919

In Chapter 1, this thesis outlined broadly, though with detailed statistics, the development of international law, through treaties, from approximately 1851 to 1905. The focus was on new multilateral treaties, most of which can be seen as the culmination of earlier networks of bilateral treaties on the same subjects. Most of these treaties required and often did stimulate domestic legislation, among the ever-widening number of signatories and on an expanding range of subjects. Britain was initially slow to enter this process but, ultimately, accommodated these developments, with few exceptions, such as on trade-marks.

The new Commonwealth’s responses to such treaties, concluded before federation, to which Britain was a party and had offered colonial adhesion, were briefly detailed. In its first years, the Commonwealth acceded to those already existing treaties on publication of custom tariffs (1901, unofficially), sanitary measures (1902, with reservations), telegraphs (1903) posts (1904) and protection of industrial property (1907). Copyright was different, despite a clause in the head convention (1886, Article 19) allowing governments to declare their colonies adherence. Britain applied the convention throughout the empire by imperial legislation, which by 1900, it was affording prior colonial consultation. The Commonwealth first legislated in 1905, thereby assuming responsibility from the states, and, despite some misgivings among British publishers, the *CO* deemed it was consistent with imperial legislation and, hence, the convention. Just as the Commonwealth did not follow Canada’s semi-autonomous path on copyright, so too, in 1903, it legislated under imperial legislation to assume the main Australian responsibility for meeting Britain’s obligations under its network of pre-existing bilateral extradition treaties. There were no policy disagreements with Britain over the above, with any Commonwealth qualified accession or delay (as on, respectively, sanitary and industrial property conventions) the result only of a lack of administrative and/or legislative capacity to meet treaty obligations. Thereby, the Commonwealth, at first unsteadily, gradually assumed sole treaty authority from the states and entered the already rapidly developing treaty-based international legal system, with its associated *PGIOs*.

From federation through 1905, the only new multi-party treaties, accession to which Britain invited colonies, were on prohibiting sugar production subsidies (1902), a successor sanitary convention (1903), banning white slave traffic (1904) and creating an international agricultural institute (1905). The Commonwealth acceded to the latter three in, respectively, 1909 (again, delayed only by lack of legislative and administrative capacity), 1906 and 1910, but declined accession to the first—the only such refusal—due to its policy of deporting ‘coloured’ labour. Racial and economic protectionism was the source of its only treaty disagreements with Britain, being mainly over bilateral commercial treaties.

The previous six chapters were detailed studies of how Australian governments and peoples responded to specific new multilateral treaties during a second period, from approximately 1906 to the First World War: treaties on, respectively, rules for the conduct of war (1906-09), transnational crime (1904-10) and international labour protection (1906). This chapter, adopting the same broader approach of Chapter 1, examines this second period to provide further context to the above specific studies. The same structure is also adopted, studying these subsequent developments at the international, imperial, colonial and Australian levels.

1. international law, 1901 to 1914: 'one directing hand and mind for a distinct end'

The most striking development globally in international law in this period continued to be the accelerating growth in multi-party treaties, increasingly requiring domestic application. These treaties increasingly covered a comprehensive range of hitherto domestic governmental policy issues. Thereby, international law seemed to be being guided, as the *LSE*'s Sir John Macdonnell observed in 1913, by 'one directing hand and mind for a distinct end'.¹ As in the 19th century, Continental Europe not Britain continued to lead these developments. Some return to the century's start, assists assessment of the scale and nature of these developments.

From 1900, there were about 40 international conferences, related to multilateral treaties.² France and Belgium were easily the leaders, with about ten each. France sponsored those on bird protection (1902), white slave and obscene publications trafficking (1902 and 1910), sanitary measures (1903 and 1912), an international bureau of health and the metric system (both 1907), motor vehicles (1909), universal time (1913) and air navigation (1913). Belgium hosted those on sugar (1902 and 1907), civil procedure (1905), maritime collisions and salvage (1905 and 1910), pharmacopoeial formulas for drugs (1902 and 1906), African liquor and arms traffic (1906 and 1910) and commercial statistics (1913). The seemingly global role of the Netherlands, venue for five such conferences, flatters. France and Russia, respectively, proposed those held there on the conduct of war (1904 and 1907) and the *USA* those on opium trafficking (1912, 1913 and 1914). Several powers, although hosting fewer conferences, were actually more internationally active. Germany, hosted the first two on radiotelegraphy (1903 and 1906), one each on seismology (1903) and international exhibitions (1912), plus one on copyright (1908). Italy held two on agriculture (1905 and 1914) and one on postage (1906). Switzerland hosted one the conduct of war (1906) and two on copyright (1908 and 1914). Further from this centre, one each was hosted by Russia, on anarchism (1904, only plurilateral), Austria-Hungary, on railways (1907) and Portugal, on telegraphy (1908).

¹ *Times*, 6 June 1913.

² This calculation may need minor correction to ascertain all major European conferences, some of which Britain did not attend. There were also some international administrative conferences, which did not negotiate treaties.

Britain hosted three London conferences, or four, if the non-treaty-making *ITU* conference of 1903 is included. The others were those on maritime warfare (1909), radiotelegraphy (1912) and safety of life at sea (1914).

The *USA*, the other major power outside the Continent, was only just starting to play a major international role, at least, beyond the Americas, where it led on some similar multilateral issues. In Mexico in 1901-02, the *IUAR* met for the second time and re-named its office the *International Commercial Bureau* and established the *Pan American Sanitary Bureau*. The *IUAR* met again in Rio de Janeiro, in 1906, and, in 1910, at Buenos Aires, where it was re-named the *Union of American Republics* and its office, the *Pan American Union*, was housed in a new building in Washington D.C. Globally, the *USA* inspired China's Shanghai opium commission (1909)—the first truly multilateral conference, albeit not treaty-making, held outside Europe—and hosted in Washington the respective multilateral and plurilateral conferences on protecting industrial property (1911) and *North Pacific* fur seals (1911), while also proposing The Hague drug treaty conferences (1912, 1913 and 1914).

The location of treaty-created *PGIOs* is also revealing. Estimates vary, as to the total existing in 1914, from between 50 to 100, but there were certainly, at least, sixteen that were treaty-related.³ The first three—with the earlier Rhine and other European river commissions, being both only plurilateral and regional—dated from the 1870s, with the *ITU*, (Berne, 1865 or 1875) and *UPU* (Berne, 1874), both on communications, and the *BIPM* (Paris, 1875), on commercially related weights and measures. Of the later ones, prior to Australian federation, they were concerned respectively with intellectual property, both industrial (*IOUPIP*, Paris, 1883) and artistic and literary (*IUPLAW*, Berne, 1886); publication of customs tariffs (*IBPCT*, Brussels, 1890); slave trafficking (*BRT*, Brussels and *BIMT*, Zanzibar, both 1890); transport, both rail *OCTI* (Berne, 1893) and maritime (*CMI*, Brussels, 1897); and arbitration (*PCJ*, The Hague, 1899). The predominance of neutral states as *PGIO* hosts is unmissable.

³ Examples of the non-treaty related *PGIOs*, created in this period, include: the *International Commission for the Study of the Sea* (1902), founded in Copenhagen by an exchange of letters between eight north European governments, including Britain, to facilitate joint action to preserve fish stocks; the *Association Internationale de Séismologie* (1903) formed in Strasbourg under German and French leadership; the *Association Internationale Permanente des Congrès de la Route* (1909), founded by France for experts not officials and now named the *World Road Association*; the *Commission permanente des congrès internationaux des sciences administratives* and the *Union of International Associations* (1910), formed by two two congresses hosted by Belgium; the *Association internationale de bains populaires et de propreté* (1912) founded in the Netherlands; the *Central Bureau of the International Map of the World* (1913) formed in Paris but based at Southampton. There are brief outlines of many of these organisations in Amos J. Peaslee, *International Governmental Organizations: Constitutional Documents, Volume 1 & 2*, Martinus Nijhoff, The Hague, 1956. More specifically, see Dean S. Rugg, 'The International Map of the World', *The Scientific Monthly*, 72, 4, April 1951, pp. 233-240; Denis Moschopoulos, 'The International Institute of Administrative Sciences: main stages of its history', *International Review of Administrative Sciences*, 71, 2, June 2005, pp. 197-215; Stefan Fisch, 'Origins and History of the International Institute of Administrative Sciences: From Its Beginnings to Its reconstruction After World War II (1910-1944/47)' in Fabio Rugge and Michael Duggett (eds.), *IIAS/IISA Administration & Service 1930-2005*-, IOS Press, 2005, Amsterdam, pp. 35-37.

After Australian federation, other *PGIOs* were established by treaties, those being on sugar production (*PSC*, 1902, Brussels); on geodesy, for navigation, the *International Seismological Association* (*ISA*, Strasbourg, 1903); statistics, on agriculture (*IISA*, Rome, 1905) and for commerce, the *Bureau de Statistique du Commerce International* (*BSCI*, Brussels, 1913), which did not really operate until 1923, delayed by war;⁴ health, the *Office d'Hygiène Public International* (*OHPI*, Paris, 1907); radiotelegraphy, with the *International Radiotelegraphic Union* (*IRTU*, 1906, Berne) as a section in the *ITU's* Bureau; trafficking in obscene publications (*ZPBUBS*, Berlin, 1910); and *Le Bureau International de l'Heure* (*BIH*, Paris, 1913) for transport and communications. Thereafter, especially after the war began, there were no more *PGIOs* created before the peace treaties of 1919. There were also 500 private or semi-official international organisations, at this time, two-thirds of which, were Brussels-based. The dominance of Continental and absence of British host locations are manifest.

Calculating the exact number of multilateral treaties concluded then is somewhat complicated by the slippery distinction between what, today, would be considered only a plurilateral, as opposed to, a truly multilateral treaty. Some may have started as the former but developed into the latter, as more states eventually joined. Some of these legal instruments were also only articles, acts, protocols and declarations, associated with the original, principal treaty. Furthermore, some treaties, although signed, never came into effect, due to non-ratification.

With those considerations in mind, a reasonable estimate is that around 86 such multi-party agreements, many requiring or were associated with domestic legislation, were concluded--an average annual rate of approximately six--a six-fold increase over the latter 19th century. Of these, about twenty were associated protocols and four associated declarations. Of the remaining 62, some were simply modifications of earlier head treaties, such as on protection of industrial property, copyright, registration of trade marks and prevention of false indications of origin on goods, sanitary measures or standardisation of railways, posts and telegraphs. Some were entirely new issues for multilateral instruments, including on maritime and motor transportation, radiotelegraphy, sharing of agricultural, health and commercial statistics, sugar production, labour protection and suppression of trafficking in drugs, females, obscene publications and wildlife. Four (on fur seals and African wildlife preservation, as well as on slave, arms and liquor trafficking) were plurilateral, rather than truly multilateral.

⁴ R. A. Horváth, 'Le Concept de Statistique Internationale et son Evolution Historique', *ISR/RIS*, 40(3), December 1972, pp. 281-98.

The conduct of war was the largest group (about eighteen or 30%) of such treaties, of which, all but three entered into force. This, being almost one-third, is a statistical anomaly, as over much longer periods, this treaty subject was less prominent. For, apart from the conventions on exempting hospital ships from harbour dues (1904, and an act) and misuse of the 'Red Cross' symbol (1906, with a protocol), fourteen substantial treaties and the *Final Act* were signed at the one Hague peace conference (1907), of which, that on prize courts, its associated protocol, and the related, *London Naval Declaration* (1909, with protocol and declaration; and an additional protocol in 1910) did not enter into force.⁵

The second largest treaty group (about fourteen or 23%) was a diverse collection on several various, commercially related subjects. (The core issues of commerce and navigation, except in the case of sugar, were governed only by bilateral treaties.) On agriculture, the head sugar treaty (1902), on eliminating subsidisation of production, was followed by a modifying convention and two associated protocols (1907). There was one treaty, limited to Europe, on protection of useful birds (1902), another established an international institute for collection and dissemination of agricultural statistics (1905), while another, unratified, was on phytopathology (1914), the study of plant diseases, a continuation of the series of treaties dating from 1878 on *phyllorixa*.⁶ On intellectual property protection, the treaties on industrial property, registration of trade marks and prevention of false indications of origin on goods (all 1911), each built on the head treaties of 1883 and 1891, respectively, as did, similarly, two additional treaties on copyright (1908 and 1914), following the head treaty of 1886. The convention for an international bureau to gather and share commercial statistics (1913) was ratified but that for organising international exhibitions (1912) was not.⁷

International communications and transportation, both of which also had strong commercial aspects, were the next largest groups, depending on how they are counted. On transportation, there were four: on maritime transport, two preliminary protocols (1905) led, to a convention each on, respectively, collisions and salvage (1910); one, on railways (1907), amended earlier conventions; on newer transport subjects, there was one on the international circulation of motor vehicles (1909), while another on air navigation was drafted but not signed (1913).⁸ A convention on the *Safety of Life at Sea* (1914), a response to the *Titanic* disaster, was signed but not ratified, due to the war. On communications, there was one on the well-established

⁵ Just prior to the conference, two instruments for accession were signed. One was a protocol for the accession to the 1899 convention on the Pacific Settlement of International Disputes by original non-signatory states. The second was Britain's belated accession to the 1899 Hague Declarations on, respectively, *Expanding Bullets* and *Asphyxiating Gases*.

⁶ Stéphane Castonguay, 'Creating an Agricultural World Order: Regional Plant Protection Problems and International Phytopathology, 1878-1939, *AH*, 1, Winter 2010, pp. 46-73.

⁷ The *Bureau International des Expositions* was created by a successor convention in 1928.

⁸ This was the precursor to the *Air Navigation Convention* of 1919.

subject of postage (1906), while two agreements on telegraphs (1903 and 1908), do not appear to have been formal treaties. There were also three on the new subject of radiotelegraphy (1903, 1906 and 1912).⁹ A convention to create the *BIH* (1913), to coordinate internationally, measurement of time, for more effective scheduling of modern faster-moving transportation (initially, railways) and communication, was signed but not ratified.¹⁰

Of the remaining approximately 25% of the total, those treaties on, respectively, pharmacopoeial drug formulas (1902 and 1906) and the *OIHP* (1907) were clearly on public health. The treaty on restricting African liquor traffic (1906), like the declaration (1910), amending the Brussels' *General Act* of 1890 on arms trafficking in Africa, both really only regional and plurilateral, might be deemed as either 'native protection', anti-transnational crime or, for the former, health, measures. The head opium convention (1912) and three protocols (1912, 1913, 1914) might also be deemed to be either on health or anti-transnational crime. The *projet* (1904) and convention (1910) on white slave trafficking, like that on obscene publications trafficking (1910), were certainly anti-transnational crime measures. The treaties prohibiting white phosphorus matches and women's night work (both 1906) were clearly on labour protection, although they, along with those on white slave trafficking, may also be seen, along with the original slave trafficking treaties, as human rights protection.

Another new subject was nature protection. Less known than the Continental-only treaty on birds (1902), mentioned above, is the proposed multilateral treaty against bird plumage trafficking (1908-14), ironically frustrated by France (sponsor of the 1895 and 1902 bird protection treaties) and, then, war. This did lead to the bilateral treaty between Britain and the *USA*, on North America's migratory birds (1916). The plurilateral treaty on North Pacific fur seals and associated protocol on polar marine life, generally, (1911) was more about 'preservation' of commercial natural resources, not, 'protection' (the term used for birds).¹¹

The number of bilateral treaties also continued to increase in this period, mainly on already well-established subject matters, notably commerce and extradition. The notable new subject was on arbitration, which had started to appear in the latter 19th century, on specific matters of dispute, but was given greater impetus by the creation of the *PCA* in 1899. From 1901, there were a smaller number of specific arbitration treaties but many more, usually of fixed terms, on 'general arbitration', especially between European governments, though including some of

⁹ Internal records attest that four instruments were signed at Berlin in 1906 but, like the four protocols on labour protection signed at Berlin, in 1890, they do not appear in standard treaty lists.

¹⁰ France proposed at the *Conférence internationale de l'heure radiotélégraphique* the creation of *Le Bureau International de l'Heure (BIH)*, which became the executive body for the *International Time Commission*, one of two subsidiaries of the *Union astronomique internationale* (1919).

¹¹ The first steps towards a treaty protecting whales were also stalled by the war.

the Americas. In 1913-14, the USA led the conclusion of thirty similar 'peace commission' treaties, which also straddled the Atlantic. A few more were concluded during the war.¹²

The driving force behind these new types of treaties, continued to be almost entirely not governments but the '*la voix publique*', to invoke the phrase first applied in 1815 to the call for the suppression of slave trafficking. Many new *NGOs* emerged in this period.¹³ Originally, there were long-established, traditional organisations, which were not specifically formed for the issues in question, such as religious bodies, especially on moral or social issues, including traffic in slaves, drugs, obscene publications, white slaves, liquor, arms and plumage birds. Others included private commercial bodies, lobbying on commercially based treaty subjects, including on international trade, navigation, copyright, transportation and communications. On some issues, these bodies took opposing views, such as over commerce or trafficking in drugs and plumage birds. For treaties on the conduct of war, there was some agreement between such groups, perhaps, with different motives, for lessening the impact of war. A sharp dichotomy in such motives was not always the case, as, for example, the *Anti-Corn Law League*, which included Quaker leadership, had moral as well as commercial inspirations in championing 'free trade', seeing it as a pathway to peace.¹⁴

Long established religious organisations were often the original and most respectable base for pressure on governments for legislation and treaties. The most active of such were undoubtedly those of Non-Conformist Protestantism, whose doctrines placed more emphasis on the protestation of faith, rather than the more passive propagation of faith of the Anglican and, especially, Catholic churches. Amongst the former, the small but wealthy Quaker sect often provided early leadership, notably on creating peace societies and opposing slave and opium trafficking. Presbyterians, Baptists, Congregationalists and Methodists were also very important. Quakers led the way on issues of war and peace. On the white slave traffic, although it was Non-Conformist Liberals who took the lead, Anglican bishops soon became supporters, as did eventually the Catholic Church and Jewish groups. On labour protection, the role of such groups was less pronounced, although the Vatican did voice its support for Catholic workers in Europe. Most of the churches, with the national-based Church of England an exception (though it was imperially linked), had inherent transnational linkages, at least within the English-speaking world, which encouraged an international outlook and action.

¹² The senate ratified 22. Editorial comment, 'Mr. Bryan's Proposed Commissions of Inquiry', *AJIL*, 7(3), July 1913, pp. 566-70 & 'Secretary Bryan's Peace Plan', *AJIL*, 8(3), July 1914, pp. 565-71; Denys P. Myers, 'Status of the Treaties for the Advancement of Peace (Bryan Peace Treaties)', *AP*, 77(3), March 1915, p. 66; George A. Finch, 'The Bryan Peace Treaties', *AJIL*, 10(4), October 1916, pp. 882-90

¹³ The only general works on this are Lyons, *op. cit.* and Davies, *op. cit.*

¹⁴ In one striking example discovered in research for this thesis, the British government's decision in the late 1830s to approach several governments for its first bilateral treaties on copyright arose from written representations of British authors and publishers.

From this religious base, non-denominational groups were sometimes formed from a number of the above sects, with a more secular nature. Some were not focused on a specific secular issue, such as the *YMCA* and *YWCA*, whereas others, such as the *WCTU* were. The latter also broadened its concerns from liquor consumption to other issues, notably trafficking of opium, white slaves and obscene publications. These bodies were also important in developing overseas branches—international and imperial—and other forms of linkage, which spread their influence. Opportunities for female public voices in such bodies, otherwise denied in most governments, also led to exclusively female *NGOs*, driven by concerns over enfranchisement, alcohol, marriage laws and prostitution, notably the *IWSA* and *ICW*, plus affiliated, local *NCWs*. They proved very important in the campaigns against trafficking in females, drugs and bird plumage, plus protection of female workers.

On specific issues, ‘umbrella’ organisations or, to use today’s term, ‘peak pressure groups’ were formed to unite like-minded but disparate public voices for more effective action. On the conduct of war, peace societies were formed in both the *USA* and Britain in 1815-16 and led campaigns over the later Hague peace conferences. Conversely, powerful naval, shipping and commercial interests were behind the failure of the *Declaration of London*. On bird protection, a conference in Switzerland in 1873 led to the founding of the *International Ornithological Congress* in Vienna (1884), which convened in different European capitals, thereafter, every five years. With Britain’s branch exclusively male until 1909, women took the lead in forming the more strident (*Royal*, from 1904) *Society for the Protection of Birds* in 1889-91. Scientists of the *Zoological Society of London* and *British Museum* led the early campaign on whale preservation. On opium trafficking, which was of most public concern in Britain because of its leading role in the trade, the *Edinburgh Committee for the Suppression of the Indo-Chinese Opium Traffic* (1859) and Quaker-inspired *Anglo-Oriental Society for the Suppression of the Opium Trade* (1874) led that campaign throughout the empire, while co-operating with similar foreign organisations, especially in Shanghai. On white slave and obscene publications trafficking, the British *NVA* (1885) coordinated imperial and international efforts through the international *IBSWST* (1892).

On labour protection, trade unions and their later national confederations did not lead the campaigns. They were male-dominated, while the earliest causes were mainly concerned with female employment. Unions also preferred collective bargaining to legislative reform, (until they established labour parties), and, only belatedly, developed international linkages. Labour elements, which did have an international approach, were mainly radical socialists, often favouring revolution over reform. Many liberals, active in many reform campaigns, were less inclined to support labour issues for both ideological and commercial reasons. (Many liberals,

notably Quakers, being businessmen, were unfriendly to trade unions.) Women's organisations, such as the *IWSA* and *ICW* and its British affiliate, tended to be predominantly *bourgeois*, without much knowledge of or interest in industrial issues. So, when the *IALL*, and its subsidiary, the *IOT*, was formed in Continental Europe in 1900-01, there was no British involvement. Soon, though, some radical liberals and moderate socialists, especially female, embraced these causes, especially those intended to protect female workers, and formed the *BALL* (1905). This leading role of the public voice in treaty making has been overlooked.

Governmental officials often regarded this 'voice' initially with disdain—deprecating 'anti-opiumites', on drug trafficking, as they had, a century prior, 'anti-sacharrites' on slave trafficking. In so doing, such officials were simply representing the established dominant commercial interests against their opponents. Often, sections of government became divided against each other in supporting different sections of the 'public voice'. In many cases, officials ultimately moved towards support of the opposing section of that 'voice'.

2. Britain and treaty developments, 1900-14: 'we cannot refuse if everyone else agrees'

The British government, though often not its people, initially, continued in this period to be more a follower than leader of Europe in this striking development of the treaty system. This is evidenced by the above statistics on which governments proposed treaties, hosted treaty conferences and led treaty negotiations. Even the new global power, the *USA* began to assert itself in this regard, despite its greater involvement in the Americas. The *USA*, supporting China, led the international push for the landmark opium convention (1912). Britain, as was often the case on multilateral treaties, preferred its own course, which in this case was a bilateral path through which it bullied a weak China. Ultimately, Britain found on this, like several other issues, that despite being the pre-eminent global power, it could not stand out from the increasing multilateralism. Attesting to this are the words of under secretary for the colonies, John 'Jack' Seely, in 1910, with respect to the unwelcome *USA*-proposed opium conference. 'Plainly, we cannot refuse if everyone else agrees'.¹⁵ This often proved to be the case. By 1914, however, Britain had largely caught up with Europe on most treaty subjects.

Of bilateral treaties, Britain concluded just over 300 from 1901 through 1914. The average annual rate was initially in the mid-teens, rising to the mid-twenties. Understandably, this rate dropped during the war years of 1915 to 1917, before reviving from 1919, with the peace conference.¹⁶ Of these, the largest category was broadly on commercial matters (approximately 80 or 26%). By far the greater number was on commerce and/or navigation,

¹⁵ Minute, Stubbs, 16 June 1910, CO129/372/144, TNA.

¹⁶ The totals in the main war years seventeen (1915), eleven (1916) and nine (1917) fifteen (1918) and back to seventeen, with peace, in 1919.

some of which specifically concerned relations between Britain's colonies and foreign governments, such as between Japan and Canada (but none, specifically, on Australia).¹⁷ There was also a small, diverse clutch of smaller sub-categories, such as commercial travellers' samples, deceased seamen's estates, opium trading, trademarks (though, along with copyright, this had declined as a subject of bilateral treaties, after the respective multilateral conventions of 1891 and 1886), plus real and personal property.¹⁸ There were also four with the *USA* on *North Atlantic* fisheries, some directly effecting Canada and Newfoundland, which could also be considered as on spheres of interest. During the war, Britain signed only five more commercially related treaties.

Britain's second largest bilateral treaty category (about 67 or 22%) covered semi-traditional subjects, mainly territorial boundaries of possessions, navigation of boundary waters, spheres of interest, alliance (two, Japan, 1902 and 1911), protectorates and guarantees of another's territorial integrity (one each). The largest sub-total was on land and water boundaries (which sometimes included navigation) in Africa or the northern hemisphere.¹⁹ There were two treaties on the related subject of dynastic marriages. From the war to 1920, Britain signed a further eleven in this traditional category.

The total of the third largest bilateral category (about 50 or 16%), on extradition alone, is arguably misleading as, by 1901, Britain had almost completed its global network of such treaties, dating from the 1870s, and, by then, extending to nearly every sovereign government.²⁰ The only original extradition agreements from 1900 to 1914 (or, even, up to the peace settlement in 1919) were with Serbia, Peru, Nicaragua, Paraguay and Greece. The remaining 45 merely amended or renewed earlier treaties. Britain only signed two more during the war and four in 1919, all on existing treaties. The fourth category, almost as large (47 or 15%), was on the new subject of general arbitration.²¹ Through 1914, Britain also signed eleven on specific arbitration issues and, from 1903, 33 general arbitration treaties,

¹⁷ Britain's network of bilateral, reciprocal trade treaties may be seen as a major foundation for the eventual conclusion of the multilateral *General Agreement on Tariffs and Trade* (1947), notwithstanding Britain's retreat from 'free trade' after the First World War.

¹⁸ The two bilateral treaties (with China and Portugal) might also be seen as contributions to suppress the traffic, although both regulated rather than banned it outright.

¹⁹ The treaties with France (1904) and Russia (1907), which established the so-called *entente*, were on spheres of influence, creating only an informal alliance. There were none on peace settlements, with the *Treaty of Vereeniging* of 1902, which ended the second Boer War, not listed by the *FO*.

²⁰ I have included two treaties concluded in late 1900.

²¹ As mentioned above, dating from 1869, Britain had signed ten bilateral treaties concerning arbitration of specific issues with certain foreign governments, with the 'Alabama' arbitration (1871-2) with the *USA* being the most important. (Almost at the same time Britain began its major effort of signing bilateral extradition treaties.) Three of those were with the *USA*, with whom Britain signed an, ultimately unratified, general arbitration treaty in 1897 and a trilateral treaty, including also Germany, over Samoa in 1899.

some of which were only renewals. Britain also signed its first bilateral 'peace commission' treaty, with the *USA* (1914) and three more in 1918-19 (Peru, Chile and Brazil).²²

Communications treaties, collectively, were the fifth largest bilateral group, with 42 or 14%, including on parcels and posts (seventeen), postal money orders (fifteen), telegraphs (eight) and telephones (two). In some cases, they applied to foreign relations with certain British colonies. Many of the first two sub-categories were renewals or revisions of earlier treaties.

The remainder of Britain's pre-1915 bilateral treaties (about eighteen or 5%, excluding one in 1914 on the war itself) was spread sparsely over a diverse range of subjects, including six on various aspects of maritime navigation (with the *USA*, France and Spain), three on 'sleeping sickness' prevention (all with Germany), two on nationality (both with Haiti), two on repatriation of pauper lunatics (France and Germany), one each on restriction of arms importation into 'native' areas and on workmen's compensation, both with France.²³

On multi-party treaties, the point has been made that Britain, although not generally a leader, usually supported these mainly European initiatives. So, Britain ultimately adhered to most multilateral treaties, also legislating where necessary, with only a few exceptions.

On the various specific subjects of commerce, including agriculture, Britain's participation was mixed. Britain had been party to plurilateral treaties with the Continent on ending subsidisation of sugar production, since the mid-19th century and signed the wider Brussels treaties (1902 and 1907), although it withdrew from the head agreement in 1913. This suggests that the sugar producers' influence, especially in the West Indies, overcame that of home consumers.²⁴ Britain did support and sign the convention in Rome (1905) for the establishment, in 1910, of the *IISA* but did not attend the French-sponsored conferences of 1910 and 1912 nor sign the resulting plurilateral convention (1912), which later created an international bureau for studying the analytic chemistry of human and animal food.²⁵ Britain's ultimate attitude to the Rome convention on phytopathology (1914) is uncertain as, despite signing the conference's *Final Act*, war prevented the convention coming into force.

On protection of intellectual property, Britain, despite some reservations over the *Additional Act* of 1896, signed both it the modifying convention on copyright (Berlin, 1908) and

²² The renewals were with France, Italy, Spain, Germany, Sweden, Norway, Switzerland, Portugal, *USA*, Austria-Hungary, Netherlands, Denmark and Argentina. Most (twelve) of these, though obviously not those with Germany and Austria-Hungary, were renewed during the war. Uruguay signed an original treaty in 1918. Britain signed 'peace commission' treaties with Peru, Chile and Brazil in 1918-19.

²³ Between 1914 and 1919, Britain signed a group of bilateral treaties (24) specifically on the war.

²⁴ *Sugar Convention Act 1903*, 3 Edw. 7, c. 34.

²⁵ *Bureau international permanent de chimie analytique pour les matières destinées à l'alimentation de l'homme et des animaux*. This was signed in 1912 by France, Denmark, Austria-Hungary, Italy, Mexico, Portugal and Uruguay but the bureau was not established until 1923.

additional protocol (Berne, 1914). Britain also continued to sign treaties on protection of industrial property and prevention of indications of false origins of goods but again declined that on international registration of trademarks (all, Washington, 1911).²⁶ Britain signed the German-sponsored convention and protocol to reduce the number of and make more effective international exhibitions (Berlin, 1912) but the war prevented it being ratified. (Britain would sign its French-sponsored successor in 1928.) Britain had earlier been keen on its empire's support for the Brussels convention (1890) on publication of customs tariffs and signed the related Belgian-sponsored convention on sharing commercial statistics (Brussels, 1913).

Communications and transport were directly related to commerce and navigation, with the former being a long-standing multilateral treaty subject. Britain, although a late starter in this area of multilateralism in the 19th century, hosted the conference to revise *ITU* regulations (1903), which, like its successor, (Lisbon, 1908), it signed, though neither appear to be formal treaties. Britain also signed the successor *UPU* convention (Rome, 1906). Britain signed the preliminary protocol (Berlin, 1903), led by its great naval rival, Germany, which resulted in the head convention on radiotelegraphy (Berlin, 1906) and, then enacted, its foundational domestic legislation.²⁷ With radiotelegraphy of great importance to shipping, Britain hosted the conference for the successor convention (London, 1912).²⁸ Universal time was especially important for infant radiotelegraphy and Britain supported the creation of the *BIH* (1913).

On maritime transportation, Britain guarded its globally pre-eminent shipping position closely. Reflecting those interests, the three multilateral treaty conferences that Britain hosted in this period (excluding the non-treaty *ITU* conference of 1903) were those on maritime warfare (1909), radiotelegraphy (1912), which was mainly about shipping communications, and safety of life at sea (1914). Britain did not join Continental governments in forming the *ISA* (1903). Britain had long resisted overtures from European powers and the *USA* to join multilateral efforts to develop international maritime law on collisions and salvage at sea. The ghosts of the *Navigation Code* continued to haunt British international policy. Britain only belatedly attended the first such conference (Brussels, 1905), which only concluded preliminary agreements, but, ultimately, Britain signed both resulting head conventions (Brussels, 1910) and supported the war-interrupted negotiations for two more conventions, respectively, on shipowner's liabilities and maritime liens.

²⁶ On the only multilateral, private international law convention in this period, that on civil procedure (The Hague, 1905), Britain was sympathetic, unlike many others, but with reservations, and, so, did not accede before the war.

²⁷ *Wireless Telegraphy Act 1904*, 4 Edw. 7, c. 24 & *Wireless Telegraphy Act 1906*, 6 Edw. 7, c. 13.

²⁸ D. W. Todd, 'The International Radio Conference of London', *JASNE*, 1912, 24, pp. 1328-52.

On other forms of transportation, Britain did not sign the latest Continental railway agreements (1907 and 1912), just as it had not the 19th century conventions, only because it had no relevance to it, yet, being an island. Perhaps, surprisingly, given the same geographic grounds, Britain not only signed but also legislated with respect to the *Convention for the International Circulation of Motor Vehicles* (Paris, 1909).²⁹ Britain participated in the French-sponsored conference on aerial navigation (Paris, 1913), which drafted but did not conclude a convention. This appears to have influenced, as with radiotelegraphy and motor vehicles, Britain's inaugural domestic legislation.³⁰

On public health, Britain strongly supported new sanitary conventions (Paris, 1903 and 1912) and the conventions, respectively, for unifying internationally pharmacopoeial formulae for drugs (Brussels, 1902 and 1906) and creating the *OIHP* (Paris, 1907).

The suppression of opium trafficking, whether held as a matter of public health or transnational crime, was a major public issue for the British government, which however, was reluctant to act due to the enormous financial interest of, mainly, British India. Britain preferred gradual reduction of the trade through bilateral agreements with a weak China. The *USA* pressured Britain into attending the *Shanghai Commission* (1909) and conferences of 1911-12, 1913 and 1914 (The Hague), only by extending the matter to heroin, morphine and cocaine, the trade in which, rival Germany largely led. Britain signed the head convention (The Hague, 1912) but not the protocol (The Hague, 1914) putting the convention into effect. (Only China, the *USA* and the Netherlands signed, all in 1915). Britain only became party to the convention through the peace treaty, ensuring Germany was bound (Versailles, 1919).

Labour protection, a new subject of multi-party treaties, was also linked to commerce. Germany led on this, hosting the conference (Berlin, 1890), which signed four preliminary protocols, while Switzerland hosted the non-governmental *IALL* from 1900. The British public did not widely embrace this cause, although Britain subsidised the *IALL*, legislated to create labour offices in London councils in 1903 and the *BALL* was established in 1905.³¹ Britain, as confident in its factory, as much as its bird protection laws, was diffident about the Swiss-hosted conferences of 1905 and 1906. Although wary of any restriction of commerce, Britain did sign the women's night work convention (Berne, 1906) but hesitated over prohibiting white phosphorous matches. Ultimately, a shift by influential match manufacturers, towards using only red phosphorous matches, led the government to sign also

²⁹ *Motor Vehicles (International Circulation) Act 1909*, 9 Edw. 7, c. 37.

³⁰ *Aerial Navigation Act[s]*, 1911, 1 & 2 Geo. 5, c. 4; 1913, 3 & 4 Geo. 5, c. 22.

³¹ *Labour Bureaux (London) Act, 1903*, 2 Edw. 7, c. 13.

that convention (1907). Britain was also involved in the first international steps for a convention on juvenile labour conditions, only temporarily interrupted by the war.

International nature ‘protection’ blurred with ‘preservation’ of natural living resources, as another new subject of multilateral treaties. On bird protection, campaigners sometimes invoked agricultural arguments, despite the overwhelming evidence that their true motives were of a moralistic kind. Britain neither attended the Paris conference nor signed the treaty (1902), despite having signed the preliminary protocol of 1895, on ‘birds useful to agriculture’. Britain held that its existing domestic legislation was sufficient, though this treaty appears to have led indirectly to further British domestic legislation.³² Britain ultimately did champion (ironically, against France) the unsuccessful efforts between 1908 and 1914 for a multilateral treaty to suppress trafficking in bird plumage, after being pressured by its domestic (including colonial) bird protection lobbies (see above), against opposition to restrictive legislation from the *BoT*-supported millinery industry. Concluding the treaty was frustrated, first, by France and, then, the war, although Britain concluded a bilateral migratory bird protection treaty with the *USA* for North America in 1916 and, finally, legislated in 1921, without a treaty, against the plumage traffic.³³

Britain’s conclusion of treaties on fisheries, including sealerries, in the 19th century, was certainly more about ‘preservation’ of natural resources. (As was the French-sponsored protocol of 1895 and convention of 1902, cited above, on protection of birds ‘useful to agriculture’.) The very title of the plurilateral *Convention respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean* (Washington, 1911), whose conclusion was led by Britain and the *USA*, suggests the slow shift away from a purely commercial motive for protecting nature. The *FO*’s Louis Mallett explained the need for this treaty, as being ‘in the interests both of humanity and commerce’.³⁴ The associated protocol, moreover, on protecting polar marine life, was the first step towards the Antarctic treaty (1959). Britain was also a leader in the first moves to protect whales, initially inspired by scientific concerns, though the dominant commercial motive of resource preservation, was exposed when war interrupted progress and enhanced the need for glycerine from whales.

Issues of transnational crime, apart from those earlier on piracy and slave trafficking, increased with the expansion of international commerce and transportation. Britain had certainly led the treaty making on anti-slave trafficking, which by 1901, was rarely the subject of new treaties, though Britain was party to the declaration (Brussels, 1910) modifying the

³² *Wild Birds Protection Act*[s]; 1902, 2 Edw. 7, c. 13; 1904, 4 Edw. 7, c. 4; 1908, 8 Edw. 7, c. 11.

³³ *Importation of Plumage (Prohibition) Act 1921*, 11 & 12 Geo. 5, c. 16.

³⁴ Letter, *FO* (Louis Mallett) to *CO*, 11 November 1910, CO209/272/121-4, TNA.

Brussel's *General Act relative to the African Slave Trade* of 1890. Earlier, Britain was also party to the *Convention respecting the Liquor Traffic in Africa* (Brussels, 1906). Britain resisted public demands to host an international conference on suppressing the white slave traffic and attended the French-convened conference (Paris, 1902) with reserve. Nonetheless, Britain joined the other parties in ratifying the resulting preliminary *projet* (1904), as well as, with greater commitment, both the resulting head conventions of white slavery and obscene publications (1910). Politically-motivated violence, then in the specific form of 'anarchism', was a new issue. Britain declined Germany and Russia's invitation to attend the conference or sign the secret, plurilateral protocol (St. Petersburg, 1904), due to concerns over political freedoms in autocracies, while promising close police cooperation.³⁵

On conduct of war, Britain only signed and ratified the three Hague conventions (1899) in 1900 and did not accede to two of the three declarations, on asphyxiating gases and expanding bullets, until 1907. Britain did not sign the third Declaration (1899), prohibiting bombing from balloons, but was one of only three to sign the new convention on this in 1907, though, significantly, probably because it did not include the original 1899 phrase '*or by Other New Analogous Methods*', which would have placed aircraft under the ban. Britain did not sign the convention on exemption of hospital ships from harbour dues (1904), because private commercial interests owned the relevant harbour facilities, complicating domestic application. Britain signed the *Geneva Convention* on the use of the Red Cross symbol (1906), with reservations over the need for legislation. By 1911, Britain was prepared to withdraw the reservations and legislate, although granting those commercial interests, using the symbol, a time of grace to cease so doing. Britain signed all the instruments concluded at The Hague in 1907, except for that on Germany's proposed international prize court, which only Nicaragua signed and did not come into force. Subsequently, Britain did not join most signatories in ratifying the conventions, respectively, on the *Adaptation to Maritime Warfare of the Principles of the Geneva Convention* and *Rights and Duties of Neutral Powers in Maritime War*. Britain did try, unsuccessfully, to lead an alternative path through the unratified *Declaration of London*. British naval and commercial, including shipping, interests were sharply divided over the issues at stake.

Britain's overall record in treaty making between 1901 and 1914 was one of general support for, though rarely as a leader of, these developments. The same cannot be said, in many instances, about the British public which, enjoying a fairly wide franchise, relatively open government and a well organised civil society, was often a world leader in the campaigns for

³⁵ Undoubtedly Britain's strong emphasis on the right of free political expression and suspicion of autocratic monarchies were the main factors here, as they had been in Britain's delayed agreement to Continental requests for bilateral extradition treaties. HO144/757/118518, TNA.

some of these measures. Sometimes, these public campaigns were opposed by commercial interests, to whom, the government often showed greater sympathy. Commercial interests, however, often drove treaty-making on commerce, transport and communications, even rules on the conduct of war. Pressures from foreign governments commonly drew often sceptical, hesitant, reluctant or, even, resistant British governments into this international treaty cooperation. When that did happen, Britain turned to its colonies to follow its lead.

3. Britain and its colonies on treaty-making: 'a quasi-separate international status'

In the first decade after Australian federation, the imperial government's unsystematic procedures for dealing with colonial accession to non-political, multilateral treaties puttered along. Generally, Britain did not consult any colonies in advance on any of the new multilateral treaties but did, shortly afterwards, invited accession. The reasons for this were probably quite practical, with the imperial government not wishing to over-complicate its treaty-making process by encouraging potentially up to fifty separate colonial viewpoints. Britain's delegates represented the whole empire but, if dissatisfied, colonies could decline accession. This approach caused no great problems, at first.

During 1901-05, as covered in Chapter 1, less than one new multilateral treaty a year was opened to colonial accession: those on sugar (1902), sanitary measures (1903), white slave traffic (1904) and the *IISA* on agriculture (1905). Britain did not afford prior consultation on any of these treaties to colonies, which were only afterwards advised and offered accession. Colonies, which had adhered to the Brussels sugar convention, were only collectively represented on the resulting *PSC* by a single, non-voting imperial delegate.³⁶ Colonial adherents were able from 1907 to appoint representatives to the *IISA*'s permanent bureau in Rome, which did not make formal decisions. Britain allowed separate representation at and signature of the non-treaty agreement in London (1903), to its *ITU* adherents, then, being India, Australia, *NZ*, Natal and Ceylon. The treaty-making conference in Paris (1903) on revised sanitary measures, was different. There was extensive discussion between the *FO* and *CO*, as to whether to offer self-governing colonies separate conference representation. The ultimate decision was not to so do, due to the differences, which existed between some colonies and, also, with Britain, over the preferred approach to dealing with transnational diseases.

In the next period, from 1906 to the imperial conference in mid-1911, these patterns did not greatly change, though multilateral treaty numbers slowly began to increase. Firstly, Britain notified colonies (see Chapter 2) of the earlier hospital ships convention (1904), although it

³⁶ Letter, Wellesley to Grey, 17 September 1906; minute, Green to Johnson, 20 September 1906; minute, Johnson to Lucas, 20 September 1906; letter, *CO* to *FO*, 22 September 1906, CO323/519/532-50, TNA.

did not sign what was, in any case, a political treaty, to which separate colonial accession would not have been offered. The new need for domestic application of this and some other later treaties, on rules for the conduct of war, drove this change. This was also the case, as was shown above, with the Geneva or Red Cross convention of 1906 and some of the Hague conventions of 1907. Of the non-political multilateral treaties signed in 1906, white phosphorous matches, night work for women (at a single conference, as detailed in Part 2) and pharmacopoeial formulae for drugs, Britain offered colonies only later consultation and invitations to accede. These treaties did not result in the creation of a *PGIO* or plans for future conferences, that in Berlin on radiotelegraphy in 1906 did. Colonies were not invited to attend but were consulted in advance. Article 12 of the resulting convention provided that adhering parties were allowed maximum of six votes, including for dependencies, which were 'to be regarded as forming a country'.³⁷ Thereafter Britain actively urged the self-governing colonies to adhere, as it had with the *UPU*.³⁸

The other exception to the overall pattern was the *UPU* conference in Rome in mid-1906, which concluded a successor convention and six additional minor instruments. The *UPU* was the one *PGIO*, on which colonies then had voting rights. After 1875, Britain had first secured a vote for both India and Canada, plus a joint single vote each for both Australasia and all Britain's other colonies. The Commonwealth had asked to adhere in mid-1901 but maladministration in the *CO* delayed this until 1904. Then, the Commonwealth had assumed the single collective vote of its states, leaving *NZ* out. While the next scheduled *UPU* conference was successively postponed, from 1903 until 1906, Britain strongly pitched, without optimism, for an additional three votes covering, respectively, *NZ*, a combined South Africa and all other colonies. Anticipating foreign opposition, *NZ* was Britain's first preference. Ultimately, despite some opposition in the conference, *NZ* was awarded voting status. These colonies were all separately represented at the Rome conference.

In 1907, apart from the multiple Hague conventions, which did not contain the 'colonial clause' for separate adhesion (nor, as seen above, was prior consultation afforded), there were two multilateral treaties, one creating an international health bureau and another, modifying regulations of the metric convention of 1875. The imperial government did not consult the colonies on either subject, only later inviting their adherence to the former. On the latter, Canada took the unprecedented step, of asking in 1906 for adherence to the 1875 convention and for separate representation at the impending conference in 1907, arranged to amend the convention. This unusual solo colonial initiative was accepted readily by Britain.

³⁷ *International Radiotelegraphic Convention*, Berlin, 3 November 1906, EIF 1 July 1908.

³⁸ CO323/518/58-81, 239-44; CO323/530/3-9; CO323/534/197-207, TNA.

Copyright had proven a more vexed issue for the empire, with Canada, in particular, asserting a constitutional right to local legislation: a position the Commonwealth slowly adopted. Britain, seeking tight control of this treaty subject, had not offered separate colonial representation at the Paris revision in 1896, of the head convention (1886). By the time of the postponed conference in Berlin in 1908, much had changed in imperial relations. Some in the *CO* now thought representation should be offered, a proposal with which the responsible office, the *BOT*, was comfortable. Continued disagreement with the colonies, led first to an alternate suggestion, then abandoned, of a specialised colonial conference, held in Ottawa to placate Canada. In the end, Hopwood, deputy colonial secretary, had the colonies only briefed in advance on Britain's position, while deliberately leaving it to them to raise the question of their separate representation. None did.³⁹ Subsequently, Britain applied the revised convention by imperial legislation in 1911.

Subsequently, Britain generally continued with its standard practice of only advising colonies after the conclusion multilateral treaties. The convention on the international circulation of motor vehicles was signed in Paris in October 1909. The *CO*, aware that it was of little relevance to overseas colonies, did not ask for colonial adherence until January the next year.⁴⁰ The lag in advising colonies of the conventions on the white slave and obscene publications traffic, both concluded in May 1910 was detailed above. The *CO* saw no need to consult colonies, except some in Africa, on the Brussels conferences of 1906 and 1910, respectively on liquor and arms traffic, including revision of the *Declaration* attached to the Brussels' *General Act* (1890).

Maritime law was a subject, like copyright, over which Britain wished to retain close control.⁴¹ In 1908, after nearly a decade of refusal, Britain joined the Continental-based *Permanent International Association of Navigation Congresses*, extending an invitation in 1910 to the self-governing colonies to do likewise. A surprise followed, when Britain learned that Canada, alone, had already joined.⁴² In 1906, Britain considered the results of the previous year's *CMI* conference in Brussels, which it had belatedly attended. Four multilateral conventions were there proposed, covering collisions, salvage, shipowner's liabilities, plus maritime mortgages and liens, to be considered at successive conferences. Britain recognised the great importance of achieving legislative uniformity in the empire but

³⁹ There are numerous minutes discussing this at CO532/8/37-46, 90-111, 140-6, 162-75, 316-26, TNA.

⁴⁰ CO323/567/24-33; CO532/21/41-6, TNA.

⁴¹ CO532/8/252-62

⁴² CO532/22/32-40, TNA.

held that the best way of this being realised was, by asking for the colonies observations without involving them in the conference of 1910.⁴³

On protection of industrial property, Britain had been working through 1909-10 to induce greater uniformity in the relevant laws of the self-governing colonies, who proved unenthusiastic over an imperial conference on the subject. Only Australia and NZ were adherents to the head convention (1883), whose next revision, since the last conference 1890, was to take place in Washington in May 1911, starting just days before the planned imperial conference in London. Australia and NZ were Britain's only colonial adherents, and when the *BoT* 'privately' raised their separate in Washington, the *CO* responded that there was no provision for this in the head convention and decided, as with copyright, not to raise it, unless those colonies did. They, again, did not.⁴⁴ In late December 1910, however, the *USA* informed the *FO* that its original invitation in August had 'included the British Colonies and Protectorates' (literally, it did not) and had invited Canada, directly through the *USA* consul in Ottawa, to attend.⁴⁵ The *CO* was more offended than the *FO* by this breach of diplomatic protocol but agreed that the strength of Canada's commercial links with the *USA* and potential value at the conference overrode these concerns. Ultimately, non-adhering Canada sent two representatives, while adhering Australia and NZ sent none. This led the *CO* to have the British delegates ask that Union to afford at future such conferences separate votes and signatures for any of the four 'great' self-governing colonies, which had adhered: which, if secured, would be the third such case after the *UPU* and *IRTU*.⁴⁶

Then, in mid-1911, came the imperial conference and the Commonwealth's challenge over the lack of consultation over the *Declaration of London*, detailed above. Barton had raised prior consultation of colonies over bilateral commercial treaties at the 1902 colonial conference and now, his former adviser, Atlee Hunt strongly counselled his Labour ministers on this right, even on this political treaty, especially as it carried important commercial implications. After some hesitation, Fisher vigorously pursued this line at the imperial conference. He softened his resolution of 'regret' over a lack of consultation, submitted prior to the conference, which was there melded with Grey's concessions and adopted unanimously as the conference's lead resolution. Britain, thereby, committed, 'where time and opportunity and the subject matter, permit, . . . as far as possible', to afford these colonies an opportunity to consult over the framing of Britain's treaty delegates' conference instructions, while resulting conventions, 'provisionally assented to', at such a conference, would be circulated to

⁴³ CO323/518/116-44; CO323/519/528-31; CO532/8/252-62; CO532/31/190-204, TNA.

⁴⁴ Minute, Johnson to Harris, 23 November 1911, CO532/22/321-5, TNA.

⁴⁵ Letter, Whitelaw Reid to Grey, 5 December 1910, CO532/21/595-601, 614-18, TNA.

⁴⁶ Letter, Just to Mallett, 1 June 1911, CO532/32/95-101, 135-42, TNA.

the colonies for their consideration, prior to Britain signing.⁴⁷ Later, British officials admitted privately that they had ‘turned over a new leaf’ on consultation of the major colonies, even on political treaties.⁴⁸

The new imperial stance was soon put to the test. Four multilateral treaties were already under negotiation with conferences scheduled: on drug trafficking (1911), sanitary measures (1911), radiotelegraphy (1912) and international exhibitions (1912). On drug trafficking, in 1909, the *USA* had pushed Britain into inviting Canada to be represented (within the British delegation) at the non-treaty making Shanghai commission. Britain then invited the Commonwealth, which declined, though it sent a report. Now, in November 1911, Just felt that the five colonies should be given ‘the chance of taking part’, although he doubted that any would attend.⁴⁹ Harcourt concurred. Only Canada, again, appears to have given the matter due attention, though its new conservative government only asked that they be informed of any results. The *FO* was relieved: ‘It is to be hoped that the same answer will be received from the other Dominions!’⁵⁰ It was not disappointed. All four other colonies declined.⁵¹

Britain adopted a much more traditional approach to the Paris sanitary conference, also opening in late 1911. Officials had discussed and rejected colonial representation at the previous conference in 1903, due to the various policy disagreements, which existed within the empire. The *CO*, however, only agreed to this because it thought that that conference would only be of a preliminary character. As an alternative, then and now, it proposed a *CO* official be included in the British delegation, to represent the colonies. Then, the unexpected and extraordinary request of the Commonwealth to qualify its 1909 accession to that 1903 convention brought all the early difficulties to the surface. Ultimately, the *FO* insisted, with the health authorities’ agreement, that there should be neither colonial nor *CO* representation. Instead, the *FO* placed importance on an adequate separate British declaration on signing, allowing colonial choice of adhesion and withdrawal. This was the assurance that the *CO* offered to the Commonwealth.⁵²

These events led the *FO* to address, belatedly, colonial involvement in the growing number of multilateral treaties. Over the last few years, the *FO* had been developing a ‘model’ bilateral commercial treaty, to meet colonial concerns and the issues this raised for the imperial

⁴⁷ *Minutes of Proceedings, 1911*, pp. 130-4.

⁴⁸ Minute, Davis to Johnson, 13 April 1913, CO532/29/390, TNA.

⁴⁹ Minute, Collins to Fiddes, Anderson & Just, 24 October 1911; minute Just, 26 October 1911; CO129/385/53-55.

⁵⁰ FO371/1076/356-8, 407-12, TNA.

⁵¹ Nearly all records of responses were destroyed. So, see the registers: FO35534, 24 October; Gov35815 NZ, 6 November; Gov36043 Newfoundland, 7 November; Gov36864 Australia, 15 November; Gov36987 & Gov39458 South Africa, 16 & 20 November; Gov38052 Canada, 25 November; all 1911, CO708/2, TNA. For Australia: 2 November, Vol. 71, CRS A11816; 14 November, Vol. 9, CRS CO78/8; Vol. 12, CRS A62, NAA.

⁵² CO532/26/285-8; CO532/30/33-56, 82-7, 95-115, 185-95; CO532/35/362-8; CO532/42/117-9, 137-48, TNA.

government. Now, the *FO* reviewed eighteen of the twenty-two multilateral treaties, which Britain had signed since, the seemingly arbitrary date of, 1894.⁵³ The *FO* then complained to the *CO* that the provisions for dependencies to accede had been ‘far from uniform’. British delegates had had to negotiate this wording for each treaty, with the final advice coming ‘often at the eleventh hour’. As Britain had far more dependencies than any other power, this was a matter of ‘particular concern’. The *FO* wanted an agreed form of words, providing for the accession or otherwise by the colonies, which could be inserted in either all treaties or, if foreign powers did not always agree to that, a separate, associated declaration to be made by British delegations on signature or ratification. Although the *FO* preferred the former method, it acknowledged that this might not be possible, if colonies had ‘serious objections’, as had arisen over the *Paris Sanitary Convention* of 1903, when the *FO* had not been able to advise the other signatories as to all its colonies’ attitudes for four years.⁵⁴

The *CO* was wary of this proposal. Berriedale Keith argued that they must emphasise to the *FO* that there was no question of allowing separate colonial adherence or withdrawal for ‘political treaties proper’, otherwise a delegate might insert a ‘most objectionable’ clause.⁵⁵ Robinson, however, was unconcerned, saying that the self-governing colonies now ‘clearly understood’ this position, as a result of the 1911 imperial conference.⁵⁶ Berriedale Keith disagreed with the *FO*’s option of a separate declaration, as a ‘confession of negligence’ in treaty drafting. So, if the ‘colonial clause’ was to be in the body of the treaty, he thought that they did not ‘need to improve’ upon that (Articles 26 and 27) in the Anglo-Japanese alliance commercial treaty of 1911, which he described as ‘moderately reasonable and sensible’.⁵⁷ This allowed for both separate colonial adhesion and withdrawal.⁵⁸ Robinson generally agreed to use this treaty as a model, with a little further modification of its phrasing.

The *CO*’s Charles Davis was the one who realised that they were dealing with new types of treaties, which needed a new, standard approach. He advised Sir Hartmann Just that, the important principles laid down by the *LOs* for bilateral commercial treaties, could not be so easily applied to such conventions, which arose from international conferences. The source of

⁵³ For some reason, the *FO* did not include the treaties on copyright (1896), postal and sanitary treaties (both 1897) and industrial property (1900).

⁵⁴ Memorandum respecting Provisions in International Conventions affecting the Colonial Possessions of the Signatory Powers, Willoughby Maycock, 24 December 1911, CO532/41/248-252, TNA.

⁵⁵ Minute, Berriedale Keith to Robinson & Just, 11 January 1912, CO532/41/245, TNA.

⁵⁶ Minute, Robinson, 16 January 1912, CO532/41/245, 245, TNA.

⁵⁷ Minute, Berriedale Keith to Robinson & Just, 11 January 1912, CO532/41/245, TNA.

⁵⁸ *Treaty of Commerce & Navigation between the United Kingdom and Japan*, 3 April 1911, London, UKTS 015/1911; Cd. 5716. Article 26 read. ‘The stipulations of the present Treaty shall not be applicable to any of His Britannic Majesty’s Dominions, Colonies, Possessions, or Protectorates beyond the Seas, unless notice of adhesion shall have been given on behalf of any such . . . by His Britannic Majesty’s Representative at Tokio before the expiration of two years from the date of the exchange of ratifications of the present Treaty.’ Article 27 read, in part, as regard the above possessions which did adhere to the treaty, ‘either of the High Contracting Parties shall have the right to terminate it separately at any time on giving twelve months’ notice to that effect.’

the ‘difficulty’ was what he called the ‘unilateral’ nature of the colonial provisions in them, unlike the mutually agreed provisions in bilateral treaties.⁵⁹ Moreover, he did not think the time limit used for colonial adhesion or withdrawal in those treaties should be included. So, he suggested, instead, the use of the colonial clause, with one slight modification, from the *White Slave Traffic Convention, 1910* or, better, the *Industrial Property Convention, 1911*. Of these conventions, that on white slavery (Article 11) allowed signatories to notify, by declaration, if it was to come into force in ‘one or more of its colonies, possessions, or consular judicial districts’, and, similarly, so denounce it for any of them.⁶⁰ For that on industrial property (Article 16), signatories had ‘the right of acceding . . . at any time on behalf of [all] their Colonies, Possessions, Dependencies and Protectorates, or of any of them, by declaration, and to denounce in the same way.’⁶¹

The same day of Davis’ advice to Just, the new sanitary convention was signed in Paris. Probably owing to the problems and delay of governments, including those of Britain’s colonies, ratifying the previous convention, the entry into force of this new convention was not until 1920. Britain did not negotiate a clause for separate colonial adhesion, instead, made a unilateral declaration at the signing that the convention did not ‘apply to any of the colonies, possessions or protectorates of His Britannic Majesty, including the Indian Empire’ but that Britain ‘reserves to each of these . . . the right to adhere . . . whenever it shall so desire, and also the right to withdraw from it separately without being bound by the decisions of the British Government with reference to the United Kingdom.’⁶²

Cooperation on international diseases might be seen just as an ‘act of comity’ but entering obligations to suppress drug trafficking added additional pressure on to act effectively and comprehensively. So, signatories, including Britain, undertook to ‘use their best endeavours to adopt, or cause to be adopted, measures to ensure’ specified drugs ‘not be exported from their countries, possessions, [and] colonies’ (Article 13), ‘on [whose] behalf’ (Article 23) they, including Britain, signed the treaty. While, for Britain, these obligations mainly concerned, apart from India, four relatively minor possessions (even whose prior consent was sought and obtained), the obligations were strictly speaking general, thereby including even

⁵⁹ Minute, Davis to Just, 17 January 1912, CO532/41/245-6, TNA.

⁶⁰ *International Convention for the Suppression of the White Slave Traffic*, 4 May 1910; EIF 8 February 1913; BFSP 103/244; UKTS 20/1912 & 7/1914; LNTS 8; CTS 211/45; ATS 19/1949.

⁶¹ *International Convention for the Protection of Industrial Property, & Final Protocol*, Washington, 2 June 1911; BFSP 104/116; UKTS 8/1913; LNTS 39/221; CTS 213/405; ATS 17/1925. Davis was unconcerned that Canada had unsuccessfully pushed for a further specific phrase, distinguishing ‘les grandes dominions autonomes britanniques’, from other colonies. Minute, Davis to Just, 17 January 1912, CO532/41/245-6, TNA

⁶² *International Sanitary Convention & protocol*, Paris, 17 January 1912; BFSP113/786; UKTS 2/1921, 28/1921 & 14/1922; LNTS 4/281 & 4/411; CTS 215/223; ATS 5/1923.

self-governing colonies.⁶³ This, given the constitutional and political evolution of the latter by that stage, was an exceptional treaty commitment for and, thus, unprecedented assertion of constitutional paramountcy by Britain. The fact that Britain declared a standard reservation on its signing, that it ‘reserve[d] the right of signing or denouncing separately’ the convention, for all its other possessions, did not change that.⁶⁴ Fortunately for Britain, most self-governing colonies had already legislated appropriately, well ahead of even Britain, itself. Thereby, Britain did not need to go through a politically awkward process of pressing them to act and could still reassure its fellow signatories that it was meeting its obligations under Article 13.

From this date, Britain signed eight more multilateral instruments from this date until the war. The desired uniformity on the colonial accession clause was not achieved by then. There was no colonial provision in the protocols on copyright and opium (1914) and three conventions (international exhibitions, 1912; international time, 1913; phytopathology, 1914) did not enter into force. The radiotelegraphic conference was the most important. Britain suspected other governments would seek votes for their dependices and so decided, after much discussion to grant the self-governing colonies and India, not only separate representation and voting rights but also full powers to sign the convention. This was only the second instance, after the *UPU*, of Britain’s colonies being allowed a separate vote on a *PGIO* but also the first where full powers were granted.⁶⁵ Article 12 of the convention provided that, if a signatory acceded on behalf of their ‘their ‘colonies, possessions or protectorates’, all signatories would decide if the whole or part of the former ‘is to be regarded as **forming a country** [emphasis added]’ for voting purposes at conferences, with six votes being the maximum for any signatory. For Britain, the Commonwealth, Canada, South Africa and *NZ* were then each deemed to form a ‘**single country** [emphasis added]’ for such purposes.⁶⁶ There was another new development here. The *FO* advised the *CO* that, as these colonies had signed with full powers, there was no longer a need for the normal act of colonial accession.

Almost at exactly the same time, Britain seemed to retreat from this expansive approach to colonies and treaty making. The German proposed conference to secure by treaty a reduction in the number of international exhibitions had been under discussion for some time. The subject was even considered at the 1911 imperial conference. Britain sought the input of the Australian states, only to revive the unwelcome issue of the latter’s surviving desire for direct

⁶³ Ceylon, the Straits Settlements, Hong Kong and *Wei-hai-wei*.

⁶⁴ *International Opium Convention, with Final Protocol*, The Hague, 23 January 1912; BFSP 105/490; UKTS 17/1921; LNTS 8/187 & 222; CTS 215/297; ATS 20/1920.

⁶⁵ CO532/35/287-95, 304-11, 355-61; CO532/37/419-26; C532/38/56-72; CO532/41/37-46; CO532/42/419-24; CO532/43/3-5, 183-9; CO532/44/212-14, 249-53; CO532/48/351-69, TNA..

⁶⁶ *International Radiotelegraph Convention*, London, 5 July 1912; EIF 1 July 1913; BFSP 105/219; UKTS 10/1913; LNTS 1/136; ATS 7/1913.

involvement in international matters. The *CO* had to reaffirm the Commonwealth must be the only such voice. As the conference date of late 1913 approached, Britain felt no choice now but to consider again not only separate colonial representation but also the grant of full powers. Concerned Britain had set too expansive a precedent, there was even an unsuccessful attempt to have Germany reduce the status of the conference. Ultimately, the lack of colonial interest in attending the conference eased this difficult situation.⁶⁷

The French-sponsored preliminary conference in late 1913 for establishing an international commission for universal time raised similar questions to the radiotelegraphy convention. The *CO* and debated whether the self-governing colonies should be given separate representation and full powers, without coming to a final decision. After Britain ratified the convention, it invited the self-governing colonies, plus Hong Kong and Ceylon to adhere. The response was generally positive, though the Commonwealth's answer dragged on, after the states, who controlled some of the necessary facilities to carry out the required obligations, were divided in their positions.⁶⁸ War delayed any further action. Belgium's proposal for an international bureau to collate and share commercial statistics was considered in another conference a month later. Only Australia and NZ had shown interest in an earlier preliminary conference, so Britain confined its invitations to them.⁶⁹ Only Australia was represented, though under Article 7, 'States and Colonies which have not taken part in the present Convention will be allowed to accede to it later.'⁷⁰

In early 1914, Britain attended three multilateral treaty conferences. For that in London in January on safety of life at sea, a response to the *Titanic* disaster, Britain not only invited Canada, Australia and NZ (but not South Africa or Newfoundland, only because of their lack of maritime interests) to send representatives but, also, as with the radiotelegraphical conference of 1912, granted those representatives full powers.⁷¹ In the *FO*'s view, the three's separate signing made redundant the provision in the convention's Article 66, that signatories could declare, on signing or later, their application to or denunciation for, all or some of their 'Colonies, Possessions or Protectorates, or one or some of **those countries** [emphasis added].'⁷² Next, in March, a delayed French-proposed conference was held in Rome under the auspices of the *IISA* on phytopathology, or plant diseases, as an extension of earlier actions

⁶⁷ CO532/32/263-89; CO532/34/104-6; CO532/41/115-45; CO532/44/46-57, 160-3, 261-87; CO532/46/297-319, 371-5, 391-408, 461-5; CO532/45/22-45; CO532/48/529-66, TNA.

⁶⁸ CO532/54/35-65; CO532/56/556-8; CO532/58/255-64, 328-37, TNA.

⁶⁹ CO532/56/170-84; CO532/59/27-31; CO532/60/51-62; CO532/69/405-14; CO532/70/523-6, TNA.

⁷⁰ *Convention respecting the Compilation of International Commercial Statistics, & Protocol*, Brussels, 31 December 1913; EIF 1 July 1914; BFSP 116/583; UKTS 15/1924; LNTS 47; ATS 6/1915.

⁷¹ CO532/54/451-67; CO532/59/133-42, 153-8, 279-334; CO532/61/150-60, 182-4, 256-67, 291-8; CO532/63/275-9, TNA.

⁷² *Convention for the Safety of Life at Sea*, London, 20 January 1914; DNEF; BFSP 108/283.

against *phyllorea*. All self-governing colonies, except Newfoundland, were represented on the *IISA*, usually through an imperial official. So, Britain invited all four to attend, though the issue of full powers did not arise. War prevented both conventions coming into force. Finally, later that month, Britain attended another conference on copyright, to which, for reasons outlined above, it did not invite colonial representation.

Even before the war in 1914, British authorities recognised that the imperial constitution was undergoing great change, with respect to treaties. In the wake of the Australian protest over the *Declaration of London*, the *CO*'s Arthur Robinson placed those changes into historical perspective.

*We have abandoned one after another, unity of control in commercial matters, in legislation (practically if not theoretically) and in military matters. In naval matters, unity of control is, to say the least of it, most seriously threatened. It remains only in respect of the control of foreign relations, of which the treaty-making power is one aspect. If it is to be abandoned in that sphere also, it will be difficult indeed to maintain in the face of foreign powers that the Empire is a unity at all. In the sphere of international and constitutional law the bonds of sentiment have no place and what those bonds amount to in practice when the constitutional bonds are loosened, is written large over the history of the Holy Roman Empire.*⁷³

His senior colleague, Henry Lambert, had similar concerns, as to preserving the empire's sole authority over the treaty-making power.

*To part with it is to give small communities mostly far removed from the commercial & military centres of the world, the power to take action which will impose obligations on this country, itself lying at the centre.*⁷⁴

The *DD*'s head, Sir Hartmann Just, agreed that the 'unity of the Empire' should formally be preserved, 'as much and as long as possible', despite the reality that, in different parts of the world, colonial views and interests were 'practically predominant'.⁷⁵ So, in drafting the proposed 'model' clause for future non-political multilateral treaties, Charles Davis cautioned, in a phrase, which Just repeated *verbatim* to the *FO* in March 1912, about the need 'to avoid any language [in a treaty] which implies the British Colonies have a quasi-separate international status.'⁷⁶ The irony was that Britain's liberal approach to its colonies' role in treaty-making was, in fact, slowly advancing that very status of its self-governing colonies.

The astute and legally trained Berriedale Keith advised his colleagues that there had been 'no precedent' for granting these colonies' representatives full powers at the radiotelegraphic conference of 1912. This was, he continued, a step, which went 'a good deal further', than

⁷³ Minute, Robinson, 18 January 1911, CO532/33/51-4, TNA.

⁷⁴ Minutes, Lambert, 27 January 1911, CO532/33/54-5, TNA.

⁷⁵ Minute, Just, 28 January 1911, CO532/33/51-4, TNA.

⁷⁶ Letter, Just to *FO*, 16 March 1912, CO532/41/245, 253-5, TNA.

ever before, in giving to those colonies ‘an international existence’.⁷⁷ Potentially, they could have voted against each other.

*Strictly speaking it involves the theory that each part of the Empire has a right to conclude treaties . . . but we have always denied that a Dominion could conclude a treaty.*⁷⁸

He mused whether this might be an ‘inevitable’ development but suspected it was ‘undesirable to split up the unity of the treaty power’, especially at a time when Britain was seeking to restore central control of the empire’s naval power and Australia and NZ (he pointedly did not include Canada) seemed ‘loyally’ prepared to conduct foreign commercial negotiations solely through Britain.⁷⁹ The imperial government did draw one final line over the treaty power. On 28 July 1914, exactly one week before Britain declared war on Germany, Berriedale Keith observed to Davis. ‘It has been decided that, for the present at any rate, political treaties should not have Colonial clauses’.⁸⁰ With war, the imperial government asserted strong central control over its empire but Keith’s qualification, ‘for the present at any rate’, proved prescient. After the war efforts of the self-governing colonies, they were accorded separate representation and treaty signatures at the iconic peace conference at Versailles in 1919. Imperial treaty relations would never return to the pre-war days.

4. Australian responses to the developments in international law, 1906-14

Although clearly not wanting its colonies to act completely independently in the international system, Britain was undoubtedly leading them into greater participation with treaty and related developments. On many occasions, colonies were often passive, diffident or uninterested in such wider participation. Colonial governments, such as the Commonwealth, in this period remained non-sovereign dependencies within the British Empire and, thus, could not make or, arguably, unmake treaties independently, nor separately adhere to treaties, to which Britain had not. There was no instance where an Australian government pressed Britain to sign or not sign any treaty. Until 1877-8, all British possessions were automatically bound to, though often unaffected by, all Britain’s treaties, usually without prior or, often, later consultation. That British decision, to allow colonies a choice of adhesion to ‘commercial’ but not ‘political’ treaties (an increasingly imprecise distinction) was a very significant development in the imperial constitution and colonial international personality. At this same time, Britain started to invite some colonies to non-governmental (and, hence, non-treaty making international conferences) and, from 1887, to semi-official international conferences. The Shanghai opium commission (1909) was the first time Britain invited colonies, only the Commonwealth and Canada, to attend, as part of Britain’s delegation, a

⁷⁷ Minute, Berriedale Keith to Johnson, Lambert and Just, 18 June 1912, CO532/38/56-72, especially f. 57, TNA.

⁷⁸ Minute, Berriedale Keith to Johnson, Lambert and Just, 18 June 1912, CO532/38/56-72, especially f. 57, TNA.

⁷⁹ Minute, Berriedale Keith to Davis, Lambert & Anderson, 10 September 1912, CO532/44/46-7, TNA.

⁸⁰ Minute, Berriedale Keith to Davis, 28 Jul 1914 CO532/72/116, TNA.

multilateral diplomatic conference. The Commonwealth (but not Canada) declined to attend, though it sent a report. Britain invited all five self-governing colonies, which all declined, to the treaty making opium conference of 1911-12. The Commonwealth's first representation at such treaty making conferences was at London, on radiotelegraphy (1912) and maritime safety (1914), as well as Paris on phytopathology (1913).

Treaties, which Britain deemed 'political' and thus, did not allow colonies a separate choice of accession, included both traditional and new treaty subjects. Most of these were not treaties requiring further domestic legislation, imperial or colonial, which would otherwise have necessitated colonial consultation, before or after signature. Of treaties on more traditional subjects, such as alliance, peace, territory, protectorates and dynastic succession, the majority were mainly on territory, which affected, usually, only a single possession and, so, were not of general colonial concern. Canada and South Africa had foreign land borders, which interested them in boundary territories with the *USA* and Germany, respectively. Maritime boundaries concerned Canada, while Newfoundland was interested in fisheries. Australia and *NZ*, as distant islands, were generally unconcerned or unaffected.⁸¹ Australia was certainly interested in the treaties with France over the New Hebrides (1904, 1906 and 1914), as *NZ* had been over Samoa (1879, 1883, 1889 and 1899) but Britain did not consult them on these. Britain's treaties with Japan (1902 and 1911) contained provisions, amounting to an alliance and for respective spheres of interest but Barton's complaint over a lack of prior consultation on the first of these arose from his mistaken belief that it was a commercial treaty.

Of the newer political subjects, Britain continued not to consult colonies, except Canada over the *USA*, on extradition treaties, before signing an additional 50 by 1915. There was already associated imperial legislation in force, which applied to all colonies, except Canada. The Commonwealth never complained and its major legal concern was domestic, that is, whether foreign extradition requests would continue to be made to state governors or, as it preferred, to the governor-general. After encountering opposition from Victoria, a compromise was reached, whereby the governor-general could delegate the responsibility to state governors. Drafting the extradition bill, Garran endorsed the Canadian path of local legislation suspending the imperial legislation and allowing direct communication with foreign governments (really, only with the *USA*). Deakin ruled out the first and the *CO* objected to the second but compromised, only requiring that communications on extradition with European governments had to be through the 'diplomatic channel', that is through the *CO* and *FO*.⁸²

⁸¹ Papua, over which the Commonwealth assumed responsibility in 1905, had a border with German New Guinea but treaty issues did not really arise.

⁸² *Extradition Act*, no. 12 of 1903. The case, *McKelvey v Meagher* (1906) 4 C. L. R. 265, at 278-293, well-known to Australian legal scholars for its early if sparse references to the possible scope of the 'external affairs' power,

On the even newer political treaty subject of general arbitration, Britain, initially, did not consult colonies on these treaties, the first of which, ultimately unratified by the senate, was with the *USA* in 1897. After the first successful conclusion of such treaties, in 1903, the *CO* proposed but the *FO* resisted advance consultation of colonies, especially Canada and Newfoundland on treaties with the *USA*. In some of these treaties, Britain inserted a colonial adhesion clause, to alleviate colonial concerns over compulsion, under the Hague convention of 1899, to submit to arbitration by the *PCA*. After the Commonwealth's protest over the *Declaration of London* at the 1911 imperial conference, Britain decided to turn 'over a new leaf' and give the colonies prior notice of arbitration treaties. At no stage did the Commonwealth raise any issue, although it did propose that arbitration be discussed at the 1911 conference. The source and purpose of this proposal, which was not pursued, is unclear.

The Commonwealth's main concern over non-political treaties was with respect to bilateral commercial and/or navigational reciprocity treaties. The landmark decision of 1877-8 to allow colonies not to accede to these inevitably reduced this source of concern, to 'protectionist' elements in some of Britain's self-governing colonies, especially Canada and Australia. Nonetheless, the colonies, initially, remained bound to such treaties concluded before that date. The single most contentious instance of such friction, with the Commonwealth, arose from the conflict between enforcing the *Immigration Restriction Act 1901* and Queensland's adhesion to the *Anglo-Japanese* commercial treaty of 1894, which provided for a fixed number of Japanese residents. Deakin advised Barton, that this adhesion was voided by the *Commonwealth of Australia Constitution Act 1900*, which had transferred control over immigration to the federal government.⁸³ This was strongly opposed by Britain's *LOs*, on the grounds that only the crown could denounce treaties. The Commonwealth relented in this instance but pressed at colonial conferences (1902 and 1907) for prior consultation on such treaties. After 1907, Britain allowed self-governing colonies to withdraw, by an imperial not local act, from such treaties, concluded before 1877.

On major multilateral treaties, Britain invited colonies to adhere to about 30 from Australian federation through 1914, excluding associated, merely procedural, legal instruments. After July 1914, there were no more major multilateral treaties concluded until the peace settlement in 1919. (Britain did not invite colonial adhesion, at least at that time, to a few multilateral

was one of only two instances in this period when the High Court examined a treaty issue in a substantial manner. This discussion was confined to the relationship of that power to the domestic process of extradition under imperial and Australian legislation; little was said on specific treaties.

⁸³ *Protocol providing for the accession of Queensland to the Treaty of Commerce and Navigation of 16 July 1894*, Tokyo, 16 March 1897; UKTS 23/1894; ATS 66/1901. Attorney-general's (Deakin) opinion, 16 January 1902, pp. 271-6, vol. 1/1, CRS A1497, NAA.

treaties, which were not clearly political, notably, on arms and slave trafficking in Africa.⁸⁴) Of the 30, the Commonwealth desired accession to all but five, though two others never had the Commonwealth's accession finalised, while another two remained unratified and, so, did not enter into force and colonial accession was, accordingly, not finalised. Only one of these five refusals was over the treaty's purpose (sugar), while accession to another five was delayed until after the war. When the Commonwealth did not adhere or delayed its adherence, the reasons were due mainly to flawed procedural administration, exacerbated by numerous changes of government, perceived cost or lack of relevance. In some cases the Commonwealth held that it either lacked the constitutional power to carry out treaty obligations or did have the power but had not yet enacted relevant legislation and/or the administrative capacity. Isaacs and Littleton Groom, were alone in arguing that the 'external affairs' power could be used for federal legislation on powers not granted explicitly in the constitution, a view never applied in legislation nor tested in the *HCA*.

Of commercially related treaties, in 1901 the Commonwealth, inadvertently, 'adhered' to the *Convention for the Publication of Customs Tariffs* (1890), from which the states had withdrawn in 1898, directly with Belgium, without Britain's knowledge or legal instrument. (NZ had been a party since 1891.) This treaty only required data sharing and no legislation was required. In 1902, the Commonwealth did not follow Britain in acceding to the *International Sugar Convention*, whose obligations would come under its trade and commerce power. Canada, Newfoundland and NZ also did not but only because they were not sugar producers. No detailed record of the policy behind the refusal has survived but the rationale is clear. The convention obliged signatories not to subsidise production through bounties or other measures, on pain of countervailing duties, by other signatories. The industry in northern NSW and Queensland, had greatly relied on 'coloured', especially Pacific island labour, which was now being blocked and expelled, respectively, under the *Immigration Restriction Act 1901* and *Pacific Island Labourers Act 1901*. With great unrest among planters, even threats of Queensland secession, the Commonwealth planned to introduce bounties to support what was called 'white-grown sugar'.⁸⁵ Bounties were enacted,

⁸⁴ Britain appears to have regarded as these as regional treaties, and, so, initially, as not affecting colonies outside of Africa. *International Convention respecting the Liquor Traffic in Africa*, Brussels, 3 November 1906, signed by Belgium, Britain, Congo, France, Italy, Netherlands, Prussia, Portugal, Russia, Spain and Sweden; the *Declaration modifying Paragraph 5 of the Declaration annexed to the General Act signed at Brussels, July 2, 1890*, Brussels 15 June 1910, signed by Austria-Hungary, Belgium, Britain, Denmark, France, Germany, Italy, Liberia, Netherlands, Norway, Persia, Portugal, Russia, Spain, Sweden and Turkey. The Commonwealth would adhere to the latter in 1920.

⁸⁵ Despatch, Tennyson to colonial secretary, 1 June 1903, CO418/26/395-403, 497-501, 641-5, TNA.

which would have attracted commercial retaliation, if the Commonwealth had adhered and become an exporter to other signatories.⁸⁶ Britain withdrew from the treaty in 1913.

On protection of intellectual property, only Queensland (1891) and NZ of Australasia's pre-federation colonies had adhered to the head convention on industrial property (1883).⁸⁷ After taking over trade and commerce powers from the states, the Commonwealth did not immediately respond to Britain's invitation to adhere to the modifying *Additional Act* (1900) but did successfully oppose Queensland's attempt in 1902-3 to adhere separately. Over the next four years, the Commonwealth adopted three acts on patents (1903), trade marks (1905) and designs (1906), drafted with *BoT* advice, to be in accord with the imperial legislation, as the convention was applied to the Commonwealth by an imperial *OiC* in 1907, thereby leading to adherence to the convention later that year.⁸⁸ Conventions in 1911 further amended that head treaty and that on *False Indications of Origins on Goods* (1891), to which no Australian government was party.⁸⁹ Unlike NZ (1913) the Commonwealth declined to adhere to the latter, for reasons not yet apparent, and delayed adherence to the former until 1925. On copyright, Britain had applied the treaties of 1886 and 1896 to colonies through imperial legislation and, in 1908, adhered to the modifying convention on behalf of all but self-governing colonies and India, passed the *Copyright Act 1911* and ratified the convention in mid-1912. Soon, the Commonwealth passed the *Copyright Act 1912*, applying the imperial *Act*, and acceded with the same reservation as Britain, in late 1913.⁹⁰

Australia was a major agricultural producer but the Commonwealth had no administrative capacity to service membership of Rome's *IISA* (1905), which involved providing and receiving statistical information and reports. In 1910, after establishing its *Bureau of Statistics*, the Commonwealth adhered and relied upon British officials for non-permanent representation, until it employed the services of Victoria's London-based agent-general. The Commonwealth (though represented at the 1914 conference) did not follow Britain, Canada and British India in signing the *Phytopathological Convention*, which was never ratified. The Commonwealth surprised the *CO* by following NZ (unlike Canada, South Africa and Newfoundland) by asking to adhere to the convention on *International Exhibitions* (1912),

⁸⁶ *Immigration Restriction Act 1901*, no. 17; *Pacific Island Labourers Act 1901*, no. 16; *Sugar Rebate Abolition Act 1903*, no. 3; *Sugar Bounty Act 1903*, no. 4; *Sugar Bounty Act 1905*, no. 23.

⁸⁷ NZ also adhered.

⁸⁸ *The Patents Act 1903*, no. 21 of 1903; *The Trade Marks Act 1905*, no. 20 of 1905; *The Designs Act 1906*, no. 4 of 1906. CO418/30/189-91, 251-9; CO418/31/257-60; CO418/37/101-2, 402-3, 477-8; CO418/45/397-8; CO418/50/284-8, 375-8, 538-4; CO418/52-3-5; CO418/57/331-3, 365-75; CO418/58/80-3, 132-4, 160-1; CO323/496/207-9, 439-58. TNA. Trade marks was one of only two issues in this period over which the High Court considered at length the relationship between treaties and imperial and local legislation. *Attorney-General for NSW v Brewery Employees Union of NSW (Union Label Case)*, (1908) 6 C. L. R., 469.

⁸⁹ As Britain did not sign the amending treaty on trade mark registration, colonial adhesion was not possible.

⁹⁰ **UK:** *Copyright Act 1911*, 1 & 2 Geo. 5, c. 46; **Commonwealth:** *Copyright Act* no. 20 of 1912. CO532/53/394-398, TNA.

which was also not ratified. The Commonwealth was the only self-governing colony at the conference to establish an *International Bureau of Commercial Statistics* (1913) and, with Britain's desire for the widest colonial accession, joined 23 other governments in adhering.⁹¹

On transportation, Britain did not sign the latest conventions on railways, an exclusively Continental subject, but did extend invitations to some colonies to attend associated conferences. The Commonwealth did not participate. Britain did encourage all colonies to adhere to the international circulation of motor vehicles convention (1909), although it could hardly have affected a distant island, such as Australia. Constitutionally, this was ostensibly a matter for the Australian states, none of which asked the Commonwealth to adhere on their behalf.⁹² Britain also wanted its colonies to adhere to the twin maritime conventions of 1910 on collisions and salvage at sea and, then, legislate appropriately, as Britain did.⁹³ Canada, Newfoundland and NZ acceded in 1914, while the prolonged process of the Commonwealth's navigation legislation delayed adherence on both, until 1930, and legislation, until 1934.⁹⁴ Adhesion to the convention to create an *International Association de l'Heure* (1913) did not arise, as war prevented ratification.⁹⁵ The same fate befell the convention on *Safety of Life at Sea* (1914), which a Commonwealth representative attended.⁹⁶

On communications, with the Commonwealth having sole constitutional power over 'posts and telegraphs', on which it first legislated in 1901, there were no constitutional obstacles. Nonetheless, Britain had to urge the Commonwealth to adhere to the head *ITU* (1875) and *UPU* (1897) (successor to those of 1874, 1878 and 1891) conventions. All Australasia's colonies were members of both and the Commonwealth adhered in 1903 and 1904, respectively, thereby assuming the single *UPU* vote, which these colonies had held jointly since 1892. The Commonwealth acted more quickly on the next postal convention (1906), adhering within two years, and, in 1909, adhered to the revised *ITU* regulations agreed at Lisbon the year prior. The Commonwealth quickly agreed in 1908 to Britain's invitation to accede to the first *International Radiotelegraph Convention* (Berlin, 1906). For some reason, this was not finalised and only in 1913 did the Commonwealth adhere to the successor convention (London, 1912).⁹⁷

⁹¹ Asher Hobson, *The International Institute of Agriculture*, University of California Press, Berkeley, CA., 1931. On International Exhibitions see CO532/60/51-62; CO532/67/115-6; CO532/73/117-22, 208-10, 456-8, TNA.

⁹² For the motor vehicles convention see CO532/21/41-46, TNA.

⁹³ *Maritime Conventions Act 1911*, 1 & 2 Geo. 5, c. 57.

⁹⁴ *Navigation (Maritime Conventions Act 1934*, no. 49 of 1934.

⁹⁵ Britain did not consult the colonies over France's conference in 1913 on air navigation regulations, which led to the drafting of an unsigned convention.

⁹⁶ CO532/25/241-2, TNA. The Commonwealth did adhere to the successor convention in 1929.

⁹⁷ Vol. 1, CRS CP78/10, NAA.

On public health, the Commonwealth had limited constitutional powers, covering only quarantine, and not yet any administrative capacity. Only WA had adhered to the *Sanitary Convention* of 1897. Pressed by Italy, Britain urged the Commonwealth to adhere in 1901. While the Commonwealth dithered, Italy imposed a ban on shipping from Australian ports docking at Brindisi, the first European port after Suez. So, the Commonwealth adhered in late 1902, with reservations, due to doubts that it had the administrative capacity to fulfil treaty obligations, such as collecting and sharing reports of plague outbreaks and supervising quarantine.⁹⁸ These concerns delayed the Commonwealth's adherence to the successor convention (1903), until 1909, the year after it passed the *Quarantine Act* and appointed a director of quarantine to liaise with T&C officials, as he had no separate staff.⁹⁹ That year, the Commonwealth also adhered to the convention of establishing the information-sharing *Office International d'Hygiène Publique* (1907). The Commonwealth did not adhere to the successor sanitary convention of 1912, until a federal Department of Health was established in 1921, in the wake of the post-war influenza epidemic. The Commonwealth's reservations were rejected by the depositary government (France) in 1922 but, the next year, despite continued objections from some governments, its adherence was accepted. The Commonwealth asked in 1908 to adhere to the convention on pharmacopoeial formulas for drugs (1906) but, after Britain deferred acting, until Australian constitutional questions on treaties were settled, the matter was overlooked and the Commonwealth never became a party.

On the suppression of drug trafficking, pre-federation, Australian colonies had legislated, initially, to tax opium sales and importation for revenue purposes but, later, variously to restrict its sale and usage, including to aboriginal persons. Anti-Chinese sentiment, as well as moral concerns, underpinned some of this legislation. The Commonwealth initially also drew customs revenue from opium imports but Britain's vigorous anti-opium campaign had spread to Australasia. First, NZ banned manufacture sale and importation (1900) and the Commonwealth, without a lead from Britain, banned imports in 1905, after urging by women's, religious and Chinese groups, and encouraged the states to legislate on manufacture and sales, even drafting a model bill. Canada (1908) and South Africa (1910) also banned imports. With Britain still benefitting financially from the traffic, the USA took the international lead, promoting a commission of inquiry in 1909 and a treaty conference in 1911, which concluded a convention (1912) on cocaine and heroin, as well as, opium. Britain slowly accepted the inevitable, supporting the treaty. After a prolonged process to secure state

⁹⁸ In 1906, Atlee Hunt recorded that no single office activity took up more time than reporting plague outbreaks.

⁹⁹ *Quarantine Act*, no. 3 of 1908. The director later stated that the timing and form of that *Act* was a response to the 1897 convention and its 1903 successor.

legislation, the Commonwealth asked to adhere in mid-1913 but the convention did not come into force generally, until the peace settlement in 1919, with Britain not legislating until 1920.

* * *

The development of the international legal system in the period 1901-14 continued along similar lines to which had been established in the latter 19th century, rather than embarking on a distinctly new phase. The number of treaties increased but the form, including law-making and multilateral treaties, was already well established. Even in subject matter, some of the newer ones, such as on protection of labour and nature, had seen preliminary agreements before 1901. Transnational crime, in the form of suppression, respectively, of white slave, obscene publications and drug trafficking was new, as a subject of multilateral treaties, in a specific subject sense, though the use of the terms 'suppression' and 'trafficking' suggest the precedent and inspiration of anti-slave trafficking treaties.

There was also continuity with the Continent not Britain leading most of these developments. With the successful establishment of an extensive network of bilateral treaties on freedom of commerce and navigation and anti-slave trafficking, Britain's activism was further reduced. Nevertheless, Britain was generally supportive of these developments, acceding to nearly all the major multilateral treaties signed in this period. Even when Britain was clearly opposed, initially, to some multilateral measures, such as suppression of drug trafficking, ultimately, pressured by its public and/or foreign governments, it felt it could not stand out from these major international developments. Once Britain decided to be a party to such treaties, it actively encouraged, without ever pressuring, its colonies to follow its lead.

Of Britain's five self-governing colonies, Canada was clearly the most active both before and during this period. The Commonwealth was the next most active, though its federal system often meant it was slower to respond to these developments than the other three self-governing colonies, which possessed unitary systems of government. The Australian public generally lagged behind Britain's and other parts of the world on these issues. Nonetheless, with leadership from British and some foreign, especially American, *NGOs*, the Australian public ultimately mobilised on many issues to press Australian governments into action. Generally, Australian governments followed the imperial lead, albeit, belatedly in several instances. On only two multilateral issues, did Australia differ from Britain over the nature of a major treaty. The first was the Brussels' *Sugar Convention* (1902), which would have restricted the Commonwealth's ability to use protectionist economic measures to protect Australia's racial policies. The second, the Commonwealth's protest over the *Declaration of London* (1909), was both in principle, over a lack of prior consultation, and, substantially, over the perceived potential threat towards Australia's maritime trading interests, both exports

and imports. On bilateral treaties, there was also some imperial concern that the Commonwealth's financial support for local industries conflicted with some pre-1877-8 'free trade' treaties. The major disagreement, including over the desire for prior consultation, was, as with sugar, over Commonwealth interrelated policies of economic and racial protectionism.

Between federation in 1901 and the First World War, which only briefly stalled the inexorable development of international law through treaties, Australia was drawn by British governments, themselves driven by sections of the British public and foreign governments, into greater engagement with the growing international legal system. The development of the Australian state, through legislation in this period, was largely influenced and shaped by these international legal developments.

Conclusion:
‘solid foundations’

The quoted title of this thesis, ‘and treaties’, implicitly carried a dual meaning, addressing the dual aims of the thesis. On international law generally, the pantheon of famed writers and, even, many scholars today have underestimated the rise of treaties in relation to custom, as they inexorably grew in number, content and form. The focus on treaties not custom has thereby allowed the thesis to expose the hitherto under appreciated role of ‘*la voix publique*’ in international law. This thesis hopefully has redressed these omissions in modest degree. On Australian responses to those developments, the thesis has shown how the imperial government’s desire to withhold a treaty-making power from the Commonwealth, led to the deletion of those words, ‘and treaties’, from the latter’s constitution. This unnecessary surgery deprived the Commonwealth of a stronger instrument to implement treaty related legislation in the federation, although there was little political will to so do, until decades later.

In 1788, when Australia was first settled by Britain, the development of international law, still dominated by custom, was already underway and about to accelerate markedly, through treaties. A succession of great revolutionary wars, those involving the *USA* (1792-83, 1812-15) and *France* (1792-1802, 1813-15), which followed the *Seven Years War* (1756-63), made this the first era of truly global warfare. The international system was profoundly altered, politically and economically, marking the transition from the early modern to the modern era, not only in those respects but also international law. Imperialism still had a long course to run but its antithesis, the seismic process of decolonisation, had begun. This revolutionary process soon spread to South and Central America, creating by 1830 a substantial increase in sovereign states, thereby further increasing treaty making. Other states entered the system.

Treaty subjects were also changing, no longer being solely on traditional monarchical prerogatives over alliance, peace and dynastic succession. Many modern treaties required domestic application, which drew legislatures increasingly into treaty making. By the mid-19th century, technological advances, particularly those affecting transport (steam engines for trains and ships) and communications (mail steamers and electrical telegraphs), fuelled by commerce, lubricated further commerce, bringing greater cooperative interaction between states. Multi-party treaties on these modern subjects, often resulting in the establishment of the first *PGIOs*, marked yet another great development in international law.

For Britain itself these changes were just as vast. Britain’s claim of sovereignty over Australia in 1788 was based on custom, then, still the main form of international law. Island Britain was generally slower than land-linked Continental powers to embrace modern treaty making. After these wars, Britain was no longer able to regulate its American economic interests

solely by the *Navigation Code*, now having to rely more on treaties, which it also extended slowly to Continental powers. Treaties Britain signed in the following years greatly increased in number, most on the new treaty subjects. Symbolically, when Britain claimed NZ's north island in 1840, desiring a firmer international legal basis to ward off hovering rivals, France and the USA, it relied on a treaty not customary international law. In 1850, Britain's constitutional legislation limited the grant of responsible government to most Australian colonies to avoid repugnancy with treaties. After Britain granted colonies choice of adherence to non-political treaties from 1877-8, Australian governments, often diffidently, engaged in this growing, modern treaty making, albeit, only through Britain. Commonwealth federation in 1901 created a government, which, despite lacking an explicit constitutional treaty power, was more ready to respond to imperial leadership and engaged more actively, than Australian colonies hitherto, in these tectonic developments in international law.

* * *

This thesis has examined, firstly, how international law—through treaties—developed in the period through the First World War; and, secondly, how Australian governments and public, through the leadership of Britain's imperial government and public and in comparison with other self-governing colonies, responded to these developments, focusing on three of arguably eight treaty subject areas—conduct of war, transnational crime and international labour protection.

Sound historical scholarship is only boldest on the specific, detailed evidence examined and exercises greater caution in drawing general conclusions. Having said that, this thesis advances, on the basis of detailed examination of the 'particular' cases cited above, with due Rankean caution, some general, if not quite 'universal', conclusions.

1. The lack of scholarly literature

All items of scholarship exist within the collective body of scholarship of any particular discipline. One might presume, that there is invariably, a great body of such scholarship pre-dating any new work. This thesis, however, endorses the startling conclusions of Nussbaum (1947) and Neff (2014) that there are very few detailed studies of the history of international law and, certainly, as this thesis adds to those assertions, even fewer based on formerly classified governmental archives. The first major studies of international legal history, using detailed primary sources, have only emerged in the last two decades, from a field still dominated by wide-ranging general or theoretical accounts, resting on 'unsolid foundations'. Detailed histories are still extraordinarily few in number, with even fewer relevant and, then, only marginally, to this thesis, due either to the time period and/or treaty subject matter examined (Cioc, 2006; Martinez, 2011; Frei, 2020) or methodological approach (Abbenhuis,

2014; Coates, 2016; Benton and Ford, 2016). For Australia, Alex Castles (1971) has contributed the only work branded ‘legal history’ which, although valuable, ends in 1828 and only makes one reference to international law, with that being to custom not treaties. Australia’s role in international law has largely been ignored by historians.

This thesis has sought to redress this shortcoming, in modest part, mainly for Australia but also for Britain and, perhaps, even, to some extent, for the international legal system, as a whole. Only then, may the general conclusions and theorisations of mainstream legal scholars rest on solid, empirical foundations of ‘what actually happened’, so they can then generalise, more reliably, as to ‘what actually happens’, in all times, in international law.

2. The limitations of traditional methodology

Understandably, legal scholars, who are not also historians, focus on the law at present, with only some minor references to the law in the past, including as to how it developed. In the absence of detailed historical legal scholarship, scholars of law and, sometimes, international relations have purported to detail the development of international law and how it operates. These scholars, essentially, rely only on secondary or, at best, public sources and their work is very general. Inevitably, as a result, there must be doubts, as to the certainty of their conclusions, not only over specific instances but also general questions in the development and operation of international law. On Australia, such works were mainly concerned with the *HCA* and Commonwealth constitution, particularly the relationship of the ‘external affairs’ power to treaty making, rather than a detailed examination of Australian responses to treaties, let alone the treaties themselves, or how the international legal system as a whole has developed and operated. This body of work generally only sparsely cites historical examples of treaties, for the period up to the 1980s. These works do not use formerly classified records, which are now available for this whole period, to reveal the previously hidden account of treaty making by Australian or other governments. This thesis, by contrast, used such records, with reference to several specific treaties concluded in this period, to conduct a detailed examination, in these cases, of how law, both international and domestic, developed.

Hopefully, this thesis, by completing a detailed case study of Australia in a specific period, and on specific treaties, has further underlined the necessity for more detailed, archive-based histories on the making of international (and domestic) law, not only for Australia but also all members of the international legal system, major treaties and time periods. For Australia, the records of the state governments should also be examined in greater detail than was possible here. Similarly, records of *NGOs* and the public at large need close examination, as they have proven to be decisive factors in law making, both domestic and international. On international law itself, more research is needed in the records of all foreign governments, so that a truly

‘international’ body of evidence can be studied. There are inevitable issues of cost, time, language and specific, local historical knowledge, which present obstacles to such research. This certainly puts such a multilateral approach beyond the ability of any one person, except on the narrowest of subjects. So, as in all sound historical enquiry, a collective effort is required to advance scholarly understanding on law-making, in its widest sense.

3. Over-emphasis on customary international law and underestimation of treaties

This thesis concludes that the existing legal literature has underestimated the rise in relative importance of treaties and associated domestic legislation. The methodology of non-historical legal scholarship was not to examine such records and rely more on the pantheon of famous authorities on international law. What follows from this is that, in generalising about the international legal system, such scholarship has continued to uphold earlier (especially, English-language) scholarships’ increasingly outdated view. The first English-language works on law, notably those of William Blackstone (1765), Jeremy Bentham (1780) and, less excusably, John Austin (1832), mainly wrote before the great changes in law were underway, at least with respect to Britain, if not the Continent. Yet, their assessments of international law continued their hold over later minds in the absence of detailed historical scholarship to challenge them. (Even 20th century scholars have spoken with reverence of the ‘Austinian’ view, for what were only college lectures, which ignored the great changes already underway at that time.) The main result has been that too much emphasis has been placed for too long on custom, as the major source or form of international law. This has reinforced the dichotomous view on the relationship between international and domestic law, which, in turn, skewed the question of the effectiveness of international law, especially of treaties.

4. The monist versus dualist debate

This thesis challenges the common view that domestic and international law should be seen as separate spheres for all times in history. This thesis has deliberately refrained to this point from engaging the jurisprudential debates about law, specifically, the monist and dualist dichotomy, until it had first established, in certain instances, ‘what actually happened’. This debate, when applied to actual constitutional provisions, is relatively uncontroversial, as long as the normative aspect is excluded. When applied, however, to theories on the source, development and operation of law, there is much room for disagreement. Such abstract, theoretical debates have lacked the foundations of a body of detailed historical scholarship, necessary to engender confidence in either position.

The so-called ‘Vienna school’, inspired by Hungarian George Jellinek and founded by Czech-born Hans Kelsen, has most strongly upheld the monist view.¹ The incipient transnationalism of Roman Catholicism and pre-Israel Judaism, both strong in the cosmopolitan, multi-ethnic Austro-Hungarian empire, explains much of this disposition. Austria’s post-First World War constitution (1920), drafted by Kelsen, made (as, in 1932, did Siam’s, drafted by French-educated Pridi Banomyong) explicit provision for international law, following the original lead of the *USA*. The fact that a rare Australian foray into this debate was made by Joseph Starke (1936), son of a European *émigré*, is not a coincidence.² British jurisprudence on international law, however, remained largely anchored to the increasingly outdated catechisms of Blackstone, Bentham and Austin.

On the relationship between international and domestic law, this thesis began with the traditional assumption, at least, as held in common law jurisdictions, that they are essentially separate spheres, which is also how they are taught. (This was held to be true even when a government legislated in fulfilment of a signed treaty obligation.) This is not the conclusion reached at the completion of this thesis. Some of these theoretical debates in international legal scholarship have suffered from their general statements, lacking detailed empirical evidence. The large body of such evidence, in terms of treaties concluded multilaterally and, in the case of bilateral treaties, by the world’s leading power at the time, Britain, here examined, supports, at least for the period under study, a very clear conclusion on this overarching point. Without offering judgement as to what ‘ought’ or ‘should’ be the case, this thesis simply examined and, then, stated ‘what actually happened’, for particular times, governments, treaties and laws. The overwhelming conclusion here is that, from some point before 1800, domestic and international law, increasingly developed holistically. Public campaigns for legal change invariably later called, or did their governments, for treaties to make such laws effective due to increased global interaction.

The weighty burden of Blackstone, Bentham and Austin weighed so heavily on British jurisprudence, that the noted Australian legal scholar, Geoffrey Sawer, in examining all Commonwealth legislation to 1929, did not in any instance detect the relationship of this legislation with treaties.³ Representations of Australian domestic legislation, as being made in isolation from the international legal system, simply does not stand up to the empirical, historical record. Australian legislation in this period on commerce, navigation, copyright,

¹ Georg Jellinek, *Das Recht des modernen Staates: vol. 1, Allgemeine Staatslehre*, O. Häring, Berlin, 1900; Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, J. C. B. Mohr, (Paul Siebeck), Tübingen, 1920 and *Reine Rechtslehre*, J. C. B. Mohr, (Paul Siebeck), Leipzig & Wien, 1934.

² J. G. Starke, ‘Monism and Dualism in the Theory of International Law’, *BYIL*, 17(36), 1936, pp. 66-81.

³ Geoffrey Sawer, *Australian Federal Politics and Law, 1901-1929*, MUP, Carlton, Vic. 1956.

trademarks, patents, nature and labour protection, crime and welfare were directly related to treaty making. This would almost certainly be true of all other governments in the world.

In a separate point on the relationship between domestic and international law, the rather instrumentalist view, whereby domestic law associated with a treaty is something that only follows afterwards and only if expressly required by the treaty, although accurate in many cases, does not capture the true complexity of the relationship between these respective spheres of law. In this period, in many cases, domestic laws preceded treaties, to which they related, with both being the product of the same public campaigns. Such domestic law was variously made both with or without anticipation of a related treaty.

4. Effectiveness of international law

This thesis has challenged the emphasis in standard accounts of international law about the effectiveness of treaties. Instead of focussing on the general and abstract theoretic debate of whether treaties are or should be effective, the thesis details numerous examples where building confluence between domestic law and treaties, whereby treaties were actually put into domestic force. The over-emphasis in traditional, especially English-language, legal literature on customary international law and bilateral treaties on traditional subjects, has underpinned the persistence of the dualist view. This has also impacted on the sometimes, superficial debate over the effectiveness of international law. In the period here under review, the growth of treaties especially those of a multilateral form, and associated domestic legislation, has often been underestimated. To give just one illustration, an abstract debate over the effectiveness of the convention, prohibiting the use of white phosphorus in matches, cannot hinge simply on a general assertion over the unenforceability of treaties. In Australia, as a result of this treaty, the Commonwealth and every state, together, took legislative measures, such that the importation, sale and manufacture of such matches were and remain prohibited. An international instrument of enforcement, obviously lacking, was unnecessary to make this treaty's objectives effective, certainly in Australia. Federal and state authorities enforce the law resulting from the provisions of this treaty, if not the treaty itself. Moreover, the emergence of treaties seeking 'universal' adherence, such as that on drug trafficking (1912), created overwhelming international political pressures for governments to accede to such treaties and, if necessary, legislate.

5. The role of public organisations

This thesis has challenged a widely held view in historical and legal literature that the making of international law, including treaties, is largely preserve of high-level governmental officials, elected or appointed. At least for the period here examined, nearly all treaty making originated with the public, often against established official policy, and only engaged officials secondarily. This is another conclusion in this thesis, based on empirical evidence, which

supports a monist view of law: the role of '*la voix publique*' or public voice. The common view that treaties are mainly the creation of political, bureaucratic and diplomatic elites was probably true before the modern period, when the possibility, even, right of public organisation was limited, as was the franchise, even if some elected representation was permitted. Most treaties in the early modern period were mainly concerned with traditional subjects, still lying within crown prerogatives, such as on alliance, peace and dynastic succession, which did not require the involvement of legislatures nor capture wide public interest. This began to change with the increased power of legislatures, relative to monarchies, especially when treaty legislation was required, the franchise was extended and greater tolerance and, hence, creation of public organisations was allowed. The expression, '*la voix publique*', in the multi-party declaration against slave trafficking (1815) signalled, if not actually began, the role of the wider public in treaty making. Indeed, governmental elites were rarely initiators of most of the modern treaties examined here. At best, they sympathised with public demands. Sometimes, although diffident or, initially, resistant but under pressure, they eventually accommodated such demands, while usually retaining a disdain for the public voice.

The role of the public voice first manifested itself on treaties concerned with commerce, navigation and slave trafficking but, soon, extended to communications, intellectual property, extradition, conduct of war, transnational crime, protection of labour and nature. These public campaigns mainly began by demanding domestic legislation but, soon, also demanded associated treaties. For example, the campaign against transnational white slavery soon recognised domestic legislation, by itself, was insufficient and would be limited in effect, without a treaty leading other governments to act similarly. In some cases, governments did not wish to submit to their own public demands, unless other governments acted likewise, making a treaty essential. For example, the British government did not wish to limit its own match-producers' use of cheaper white phosphorus, by legislative bans, unless other match-producing or, even, potentially match-producing countries did likewise. Britain applied the same principle when considering the treaty restricting night-work for women. Similarly, Britain did not wish to speed the end of its opium traffic with China, unless other drug-exporting countries, especially Germany, agreed to restrict their own drug trafficking by legislation and treaty.

The fact that the British government rarely led this modern treaty making, after its success with free trade and anti-slave trafficking treaties, has been noted. The same cannot be said of the British 'public voice'. *NGOs* in Britain were among the most active not just locally but imperially and internationally. In Australia, *NGOs* were usually slower to develop and,

initially, less active but, latterly encouraged through those international and, especially, imperial linkages, they slowly found their ‘voice’ in demanding Australian governments legislate and/or adhere to treaties. This was certainly the case, on white slave, drug and plumage bird trafficking, as well as, the conduct of war.

6. Independence, autonomy, sovereignty and international personality

This thesis has challenged a common basic view in international law and relations literature, which has portrayed the international system, certainly in the period here examined, as being solely comprised of sovereign states. Scholars often use the above terms interchangeably or conjointly, with the latter two, especially the last, usually reserved for legal scholars. Political historians often speak of greater or lesser independence or autonomy without the same precision, which legal scholars might expect when pronouncing on sovereignty or international personality. For legal scholars, the latter two are generally seen as absolutes, like the old theory of the solid-state atom. For them, a state either has or has not these attributes. This view is understandable for legal proceedings. This thesis suggests, however, it does not capture the reality of the international legal system, especially for the period here examined, when there were so many dependent governments, some with considerable degrees of self-government.

In 1905, Lassa Oppenheim observed that Britain’s colonies ‘simply exercised for the matters in the question of the treaty-making power of the mother country which had been to that extent delegated to them’ and, so, ‘they had no international position whatever.’⁴ A senior British law officer stated authoritatively in 1910 that, although the self-governing colonies had been ‘styled “Dominions”’ since 1907, they ‘continue to be colonies within the meaning of an Act of Parliament’.⁵ Whether the activity documented in this thesis amounted to Australia (or other self-governing colonies), possessing some ‘international personality’ seems moot. Even if a strict legal view is taken, that Australia could not have had international personality until it had full sovereignty, then the argument must follow that it lacked both until, at least, the *Australia Act 1986* or, perhaps, more controversially, even now, while the Commonwealth’s constitution remains imperial legislation, with the crown as head of state.

Even if one accepts the concept of the divisible crown and, thus that the *Australia Act 1986*, despite containing references to the crown and being sanctioned by a vice-regal authority, was the moment of Australian sovereignty, the conclusion that the year before, the

⁴ L. Oppenheim, *International law: a treatise*, Vol. 1, Longmans Green, London, 2nd ed. 1912, pp.180, 198.

⁵ WO32/9101/1-5; CO532/21/74-5, TNA. The statement was by Sir Frederick Liddell, Second Parliamentary Counsel (and younger brother of Alice, of ‘Wonderland’ fame.)

Commonwealth lacked international personality is clearly unsustainable. If the crown can be divisible, so surely can international personality. Once the first conclusion is rejected for the second, a question arises, as to when did Australia acquire international personality?

From 1872, Britain approved direct negotiations for postal agreements between Australian colonies and foreign powers, albeit requiring final imperial sanction. From 1876, Britain permitted separate colonial representation, including separate voting rights, in governmental international organisations and at their non-political, treaty making conferences. From 1877-8, Britain allowed separate colonial choice of adherence to all but political (that is, the minority of) treaties, which it concluded. From 1877, Britain invited Australian (and other) colonies to attend semi-official international conferences. The Commonwealth attended government-sponsored international conferences from 1902 and was separately represented at major multilateral treaty making conferences from 1906. So, after examining the detail of Australian governments' many international interactions, in both attendance at conferences, membership of international organisations, adherence to treaties and resulting domestic legislation, it seems facile to suggest that they were not distinct parts of the international system, legal or otherwise, in this period to 1914 and had been, possibly, since the 1870s. This complex question awaits further study.⁶

7. The national and legal meta-narratives

This thesis has challenged some of the legal and historical meta-narrative that pervades numerous accounts of Australian legal development. The concept of the so-called 'meta-narrative' is that, across a body of works, not just one, there is a common theme, often with various sub-themes, sometimes implicit or only partially explicit. From the late 19th century, so-called 'nation-building' became a dominant subject for historians. von Ranke has previously been cited here for his commendation of primary source based historical scholarship. He is also credited for commending narrative history, especially on the formation of a nation-state. Once widely regarded as the 'father' of modern historical scholarship, this gender-biased title suggests why his primary subject matter has since been criticised as equally narrow. He was writing at the time of the formation of modern Germany, which was only one instance in the establishment of larger, centralised states in Europe, such as the United Kingdom, France (the Revolution and Napoleon only consolidating what the monarchy had started), Switzerland, Romania and Italy.

There was often an implicit teleological and normative dimension to such scholarship, the creation of each nation-state being both inevitable and good. A major sub-theme in this

⁶ Alison Pert, 'The Development of Australia's International Legal Personality', *AYIL*, 34, 2016, pp. 149-89.

narrative was the emerging unified state's resistance to, hitherto more powerful, neighbouring states, such as was the case in Prussia's successive wars with Denmark, Austria-Hungary and France, to acquire those parts of the latter three's territories, which 'Germans' held to belong properly within their new state. Some historians, obviously from the emerging state, either implicitly or explicitly, celebrated, as well as recorded, the process of unification. Many 'national' groups in Asia, the Middle East and Africa, colonised by Europeans, later readily embraced their version of this meta-narrative, adding achievement of independence to that of unification, with each writing their own narrative. Affirming the wide existence this process, is that so many of such resulting states, as does the *USA*, celebrate their 'independence day', as their most important official day.

The comparable narrative was somewhat different for Britain's self-governing colonies, the settlers of which, unlike their respective indigenous people, only spasmodically engaged in armed resistance to imperial rule and, generally, sought only advances in self-government rather than constitutional independence. Initially, instead of an 'independence day', their main 'national days' were celebrations of, respectively, confederation (Canada, 1 July 1867), union (South Africa, 31 May 1910), change of official title from 'colony' to 'dominion' (NZ and Newfoundland, both 26 September 1907) and British settlement (Australia, 26 January 1788), while all still celebrated the crown. Unsurprisingly, the 'national' meta-narrative histories of each reflected this difference, though still embracing a similar thrust to the truly national narratives. Initially, most of their historical accounts celebrated being part of the empire, with the trajectory of development being more on achievement of greater autonomy not independence. Equally, unsurprising, is that it was Canadian scholars, such as Edward Porritt (1922) who led with a somewhat more assertive sentiment.⁷

From the 1960s, as imperial links diminished further, with Britain entering the Common Market and related growth, of what might be termed 'national' sentiment, some of these celebrations were altered, with the creation of Republic Day in South Africa (1961) and *Waitangi* Day in NZ (1974), while Dominion Day was renamed Canada Day (1982, now also embracing Newfoundland). Celebrations of the crown continued in all but the now Republic of South Africa. In the absence of the other three's formal constitutional separation from the empire, many contemporary historical narratives in each invoked a trajectory in which the growth of independence or autonomy was charted and, sometimes, implicitly celebrated.

There has been little of a meta-narrative for the international legal system as a whole, apart from the standard chronological pantheon of famous legal scholars, because most historical

⁷ Edward Porritt, *The fiscal and diplomatic freedom of the British Overseas Dominions*, Clarendon Press, Oxford, 1922.

scholarship is ‘nationally’ focussed. In general, legal scholars have outside, the pantheon narrative, often portrayed international law as fixed. This thesis has offered a time-specific contribution to a meta-narrative for international law, by charting the rise in treaties.

Even modern Britain lacks a meta-narrative in this sense, as it was in the process of imperial devolution not nation-building but the situation for its former colonies is very different. Australia, emerging from its original status as an imperial dependency, has developed such a meta-narrative. Political history scholarship began to emerge in the mid-1960s to mid-1970s, as in some other places, at the same time of the changes reflected symbolically by adoption of the new ‘national days’, as detailed above. Australia did not change or adopt a new ‘national day’ but in 1974 did adopt a ‘national song’, while retaining ‘God Save the Queen’ as the national anthem. These political histories (La Nauze, 1965 and 1972; de Garis, 1969; Wright, 1970; Cuneen, 1973; Norris, 1975) only addressed legal questions in terms of the constitution.⁸ There was some implicit criticism, especially in de Garis, over imperial limits on Australian self-government. Works on later periods, such as *Australian independence: colony to reluctant kingdom*, (1998) contested the dates when Australia became ‘independent’. Depending as much on political inclinations as an understanding of law, the events championed in this debate included federation (1901), the Balfour Declaration (1926), Statute of Westminster (1931), Commonwealth adoption of the foregoing, separate declaration of war on Japan and first non-imperial treaty (all 1942) and, finally, the *Australia Act 1986*.⁹

At exactly the same time as these political histories, the first scholarship emerged specifically addressing the development and place of Australia in the international legal system. O’Connell (1966) began by stating that ‘the history of Australia’s emergent international personality is that of Dominion status’, which achieved

*unfettered international personality with the declaration of war on Japan; the exercise of its sovereign discretion; the participation of Australian in international conventions; and the process of executive certification.*¹⁰

He began his brief narrative of this ‘evolution’ with the postal agreement from 1874, being unaware of Germany’s unsuccessful approach in 1872 and wrongly stating that they were not ‘subject to ratification or approved by the Governor’, when, in fact, the imperial government

⁸ J.A. La Nauze, *Alfred Deakin: a biography 2 vols.*, MUP, Carlton, Vic., 1965; B. K. de Garis ‘The Colonial Office and the Commonwealth Constitution Bill’ in A. W. Martin (ed.), *Essays in Australian federation*, MUP, Melbourne, 1969, pp. 94-121; D. I. Wright, *Shadow of dispute: aspects of Commonwealth-State relations, 1901-1910*, ANUP, Canberra, 1970; J. A. La Nauze, *The making of the Australian constitution*, MUP, Carlton, Vic., 1972; Christopher Cuneen, *King’s Men: Australia’s Governors-General from Hopetoun to Isaacs*, GA&U, Sydney, 1973; Ronald Norris, *Emergent Commonwealth: Australian federation, expectations and fulfillment 1889-1910*, MUP, Carlton, Vic., 1975.

⁹ W. J. Hudson and M. P. Sharp, *Australian independence: colony to reluctant kingdom*, MUP, Carlton, Vic., 1998

¹⁰ D. P. O’Connell, ‘The Evolution of Australia’s International Personality’, in D. P. O’Connell (ed.), *International Law in Australia*, Law Book Co., Sydney, 1966, pp. 1-2.

insisted on final approval. He then observed that the ‘outstanding feature of the history of Australia’s treaty obligations between 1880 to (sic) 1920 is the increase in self-determination . . . in . . . commercial relations with foreign countries.’¹¹ By this, he meant colonies being allowed prior consultation on, separate adhesion to and withdrawal from Britain’s bilateral commercial treaties. He noted correctly that this did not apply to political treaties, missing the change by Britain after 1911. He missed completely the growth of multilateral treaties and associated organisations and, thus, an expanding colonial role in both. This Cambridge-educated New Zealander, noted rare occasions of Canadian, West Indian and Australian assertiveness over this ‘self-determination’, while essentially seeing this gradual development as mutually consensual with Britain.¹²

The American-educated German, Doecker, added a more strident note.

*Imperial control over foreign relations discouraged and even repressed attempts on the part of the Dominions to intervene on their own initiative in international politics.*¹³

The meta-narrative of subsequent Australian legal scholarship variously reflects these two perspectives. So, at some point (the precise date of achievement is debated or unstated), Australia emerged from imperial constitutional control to take an independent position in the international (legal) system. While, there is obviously much validity to this narrative, the implicit nationalism—more subtle in the legal than historical literature, which is behind much of the former—distorts the reality, as revealed through the detailed study in this thesis.¹⁴ There are several elements in this meta-narrative addressed below.

Firstly, there is absolutely no question that the imperial government did not, in the words of Sir Hartmann Just in 1912, want even its self-governing colonies to ‘have a quasi-separate international status.’¹⁵ Attendance at ‘political’ international conferences, such as planned for The Hague in 1915, was not seriously entertained. Consultation of colonies over ‘political’ treaties was generally not practiced, with some exception conceded to Canada and Newfoundland, over treaties on boundaries, extradition, arbitration and claims with the USA. Then, from 1911, after the Commonwealth’s protest over the *Declaration of London*, Britain committed to ‘turn over a new leaf’ and consult these colonies prior, on political treaties, which affected them.

Still, maintenance of ultimate imperial paramountcy, through this period, was starkly demonstrated to Australia in July–August 1914 when, with a weak prime minister and an

¹¹ *ibid.*, pp. 3–16.

¹² O’Connell, *op. cit.*, pp. 3–16.

¹³ Günther Doecker, *Treaty-making Power in the Commonwealth of Australia*, Martinus-Nijhoff, The Hague, 1966, p. 4.

¹⁴ I make this claim based on extensive analysis of the literature as detailed in Appendix 2.

¹⁵ Letter, Just to FO, 16 March 1912, CO532/41/245, 253–5, TNA.

election-distracted ministry, it was the governor-general of the Commonwealth who asserted control over the steps necessary for Australia to join the imperial campaign in the war. During that war, however, especially after the disaster at Gallipoli, a more assertive Commonwealth prime minister than hitherto, Hughes, opened direct communication with the British prime minister, for the first time, rendering the channel of the governor-general and the *CO* less important, if not yet, redundant. With the peace settlement in 1919, there was no question of Britain denying the self-governing colonies separate representation at and signature of, what was, respectively and undeniably, an international diplomatic conference and multilateral 'political' treaty. Separate representation and voting at the League of Nations and its subsidiary bodies followed just as automatically and unquestionably.

The main treaty issue, on which this implicitly 'nationalist' narrative holds true, was over bilateral commercial treaties. This is very patent in Canadian scholarship. The Dominion, in particular, asserted a right to adopt economic policies, domestic and international, at odds with imperial-led 'free trade'. From the late 19th century, the Dominion successfully persuaded Britain to include Canadian officials in negotiations for some bilateral commercial treaties, allowing it to determine the form of some treaties, though on which Britain insisted on final sanction. Australian and NZ governments were less assertive on this issue but the former, in particular, did, at a slower pace, seek to exercise a right to withdraw from or not be included in some bilateral commercial treaties. All asserted claims, in Australia's case from 1902, immediately after federation, to be consulted in advance by imperial authorities on some proposed bilateral commercial treaties. (The alliance treaties with Japan of 1902 and 1911 most concerned the Commonwealth, which wrongly assumed, at least the former to be solely 'commercial'.)

The other major point of international disagreement between Britain and its self-governing colonies was arguably not (yet) a matter of customary international law and, certainly, not a multilateral treaty: that is, on racial non-discrimination. This principle appears to have first arisen in international law in Britain's growing network of bilateral treaties, respectively on slave trafficking and 'free trade'. While the former might appear an obvious linkage, the latter might not. In fact, 'free' or reciprocal trade was interpreted by the imperial government, as also involving freedom of movement of persons, as well as commodities, involved in commerce. An assumption that such movement should be free of either 'national' or religious discrimination was expressed in a number of Britain's bilateral commercial treaties and in the language of imperial officials, discussing such treaties. Commonwealth officials privately expressed this view with respect to internal movement throughout Australia under s.92 of the Commonwealth constitution but not with respect to movement into Australia. This formed the

basis of the Commonwealth's disagreement with imperial authorities from 1901 over the commercial treaty concluded with Japan in 1894.

Most of Britain's self-governing colonies, including those in Australasia, had enacted racially discriminatory legislation, before Australian federation. This constantly irritated the imperial government, which either tried to have such legislation amended or resignedly accepted it. After federation, the latter approach was generally taken with respect to the Commonwealth more than the states, as Britain did not wish to force a rupture in relations with such a major colonial government. Thus, the *CO* did not give unequivocal support to Lord Hopetoun's clear desire not to give assent to the *Immigration Restriction Act 1901*. Similarly, the *CO* backed down six or so years later, against the united opposition of all Australian governments, against their racial discriminatory legislation being automatically reserved for royal assent in London. The imperial stance against the racially discriminatory legislation of its colonies arose, at this time, more from a notion of international 'comity' or good relations, not customary international law. Yet, when there was a treaty basis to this question, as was the case with Queensland's adherence (1897) to the Anglo-Japanese commercial treaty of 1894, Britain stood firm in 1902 against the Commonwealth, which reluctantly accepted imperial paramountcy on this occasion.

Secondly, Doeker's claim that Britain 'discouraged and even repressed' the colonies' activities in the international system, largely does not stand up to the evidence.¹⁹ Britain generally led the colonies into greater participation in international (and, hence, often domestic) legal developments. The meta-narrative places great emphasis on separate Australian representation at and signature of, respectively, the Versailles peace conference and treaties in 1919. In fact, after Britain granted colonial choice of adhesion to all non-political treaties in 1877-8, Britain encouraged colonial adhesion to such of these treaties, which it signed and supported separate representation at official international conferences and on such *PGIOs* as the *UPU*, *ITU* and *UPIP*, sometimes with separate voting rights. Britain invited colonies to semi-official international conferences from 1877 and to fully governmental conferences from 1878. The Commonwealth, again with the full agreement of Britain, sent separate representatives to non-treaty making international governmental conferences from 1902, including signing the 1906 *UPU* convention separately. Britain provided organised representation of the Commonwealth, which had no available officials, on the *IISA*. From 1911, Britain invited the self-governing colonies to send representatives to the treaty making opium, radiotelegraphy and sea safety conferences.

¹⁹ Doeker, *op. cit.*, p. 4.

A further implication in the meta-narrative, again in Doeker's words, is that there were 'attempts on the part of the Dominions to intervene on their own initiative in international politics'.²¹ Apart from the economically and racially protectionist policies outlined above, there is no instance in this period of these colonies, with the partial exception of Canada, seeking to take any such initiative. Pre-federation, most Australian colonies were slow to join the *UPU*, *ITU*, *UPIP* and other important *PGIOs*. Only *WA* signed the *Venice Sanitary Convention* (1897) and all withdrew from the *IBPCT* in 1898. The Commonwealth, not Canada, declined Britain's invitation for representation in its delegation to the Shanghai Commission on opium trafficking (1909) and all self-governing colonies declined the offer of representation at the treaty making opium conference of 1911-12. Overall, Britain drew its often passive, uninterested or diffident colonies, including Australia, into the growing modernisation of the international legal system and, thereby, often, their domestic law.

Thirdly, the greatest obstacle to Australia's participation in this modernisation of the international system and law was the Commonwealth not imperial constitution, both admittedly, imperial law. In comparison to the other self-governing colonies, the Commonwealth was less active and assertive than the Dominion of Canada. *NZ*, like Newfoundland and South Africa, was less engaged internationally but the three's unitary system of government allowed them to react more promptly in many cases. Australia's federal system, by contrast, greatly complicated the treaty making and associated legislative processes. Among the timid Commonwealth leadership, Deakin and, to a lesser extent, Fisher, were the most active in trying to secure state cooperation in realising treaty obligations. Barton, Chris Watson, Reid and Cook were too briefly in office to make a mark but do not appear to have been greatly engaged. Of the attorney-generals, Deakin, Isaacs and Littleton Groom exhibited the greatest, if limited, vision of autonomy. Of their two perennial advisers, Atlee Hunt was the most strident advocate of the Commonwealth's paramountcy with respect to the states, while Garran, at least on extradition, advocated the Canadian path of local legislation suspending imperial law and direct communication with foreign governments.

Comparable federations, notably Canada and the *USA*, were less hobbled than the Commonwealth, partly because of their respective, explicit constitutional treaty powers. When Britain became frustrated, as it often did, with the slowness of Australian accession to treaties, perhaps, it should have reflected ruefully on its own actions in 1897-98, when it had, by stealth, removed two little words, 'and treaties', from the Commonwealth's draft constitution bill. This was unnecessary, as no Australian political leader intended, then, or, later, until H. V. Evatt made treaties with the *USA* (1942) and *NZ* (1944), attempted to make a

²¹ *ibid.*

treaty independently of Britain with any government, especially a foreign one. Within Australia, no Commonwealth government was bold enough, for more than seven decades after federation, to cross, in the words of the *CO*'s Charles Davis, the 'chasm' between state and federal powers, by the 'bridge' of s.51(xxix), which alone Isaacs and Littleton Groom, sons of, respectively, a Polish-Jewish tailor and a convict, had commended before 1914; that is, the treaty-silent 'external affairs' power.

APPENDICES

LITERATURE REVIEWS

Appendix 1

Literature Review: International Legal History

This thesis is a work on the history of certain specific treaties and domestic laws. Thereby, it is part of a sub-discipline of law or, perhaps, inter-disciplinary legal history. Perhaps, it might also be categorised as international legal history, except that the thesis argues the distinction between international and domestic law, at least for the period here under close examination, is misleading. Many legal scholars, who are not historians, invoke historical examples of law. Most of these works are not, however, legal histories. Today, the numbers of detailed and primary source-based legal histories, in English at least, are surprisingly few.

International legal history has a long, if chequered tradition, arguably almost as old as modern international law itself. Like so many initiatives in the latter, the former began in Continental Europe, arguably with Saxon scholar Samuel (later, von) Pufendorf. Appointed royal historian in Sweden, he began publishing historical accounts, including *Einleitung zur Historie der vornehmsten Reiche und Staaten* (1695), perhaps the first such work, though international law was not its primary focus. He did use archival sources for what would be called today 'contemporary history'. Hanoverian, Dietrich von Ompteda, did focus on legal developments in *Literatür des gesammten sowohl natürlichen wie positiven Völkerrechts* (1785), although this was essentially, according to Arthur Nussbaum (see below), only a detailed bibliography.¹ In 1815 Pufendorf's initiative was revived, doubly appropriately, being in the year of the epoch-making Congress of Vienna and at the instigation of Friedrich Carl von Savigny. Frankfurt-born but to a family from Lorraine, the University of Berlin law professor co-founded the *Zeitschrift für geschichtliche Rechtswissenschaft* (*Journal of Historical Legal Studies*, 1815) and began his multi-volume *History of Roman Law in the Middle Ages* (1834-51). In these and his later two-volume *The Law of Obligations, as part of today's Roman Law* (1851-53), he argued for the importance of studying the history of law. His tradition was in turn revived and made the subject of more regular publication from 1879 with the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*Journal of the Savigny Foundation for Legal History*), which based in Vienna from 1911, still publishes.²

The development within the English-speaking world of law as a scholarly discipline, especially in its constitutional and international forms, initially was also closely linked to the discipline of history. On the history of English constitutional law, a number major works were published between 1751 and 1774, on either side of the first English-language legal

¹ Samuel Pufendorf, *An Introduction to the History of the Principal Kingdoms and States of Europe*, M. Gilliflowers and T. Newborough, London, 1695; Dietrich Heinrich Ludwig, Frenherren von Ompteda, *Literatur des ges; sowohl natürlichen als positiven Völkerrechts*, 2 vols., Johann Leopold Montag, Regensburg, 1785.

² Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 7 vols., J. C. B. Mohr, Heidelberg, 1834-51 and *Das Obligationenrecht, als Theil des heutigen Römischen Rechts*, Veit, Berlin, 1851-53.

textbooks, published by William Blackstone between 1756 and 1769.³ The first English-language work on international law was by Robert Ward. Educated in the classics at Oxford, Ward was practising as a barrister, with political contacts and aspirations. At the suggestion of rising governmental jurist, Sir William Scott, Ward published *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius* (1795). As the title suggests, this history was limited to the pre-modern period and did not use archival sources. This general, secondary-source based narrative, ending at the start of the development of early modern international law, reflects in method Ward's other work as a novelist. He was writing a narrative, more than analysing sources. The common claim that it was the first history of international law can only be sustained in respect to English-language works. Inspired by the lectures of Sir James Mackintosh (1797-99), barrister Frederick Eden's, *An historical sketch of the international policy of modern Europe: as connected with the principles of the law of nature and of nations* (1823), is necessarily general, given its short length, but actually captures accurately the major changes that international law was then undergoing, certainly better than did Ward's.⁴ Britain, being an island with a large empire, was less engaged with Continental European governments. So, it slower to embrace the growing interaction of states, which was arising from the expansion of international commerce, facilitated by Europe's land borders (as Eden so insightfully had observed). This was reflected in Britain's intellectual tradition where domestic, rather than international, law was the main interest. Henry Hallam's four-volume study, *The Constitutional History of England* (1827), was the first of three foundational English constitutional historical studies in the 19th century.⁵

The USA largely shared England's common law tradition and sense of isolation from Europe. Yet, it had two land borders and had turned to expanding its foreign trade, once freed from the restrictions of Britain's *Navigation Code*. This encouraged a greater interest in international law. Part 1 of *Commentaries on American Law* (1826), the first of four volumes by New York's retired judge, James Kent, on his lectures at the, then, *Columbia College*, is

³ *The Parliamentary or constitutional history of England: being a faithful account of all the most remarkable transactions in Parliament, from the earliest times*, Thomas Osborne and William Sandby, London, vols. 1-8, 1751; 9-13, 1753; 14-18, 1755; 19-20, 1757; 21-22, 1760; 23-24, 1761; William Blackstone, *An analysis of the laws of England*, Clarendon Press, Oxford, 1756 and *Commentaries on the laws of England*, 4 vols., Clarendon Press, Oxford, 1765-69; Gilbert Stuart, *An Historical Dissertation on the Antiquity of the English Constitution*, T. Cadell, London, 1768 and *Observations concerning the public law, and the constitutional history of Scotland*, W. Creech, Edinburgh, 1774.

⁴ Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius*, vol. 1, J. Butterworth, London, 1795; Sir James Mackintosh, *A Discourse on the Study of the Law of Nature and Nations*, London, c. 1799; Frederick Eden, *An historical sketch of the international policy of modern Europe: as connected with the principles of the law of nature and of nations, concluding with some remarks on the Holy Alliance*, J. Murray, London, 1823.

⁵ Henry Hallam, *The constitutional history of England, from the accession of Henry VII to the death of George II*, L. Baudry, Paris, 1827.

on the 'Law of Nations'. The first twenty of its 200 pages are a secondary-source based, general history. More weighty were the works of Rhode Island-born and partly European-educated, Henry Wheaton, who combined careers in both the practice of law as a barrister and judge, eventually in New York, as a diplomat in Europe and a scholar. His country's post-independence involvement in international affairs, especially relations with Britain, such as on neutrality and, later, slave traffic interdiction, led to several publications before, while in Prussia, he published *Elements of International Law: with a Sketch of the History of the Science* (1836) and, later, *History of the Law of Nations from the earliest times to the Treaty of Washington, 1842* (1845).⁶ Wheaton's latter work highlights the limitations of early international legal histories. Although providing a wealth of detail on some issues and utilizing some official records, as well as secondary sources, it focuses more on the international relations of selected foreign powers, especially Britain and the USA, rather than the making of law itself. He certainly details the anti-slave trafficking campaign but does not see this, along with the new commercial treaties, as representing a fundamental shift in the nature of treaties and, hence, international law generally. This weakness is amplified by his failure to note the contemporaneous emergence of treaties on extradition, postage and copyright. After Wheaton, there was no further major English-language international legal history on the modern era for nearly a century.

The small number of international law textbooks in both the USA and Britain in this period usually began with a 'historical' introduction. In England, William Oke Manning, *Commentaries on the Law of Nations* (1839), begins with fifty pages on the 'history of the science of the law of nations'. In 1850, Oxford University's inaugural *School of Law and Modern History* combined both disciplines. The main focus of British legal scholars continued to be domestic not international law. Sir Robert Phillimore, *Commentaries upon International law Vol. 1* (1854), confines his briefer historical account to a long preface, much as did Sir Travers Twiss, *The law of nations considered as independent political communities, vol. 1: On the rights and duties of nations in time of peace* (1861). Sheldon Amos, *Lectures on International Law* (1874), devoted one lecture to the 'history of international law', using only earlier legal, not historical, works and saying almost nothing on the 19th century.⁷ Of the Americans, Daniel Gardner has around twenty pages in *A Treatise on International Law* (1844), for a 'history of the world' in antiquity, and, nearly fifty pages, on

⁶ James Kent, *Commentaries on American Law*, vol. 1, O. Halsted, NY, 1826; Henry Wheaton, *Elements of International Law: with a Sketch of the History of the Science*, Carey, Lea & Blanchard, Philadelphia, 1836 and *History of the Law of Nations from the earliest times to the Treaty of Washington, 1842*. Gould, Banks, NY, 1845.

⁷ William Oke Manning, *Commentaries on the Law of Nations*, S. Sweet, London, 1839; Sir Robert Phillimore, *Commentaries upon International law, vol. 1*, Butterworths, London, 1854; Travers Twiss, *The law of nations considered as independent political communities vol. 1: On the rights and duties of nations in time of peace*, Clarendon Press, Oxford, 1861; Sheldon Amos, *Lectures on International Law*, Stevens & Sons, London, 1874.

‘the history of nations’—which he claims is from Moses to the present--which suggests clearly how little detail on the development of international law could be included. Henry Wager Halleck, *International Law, or Rules regulating the Intercourse of states in peace and war* (1861) has only forty pages to 1861, which focuses on traditional questions of the use of force and overlooking the major, new developments such as on commerce, including copyright, and the changes to maritime rules agreed upon in Paris in 1856, arguably the first multilateral treaty.⁸ Thomas Erskine May, *The constitutional history of England since the accession of George the Third, 1760-1860* (1861-71) and William Stubbs, *The constitutional history of England*, (1874-78) were the next two foundational constitutional studies, after Hallam. May but not Stubbs was legally trained. Unsurprisingly for those times, the University of Melbourne followed Oxford’s approach of combining modern history and law, with the professorial appointment in 1855 of the Irish scholar of classical Greece, William Hearn. He published *The Government of England: Its Structure and Its development* (1867).

In 1873, Melbourne again followed Oxford’s lead, of the year prior, by separating the teaching of law and history. Thereafter, until the mid-20th century, the two disciplines, especially in the English-language world, traveled on somewhat separate paths. This separation of law and history in the English-speaking world, at least, coincided with a fresh surge of scholarship on international law, stimulated in large part by the increased growth in multi-party, law-making treaties and associated inter-governmental international organisations. International law scholars often included, usually at the start of their standard omnibus treatments of the subject, some ‘historical’ accounts. These were inevitably very general, based solely on secondary or occasional official public sources. They did not use archival sources to examine the detailed inner-governmental, let alone non-governmental, processes of law making. Theodore Dwight Woolsey, *Introduction to the study of International law: Designed as an Aid in Teaching and in Historical Studies* (1860), David Dudley Field, *Draft Outlines of an International Code, Vol. 1: Relations of Nations and of their Members in Time of Peace* (1872) and Freeman Snow, *International law: A Manual* (1895), all adopted what was becoming the standard textbook format, without an historical section. The major, new British international law textbooks, which included Edward Creasy, *First Platform of International Law* (1876), W. E. Hall, *Treatise on International Law* (1880), James Lorimer, *The Institutes of the Law of Nations* (1883), Thomas Alfred Walker, *A Manual of Public International Law* (1895) and Lassa Oppenheim, *International Law: a Treatise: Vol 1: Peace* (1905), all dispensed with historical introductions.

⁸ Daniel Gardner, *A Treatise on International Law: a short explanation of the jurisdiction and duty of the government of the republic of the United States*, Press of N. Tuttle, Troy, NY, 1844; H. W. Halleck, *International Law, or Rules regulating the Intercourse of states in peace and war*, D. Van Nostrand, NY, 1861.

The separation was not absolute, although it was the legal scholars, especially those writing on international law, which tended to make some attempt to cover a 'history' of their field. The historians were less inclined to histories of legal developments.⁹ T. J. Lawrence, *The Principles of International Law* (1895), did have a brief history, but only to Grotius, and little on the major, recent treaty developments. Hence, he concluded, unwisely, that 'there seems no prospect of any revolutionary change', thereby missing the major changes then already underway. Leone Levi, *International Law with materials for a Code* (1887) and Frederick Edwin Smith (Lord Birkenhead), *International law* (1900) respectively, have twenty-six and sixteen 'historical' pages, but only on the pantheon of famous writers and not actual recent treaty developments. Oppenheim, at least, took note of the changing nature of the international legal system at the time, with the rise of multilateral and law-making treaties, on a range of new subjects, albeit in a chapter buried at the end of his volume. Thomas Baty, *International Law* (1909) observed:

Since the Hague Conference of 1907 it has become increasingly evident that the nineteenth-century conceptions of international law must be revised. Independence is rivaled by Interdependence.

Regrettably, he offered no detail to explain these supposed changes.¹⁰ American legal scholars followed much the same path.¹¹

Some of the more narrowly based studies of international law did explore the history of their respective sub-field, such as, John Bassett Moore, *History and Digest of International Arbitration* (1898), Stuart A. Moore and Hubert Stuart Moore, *The History and Law of Fisheries* (1903), Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters* (1911) and Carl Jacob Kulsrud, *Maritime Neutrality to 1780: A History of the Main Principles Governing Neutrality and Belligerency to 1780* (1936). Boston, MA: Little,

⁹ Thomas Erskine May, *The constitutional history of England since the accession of George the Third, 1760-1860*, Longman, Green, and Roberts, London, vol. 1, 1861; vol. 2, 1863; vol. 3, 1871; William Stubbs, *The constitutional history of England in its Origin and development*, Macmillan & Co., London, 3 vols., 1874-8; William Hearn, *The Government of England: Its Structure and Its development*, George Robertson, Melbourne, 1867.

¹⁰ Sir Edward S. Creasy, *First Platform of International Law*, John van Voorst, London, 1876; W. E. Hall, *A Treatise on International Law*, The Clarendon Press, Oxford, 1880; James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, 2 vols., William Blackwood and Sons, Edinburgh, 1883; Thomas Alfred Walker, *A Manual of Public International Law*, CUP, Cambridge, 1895; L. Oppenheim, *International Law: a Treatise: Vol 1: Peace*, Longmans, Green and Co., London, 1905; Leone Levi, *International Law with materials for a Code*, K. Paul, Trench, London, 1887; F. E. Smith (Lord Birkenhead), *International law*, Bedford, London, 1900; Thomas Baty, *International Law*, Murray, London, 1909, p. vii.

¹¹ Theodore Dwight Woolsey, *Introduction to the study of International law: Designed as an Aid in Teaching and in Historical Studies*, J. Munroe and company, Boston, 1860; David Dudley Field, *Draft Outlines of an International Code, Vol. 1: Relations of Nations and of their Members in Time of Peace*, Diossy & company, NY, 1872; Freeman Snow, *International law: A Manual based upon lectures delivered at the Naval War College*, Govt. Printing Office, Washington, D. C., 1895; T. J. Lawrence, *The Principles of International Law*, Macmillan, London, 1895, (see p. 53 in the second edition).

Brown, 1936. Although all useful, none used archival records.¹² The only major English-language international legal histories in the period before the mid-20th century, were Thomas Alfred Walker, *History of the Law of Nations* (1899), whose coverage ends in 1648, and Sir Geoffrey Butler and Simon Macoby, *Development of International Law* (1928). The latter, like Wheaton, is dominated by traditional subjects of customary international law governing relations between states, especially in war and diplomacy. Towards the end of the approximately 600 pages, which stretches to include the early *League of Nations* period, the authors made valuable reference in thirty pages to the growth in treaty-making, including on novel subjects such as labour and sanitary protection, which they term 'technical conventions'. Given the time-span of the work, as with most omnibus international legal histories, these unsourced or secondary source based sections are necessarily brief. *International Law* (1924), by American political scientist, Charles G. Fenwick, is similarly limited.¹³ Meanwhile, in Europe, international legal history had continued more strongly after Wheaton. *Kritik des Völkerrechts nach dem jetzigem Standpunkt der Wissenschaft* (1847) by the Prussian, Karl von Kaltenborn-Stachau, reflects the approach of much international history, focusing on the pantheon of 'great writers', rather than the law itself. The multi-volume *Histoire du droit des et des relations internationales* (1861-70) by Belgium's François Laurent, begins in antiquity and ends in 1870, but again is more political than legal history. 'Literarhistorische Uebersicht der Systeme und Theorien des Völkerrechts' by Switzerland's Alphonse Rivier, in Franz von Holtzendorff, *Handbuch des Völkerrechts* (1888), is a bibliographical essay, like that of von Ompteda's. *Les Origines du droit international* (1894), by Ernest Nys, a Belgian colleague of Laurent, is mainly very detailed political history, focusing on the late Middle Ages and just touching on the early modern period. His multi-volume, *Le droit international* (1912), focuses on the law but is thinly sourced. The problem of covering such a vast period and so many governments means most of these works are too superficial, which is also true of *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre* (1923) by the Alsatian, Robert Redslob, and *Geschichte des Völkerrechts* (1935), by Arthur Wegner, which is also more political

¹² John Bassett Moore, *History and Digest of International Arbitration*, Govt. Printing Office, Washington, D. C., 1898; Stuart A. Moore and Hubert Stuart Moore, *The History and Law of Fisheries* Stevens and Haynes, London, 1903; Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters; with special reference to the Rights of Fishing and the Naval Salute*, W. Blackwood, Edinburgh, 1911; Carl Jacob Kulsrud, *Maritime Neutrality to 1780: A History of the Main Principles Governing Neutrality and Belligerency to 1780*, Little, Brown, Boston, 1936.

¹³ Thomas Alfred Walker, *History of the Law of Nations*, CUP, Cambridge, 1899; Charles G. Fenwick, *International Law*, The Century Co., NY, 1924; Sir Geoffrey Butler and Simon Macoby, *Development of International Law*, Longmans, Green, London, 1928.

than legal history, concentrating on Germany.¹⁴

Continental influences helped revive interest in international legal history in the English-speaking world, including in non-legal scholarship. Political science, which initially included international relations, has a strong focus on institution-building. Paul Reinsch, a multilingual American political scientist, diplomat and lawyer of German parentage, published *Public International Unions: their work & organization: a study in international administrative law* (1911), a stunning work for its time, still widely cited on early multilateral treaty development. He extensively cited German and French legal scholarship. The University of Washington's Linden A. Mander, born in South Australia, updated Reinsch's work with *Foundations of Modern World Society* (1947).¹⁵ Unsurprisingly, it was also a European, Arthur Nussbaum, who really inspired the revival of international legal history in the English-speaking world, with a *Concise History of the Law of Nations* (1947), after migrating from Germany to the USA. This small work is still the most useful English-language omnibus work. Although also given to focusing too much on the 'great writers' and being necessarily limited in detail by covering such a long period, it does make some significant comments on the growth of treaty-making. Importantly, Nussbaum statistically notes the increase in treaties and the broadening of content. He also identified the growth of associated official permanent international organisations, invariably associated with the new, multilateral treaties. He opened his study with the startling yet, accurate, claim, especially true for the English-speaking world: **'The history of the law of nations is little explored and almost uncharted [emphasis added].'**¹⁶

Sound scholarly history, legal or otherwise, requires detailed, specific studies, covering limited time periods and subjects. The traditional vehicles for such works are scholarly journals. In the year after the publication of Nussbaum's second edition, a meeting of American law schools at the University of Chicago led to the formation the following year of the *American Society for Legal History* which, from 1957 at Temple University, began

¹⁴ Karl von Kaltenborn-Stachau, *Kritik des Völkerrechts nach dem jetzigem Standpunkt der Wissenschaft*, G. Mayer, Leipzig, 1847; François Laurent, *Histoire du droit des et des relations internationales*, 18 vols., Meline, Cans et compagnie, Brussels, 1861-70; Alphonse Rivier, 'Literarhistorische Uebersicht der Systeme und Theorien des Völkerrechts' in Franz von Holtzendorff (ed.), *Handbuch des Völkerrechts*, C. Habel, Berlin, 1888, pp. 395-525; Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius*, Trübner & c., NY, 1882; *Les origines de la diplomatie et le droit d'ambassade jusqu'à Grotius*, Librairie Européenne C. Muquardt, Brussels, 1884; *Les Origines du droit international*, A. Castaigne, Brussels, 1894; *Le droit international; les principes, les théories, les faits*, 3 vols., M. Weissenbruch, Brussels, 1912; Robert Redslob, *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre*, Rousseau, Paris, 1923; Arthur Wegner, *Geschichte des Völkerrechts*, Vol. 3 of *Handbuch des völkerrechts*, W. Kohlhammer, Stuttgart, 1936.

¹⁵ Paul Reinsch, *Public International Unions: their work & organization: a study in international administrative law*, Ginn and Company, Boston, 1911; Linden A. Mander, *Foundations of Modern World Society*, StUP, California, 1947.

¹⁶ Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd ed., Macmillan & Coy., New York, 1954 (1947), pp. 196-7.

publishing the *American Journal of Legal History*, the first English-language academic periodical in the field. The society has also published, since 1983, the *Law and History Review* and a book series, *Studies in Legal History*. From 1989 the *Yale Journal of Law and the Humanities* also published legal history while, from 2001 the University of Kansas began the *Journal of Asian Legal History*. As the various titles suggest, these were not journals focusing on international law, which only formed a minor part of their content. European scholarly development, especially in Nussbaum's homeland, had been held back by Nazi repression and defeat in the Second World War. As Germany's recovery gained momentum, vigorous scholarship in this field revived there. Wolfgang Preiser, *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode* (1964) drew attention to limitations of existing scholarship. That same year, the *Max Planck Institute for European Legal History* was founded, significantly at Frankfurt, Savigny's birth-place, where Ingo Hueck led research on the past German contribution to international legal doctrine. Charles Alexandrowicz, Viennese-born and Polish-educated, while at the University of Sydney, published *An introduction to the history of the law of nations in the East Indies: 16th, 17th and 18th centuries* (1967) and, on return to London, helped found the *Grotian Society* and edited its *Studies in the history of the law of nations* (1970).¹⁷ European scholarly journals on legal history increased in number, including: *Zeitschrift für Neuere Rechtsgeschichte* (1979); the bilingual *Journal of the History of International Law/Revue d'histoire du droit international* (1999), in association with the *Max Planck Institute of Public Law and International Law* at Heidelberg, echoing the original initiative of Pufendorf; *Rechtsgeschichte* (2002), by the *Max Planck Institute for European Legal History*, the 'online' *Ancilla Iuris* (2006), at the University of Freiburg; and *Contributions to Austrian Legal History* (2011) in Vienna. The *European Society for Comparative Legal History* was established in *Den Hague* in 2009.

British scholars were somewhat slower than their American and Continental counterparts. (*The Osgoode Society for Canadian Legal History* was established in 1979.) Unsurprisingly, like in the USA, it was a European--the Hungarian-born legal scholar, Albert Kiralfy--who founded *The Journal of Legal History* at University College, London, in 1980. The Continental influence was again present in 2010 with the founding, in London, of the twin English/German-language *Journal on European History of Law*. In Australia, in the interim, Macquarie University began *The Australian Journal of Legal History* in 1997. Within these promising developments, there was very little scholarship, at least in English, which employed the mainstream historians' method of writing specific, limited studies based on

¹⁷ Wolfgang Preiser, *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode*, Steiner, Frankfurt, 1964; Charles Alexandrowicz, *An introduction to the history of the law of nations in the East Indies: 16th, 17th and 18th centuries*, Clarendon Press, Oxford, 1967 and *Studies in the History of the Law of Nations*, (Grotian Society Papers 1968), Martinus Nijhoff, The Hague, 1970.

deep, archival research, on either governmental or non-governmental policy-making. There is almost nothing on the specific studies contained in this thesis.¹⁸

In the interim, the main works on international legal history remained both of the shallow, omnibus kind and were primarily Continental. The Netherlands' Jan Verzijl, published the first two volumes of *International Law in Historical Perspective* (1968-69), the beginnings of what has become (continuing after his death) an eleven-volume series. Focusing on the period from 1900 to the Second World War, this concentrates on the issues of sovereignty, international personality and the rights and duties of state. The development of the international legal system, especially its treaty development, is not examined in any detail. There was then a hiatus in major publications, until the second phase of the Cold War began to thaw.¹⁹ In 1982 Manfred Lachs (educated in Cracow, later, professor of international law at the University of Warsaw and justice of the *International Court of Justice*) published *The Teacher in International Law*. This small but oft-cited work exhibits all the general limitations of this sub-discipline, as it has been originally practiced to date. He devoted almost one hundred pages to the period after the French Revolution. Yet, nearly all of it is a succession of brief biographies of writers on international law. He briefly (p. 68) made a few sound generalisations, such as saying this period was 'new chapter of history', an 'era of congresses' [citing those of 1815, 1856, 1885] and 'important international instruments determining in legal terms' the destiny, not only of Europe but beyond, and when '*treaty law developed at enormous speed and covered ever new areas; written law reached a hitherto unknown peak.*'²⁰ Yet, he provided almost no details of these developments. Specific treaties, apart from a few obvious ones concerned with war, were virtually ignored. The substance of his writing relates to these developments but another of his observations: 'This was a time of prolific writings: the gallery becomes more crowded,' discloses the traditional focus on 'great writers', as the main subject for close study.²¹

In 1984, two major works emerged from Germany: Volume Seven of the *Max Plank Institute's Encyclopedia of Public International Law* (under direction of Rudolf Bernhardt), which listed international legal history as one of its four subjects. In fact, less than 150 multi-authored pages were devoted to this, with only eighteen on the period between 1815 and

¹⁸ A brief and limited study of the growth of international legal history and the cause of its relative, original neglect include Ingo Hueck, 'The Discipline of the History of International Law', *JHIL*, 3, 2001, pp. 194-217 and Johan W. Verzijl, 'Research into the History of the Law of Nations' in J. W. H. Verzijl (ed.), *International Law in Historical Perspective*, A. W. Sijthoff, Leiden, 1968, pp. 400-34; Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', *Der Staat*, 26, 1987, pp. 103-26.

¹⁹ J. H. W. Verzijl (ed.), *International Law in Historical Perspective*, vols. 1 & 2, A. W. Sijthoff, Leiden, 1968-69.

²⁰ Manfred Lachs, *The Teacher in International Law: Teachings And Teaching*, Martinus Nijhoff, The Hague, 1982.

²¹ *ibid.*

1914, by Hans-Ulrich Scupin. A far more weighty work is Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (translated in 2000 as *Epochs of International Law*). Although this very large work is highly regarded, it is essentially just general international diplomatic history, based on secondary sources, with only sporadic mention of treaties—nearly all of which are confined to political treaties such as on alliances and peace. He focused on the overall issues of statehood and sovereignty, which are obviously important but, in so doing, he missed the real developments in international law, which were in the growth in number, form and contents of treaties. His ‘epochs’ do not concur with the actual stages of development in treaty making.²²

In more recent years, scholarly interest has grown in international legal history but the necessary primary research has generally not been undertaken nor, it seems, understood. A traditional historian would not attempt, as does Sri Lankan, Chittharanjan Amerasinghe, in ‘The Historical Development of International Law-Universal Aspects’ (2001), to cover any topic from antiquity almost to the present so briefly (26 pages): being so shallow in detail must lead to important omissions, errors and doubtful conclusions. In a number of brief articles, Belgium’s Randall Lesaffer has acknowledged that international legal history was ‘still lagging behind compared to most other branches of legal history’ and regretted the ‘neglect the field has suffered during most of the past two centuries’. He pointed to the need for examination of the required methodology but seemed not to recognise the need for archival research. This is reflected in the chapters of his major, edited work, *Peace Treaties and International Law in European History: from the late Middle Ages to World War One*, (2004). His authors relied almost entirely on secondary or public sources.²³ Marie-Hélène Renault, *Historie du droit international public* (2007) is, likewise, a relatively brief (190 pages) work for the long time period covered, making it quite general.²⁴

Massive and multi-authored, *The Oxford Handbook of the History of International Law* (2012), edited by Bardo Fassbender and Ann Peters, has well over 1,000 pages, divided into many short chapters, which contribute almost no new original, primary source-based scholarship. On the subjects relevant to this thesis, Joaquín Alcaide Fernández, on international criminal law, discusses piracy briefly, slavery generally, and the white slave treaties of 1904 and 1910 in a half-page. The obscene publications treaty is not mentioned.

²² Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, North-Holland Publishing Coy, Amsterdam, 1984; Wilhelm G. Grewe, *Epochs of International Law*, Walter de Gruyter, Berlin, 2000.

²³ C. F. Amerasinghe, ‘The Historical Development of International law-Universal Aspects’, *Archiv des Völkerrechts*, 39 (4), December 2001, pp. 367-93; Randall Lesaffer, ‘The Grotian Tradition Revisited: Change and Continuity in the History of International Law’, *BYIL*, 73, 2002, pp. 103–139; Randall Lesaffer (ed.), *Peace Treaties and International Law in European History: from the late Middle Ages to World War One*, CUP, Cambridge, 2004, pp. 1-8.

²⁴ Marie-Hélène Renault, *Historie du droit international public*, Ellipses, Paris, 2007.

On labour protection, there is nothing on the Berne conventions of 1906 or bilateral social insurance treaties. On nature, there is no mention of protection of birds, plumage, African game, North Pacific fur seals or whales, and only a brief reference to sealing in the Behring Sea, with reference to law of the sea. On drug trafficking, there is one reference to the opium trade but not to the treaties. There is little else on the other treaties of this period.²⁵

Stephen Neff's *Justice among Nations: A History of International Law* (2014) is the most significant, recent international legal history. Given the high quality of his slightly earlier study of the legal aspects of the American civil war, this is a disappointing work. He devotes 136 pages to the period between 1815 and 1915, which is essentially divided into a sequence of short summaries of major writers on international law or some overall theoretical concepts, such as 'liberalism' and an obscure 'solidarism'. He only examines or, better, describes, developments in the international legal system itself on rare occasions and, then, only briefly, just like most other works cited above.²⁶ For example, he pauses briefly for little more than one page in the middle of this sequence of writers to mention the conventions on river navigation since Vienna 1815 and the treaties over the Suez and Panama canals. He then mentions, just in passing, the creation of the *General Postal Union (GPU)*, *Universal Telegraph Union (UTU)* and the *International Radiotelegraphic Union*, without analysis of their significance in the development of treaty-making. Similarly, he notes the emergence of other international organisations but, giving only a few examples of what he says were forty-five in number by 1911, including the *International Maritime Commission* (in connection with which he does mention the two landmark maritime conventions of 1910) and the *Permanent Sugar Commission*, he does not differentiate between these government-created bodies and the unofficial *Office Internationale du Travail*. He does not mention the two Berne labour conventions, let alone the bilateral social insurance treaties, nor the other treaties covered in this thesis on drugs, white slavery and obscene publications.

Aside from the few omnibus international legal histories mentioned above, there are very few detailed major works, which use primary source material, of international legal history on specific treaty subjects from the period covered in this thesis. The most substantial is Mark Cioc, *The Game of Conservation: International Treaties to Protect the World's Migratory Animals* (2009). This uses some US and British government archival records to examine the African game treaty of 1900, the convention for the regulation of whaling of 1931 and the USA-UK migratory bird treaty of 1916. He seems unaware of the pre-First World War preparations, stalled by the war, for both respectively the protection of whales and plumage

²⁵ Bardo Fassbender and Ann Peters (eds.), *The Oxford Handbook of the History of International Law*, OUP, Oxford, 2012.

²⁶ Stephen Neff, *Justice among Nations: A History of International Law*, HUP, Cambridge, Mass., 2014.

birds, the latter of which led to the 1916 bilateral treaty. Sara Bannerman uses Canadian but not vital British records in *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1842-1971* (2013). The wide period covered means she does not examine with great detail. For treaty subjects covered in detail in this thesis, there is also a striking lack of modern legal history scholarship. The only work, which covers in some detail, any of these treaty subjects is Jean Allain's very recent 'White Slave Traffic in International Law' (2017). This is a very useful, minor work, which does not, however, use archival sources or examine the policy of any one government in detail.²⁷

²⁷ Mark Cioc, *The Game of Conservation: International Treaties to Protect the World's Migratory Animals*, Ohio UP, Athens, Ohio, 2009; Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism, 1842-1871*, UBC, Vancouver, 2013; Jean Allain, 'White Slave Traffic in International Law', *JTHE*, 1 (1), 2017, pp. 1-40.

Appendix 2

Literature Review: Australian International Legal History

There has been very little primary source-based international legal history published on Australia and nothing on the subjects examined closely in this thesis. Generally, there has only been very brief, secondary and, occasionally, public primary source-based scholarship, mainly included within studies of the Commonwealth constitution and, less frequently, on Australia's role in international law. All these contributions have been included within works on contemporary Australian legal developments and not specific legal histories. Mainstream (non-legal) historians have belatedly contributed in studies on the making of the Commonwealth constitution but have essentially ignored international law; certainly for the period covered in this thesis.

The first scholarship, related in some way to the Australian aspects of this thesis, appeared in the years immediately before and after the federation of the Australian colonies. Most were constitutional studies, as there were, as yet, few historical works on this contemporary period and no studies of Australia's relationship with international law. Most major works were produced by Australian-based legal scholars and officials (either elected or appointed) closely involved in the process of constitutional development. The notable works of the former include those by W. Harrison Moore, Jethro Brown and Richard Clive Teece;¹ of the latter there were by Sir Robert Garran, Sir John Quick and Andrew Inglis Clark.² Their sources were public records and, in some cases, personal experience. Most included brief, though important, references to the legal meaning of the 'external affairs' power of the Commonwealth constitution. There was no real coverage of past international treaty developments, let alone what this meant for the future. For over a century, legal scholars have relied heavily on these works. There were only a few works by non-legal historians on constitutional questions, all using public sources and ignoring international aspects, as most historians concentrated on earlier periods. Although, as this thesis demonstrates, there was

¹ W. Harrison Moore, *The Commonwealth of Australia: four lectures on the Constitution Bill 1897*, George Robertson and Co., Melbourne, 1897, especially pp. 43-44; 'The Commonwealth of Australia Bill', *LQR*, 16, 1900, pp. 35-43; *The Constitution of the Commonwealth of Australia*, John Murray, London, 1902, especially pp. 142-3; 'The Legal Relations of the Several States of the Empire', *JSCL*, 9, 1, 1908, pp. 113-21. Jethro Brown, 'The Australian Commonwealth Bill', *LQR*, 16, 1900, pp. 24-34. Richard Clive Teece, *A Comparison between the Federal Constitutions of Canada and Australia*, W. E. Smith Ltd, Sydney, 1902, especially pp. 59-60. Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, Clarendon Press, Oxford, 1902, especially pp. 54-90. He has a section on early Australian constitutional development (pp. 276-92) but does not mention treaties as an Imperial constitutional issue, only restrictions on customs legislation.

² R. R. Garran, *A Problem of Federation under the Crown: The Representation of the Crown in Commonwealth and States*, Brisbane, 1895; *The Coming Commonwealth: an Australian handbook of federal government*, Angus & Robertson, Sydney, 1897; John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, especially pp. 631-32. Andrew Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1901. John Quick, *The legislative powers of the Commonwealth and the States of Australia with proposed amendments*, Melbourne, Charles F. Maxwell, 1919, especially pp. 92-3.

considerable involvement of all Australian governments in treaty-making in this period, contemporary Australian scholars essentially have ignored this.³ There was only rare mentions of treaties in the *High Court*, such as in *McKelvey v. Meagher* (1906), where Barton J stated: 'It is probable that that power includes the power to legislate as to the observance of treaties between Great Britain and foreign nations'. The lack of High Court consideration of treaty issues did not encourage greater attention to this subject by constitutional scholars.⁴

Legal scholars and former government officials in Britain and Canada (reflecting the latter's greater activism in international affairs than Australia's) generally took a wider view on Imperial constitutional and international legal questions. In his omnibus text on international law, Lassa Oppenheim, observed that Britain's colonies were merely 'British territories' and could never be party to international negotiations, which had to remain with the 'mother country'. This might be constitutionally correct but the *CO*'s Arthur Berriedale Keith, who had direct involvement with these treaty issues, knew the reality was less straightforward. His many, detailed works capture this complexity more accurately than Oppenheim's generalisation. Canadian legal scholars, Augustus Lefroy and Arthur Poley, and historian, H. E. Egerton, wrote extensively on the constitutional issues; while former official, Sir Charles Tupper, wrote specifically on Canada and treaty-making.⁵ The First World War and, especially, the peace settlement increased markedly the engagement of Britain's self-governing colonies with the international legal system. The development of the latter also accelerated, with the creation of the *League of Nations*, which included a legal secretariat, to foster multilateral treaties, and its subsidiary, the *International Labour Organisation (ILO)*. The Washington conference of 1922 and the so-called 'Halibut treaty' of 1923 were additional factors, especially in Canada, for encouraging discussion of the place of the self-governing colonies in international law. This led to a surge in scholarship on the implications of all this for the constitution of the British Empire in international law.

³ Edward Jenks, *The history of the Australasian colonies (from their foundation to the year 1893)*, University Press, Cambridge, 1895; Karl R. Cramp, *The state and federal constitutions of Australia*, Angus & Robertson, Sydney, 1913. B. R. Wise, *The making of the Australian Commonwealth, 1889-1900: a stage in the growth of the Empire*, Longmans Green, London, 1913.

⁴ (1906) 4 CLR 265, at 286

⁵ L. Oppenheim, *International Law: a treatise*, Vol. 1, Longmans Green, London, (2nd ed. 1912), pp. 231, 530; Arthur Berriedale Keith, *Responsible government in the dominions*, London, Stevens and Sons, 1909, especially pp. 136, 166-71, 190-3, 222-36, 280-5. A.H.F. Lefroy, 'The Commonwealth of Australia Bill', Parts 1 & 2, *LQR*, 15, 1899, pp. 155-64 & 281-93; (also see his *The law of legislative power in Canada*, Canada Law Book Co., Toronto, 1897; Arthur P. Poley, *The federal systems of the United States and the British Empire: their origin, nature and development*, Sir Isaac Pitman & Sons, London, 1913; H. E. Egerton, *The origin and growth of the English colonies and of their system of government*, Clarendon Press, Oxford, 1903; *Federations and unions within the British Empire*, Oxford, Clarendon Press, (1911), 1925, p. 203; Sir C. Hibbert Tupper, *JSCL*, New Series, Vol. 17, No. 1/2, 1917, pp. 5-18. A French doctoral thesis was published as René Guyon, *La Constitution australienne de 1900*, Librairie Marescq Aine, Paris, 1902.

Edward Jenks (1918), back in Britain after his brief and unhappy time as Moore's predecessor in Melbourne, opened this new phase in examining the changes in the Imperial constitution.⁶ The major contributor, though, was the prolific Berriedale Keith, now lecturing on constitutional history at Edinburgh. Although he had close experience with the colonial treaty adherence issue in the pre-war period, he now focused on the present rather than the history.⁷ In 1918, the *Journal of Comparative Legislation* added 'and International Law' (*JCL&IL*) to its title and the *British Yearbook of International Law* (*BYIL*) commenced in 1920. Both soon featured discussion on the constitutional questions associated with treaties, while not examining any treaties, present or past, in detail.⁸ Sir Cecil Hurst, the *FO*'s principal legal adviser, joined others, including Moore and *NZ*'s economist, J. B. Condliffe, in reflecting on the post-war changes, in *Great Britain and the Dominions* (1928). *University College, London (UCL)* had appointed Philip Noel Baker, as its first professor of international relations in 1924. Previously, a junior British official involved in the League's establishment and, later, a Labour minister, this Quaker was not legally-trained but *The Present Juridical Status of the British Dominions in International Law* (1929) arose from his lectures at the *Hague Academy of International Law*. Once again, the history of treaty-making was absent.⁹ North Americans, particularly, Canadians continued to overshadow Australians in this scholarly discussion including, when the subject was Australia. Egerton (1922) updated his study of British colonial policy but the major work was Edward Porritt, *The fiscal and diplomatic freedom of the British Overseas Dominions* (1922). This large, rambling study only uses public sources but is nonetheless important, tracing the development of independent policy-making, especially in international commerce, not only in Canada but, also, Australasia during the 19th century, while overlooking the other treaty questions covered in this thesis.¹⁰ The same year, Canadian legal scholar, William Kennedy, touched briefly on treaty questions in his volume

⁶ Edward Jenks, *The Government of the British Empire*, Murray, London, 1918.

⁷ *Imperial Unity and the Dominions*, Clarendon Press, Oxford, 1916, especially 261-301 on treaties; *War Government of the British Dominions*, Clarendon Press, Oxford, 1921; *Dominion Home Rule in Practice*, H. Milford, OUP, London, 1921; *The Sovereignty of the British Dominions*, Macmillan, London, 1929; *The Constitutional Law of the British Dominions*, Macmillan, London, 1933; *The King and the Imperial Crown: the powers and duties of His Majesty*, Longmans Green, London, 1936; *The Dominions as Sovereign States*, Macmillan, London, 1938; *The British Commonwealth of Nations: its Territories and Constitutions*, Longmans Green, London, 1940; *The Constitution under Strain*, Stevens, London, 1942.

⁸ Malcolm Lewis, 'The International Status of the British self-governing Dominions', *BYIL*, Vol. 3, 1922-23, pp. 21-41; A. Berriedale Keith, 'Notes on Imperial Constitutional Law', *JCL&IL*, 3rd Series, Vol. 6, No. 1, 1924, pp. 135-6; 'Notes on Imperial Constitutional Law', *JCL&IL*, 3rd Series, Vol. 6, No. 4, 1924, pp. 193-8; 'Notes on Imperial Constitutional Law', *JCL&IL*, 3rd Series, Vol. 7, No. 1, 1925, pp. 106-09; Malcolm M. Lewis, 'The Treaty-Making Power of the Dominions', *BYIL*, Vol. 6, 1925, pp. 31-43; Norman Mackenzie, 'Notes', *BYIL*, Vol. 6, 1925, pp. 339-191-2.

⁹ Sir Cecil J. B. Hurst et al, *Great Britain and the Dominions*, The University of Chicago Press, Chicago, 1928. Philip Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, Longmans, London, 1929.

¹⁰ H. E. Egerton, *British Colonial Policy in the XXth Century*, Methuen & Co., Ltd. London, 1922; Edward Porritt, *The fiscal and diplomatic freedom of the British Overseas Dominions*, Clarendon Press, Oxford, 1922.

on Canada's constitution.¹¹ Gordon Dewey's published political science doctorate, *The Dominions and Diplomacy* (1929), completed at *Columbia University*, under legendary fellow Canadian, James T. Shotwell, also touches on treaty issues and is still cited today by Australian legal scholars. The latter is equally true of American, Robert B. Stewart's Harvard doctorate, *Treaty relations of the British Commonwealth of Nations* (1939).¹²

In Australia, whose federal government was much less internationally active than Canada's, treaty issues were still relatively neglected. Of specific constitutional studies by lawyers, after a further, minor work by Garran (1924), there were two major works--by the University of Adelaide's Donald Kerr (1925) and Anstey Wynes (1936)--both of which only touched on the 'external affairs power' briefly, without historical treatment and no examination of treaties. (Kerr soon died but, in 1952, Wynes was appointed the first legal adviser to the Department of External Affairs.) In between these major publications, Britain's adoption of the *Statute of Westminster* in 1931 stimulated further consideration of constitutional questions, though mainly in terms of federal-state relations, with treaties not a major issue.¹³ Of Australian non-legal, constitutional or 'national' histories, Edward Sweetman (1925) ignored the international dimension in his study of Australia's pre-federation constitutional development, as did A. C. V. Melbourne, although he briefly mentioned the constitutional 'treaty' restraint on Australia's colonies from 1850. Keith Hancock (1930) and Frederick Wood (1933) briefly mentioned treaty issues but only for the post-First World War period. K. C. Wheare (1938), surprisingly, given his focus, overlooked the issue completely but, in a later work on federalism, did discuss it generally, though mainly with respect to Canada and the *USA*.¹⁴

The growing importance of international law to Australia was not entirely ignored in scholarly circles. Significantly, in 1920, the University of Sydney appointed Scottish *ILA*

¹¹ W.P.M. Kennedy, *The Constitution of Canada*, OUP, London, 1922; on treaties, see pp. 347-9.

¹² R. M. Dawson, *The Development of Dominion Status, 1900-1936*, OUP, London, 1937, pp. 3-34; A. Gordon Dewey, *The Dominions and Diplomacy: the Canadian Contribution*, 2 Vols., Longmans, Green and Company, London, 1929; Robert B. Stewart, *Treaty relations of the British Commonwealth of Nations*, Macmillan, New York, 1939; G. P. de T. Glazebrook, *Canadian External Relations: an historical study to 1914*, OUP, London, 1942, on treaties, pp. 263-4; *Canada at the Paris Peace Conference*, OUP, London, 1942.

¹³ R. R. Garran, *The development of the Australian Constitution*, Chaucer Library, Melbourne, 1924; Donald Kerr, *The law of the Australian Constitution: being a treatise on the Commonwealth of Australia Constitution Act (63 & 64 Vict. Ch. 12), and the judicial interpretation of it, and on the provisions of the Judiciary Act, 1903-1920, relating to the jurisdiction of the High Court of Australia*, Law Book Co. of Australasia, Sydney, 1925; Anstey Wynes, *Legislative and executive powers in Australia: being a treatise on the legislative and executive powers of the Commonwealth and states of Australia, under the Commonwealth of Australia Constitution Act*, Law Book Co. of Australasia, Sydney, 1936.

¹⁴ Edward Sweetman, *Australian constitutional development*, Macmillan & Co. in association with Melbourne University Press, Melbourne, 1925; A.C.V. Melbourne, *Early constitutional development in Australia: New South Wales, 1788-1856*, OUP, London, 1934; Keith Hancock, *Australia*, Charles Scribner's Sons, New York, 1930, pp. 531-3 and *Survey of British Commonwealth Affairs, Vol. 1: Problems of Nationality*, OUP, London, 1937; F. L. W. Wood, *The constitutional development of Australia*, George G. Harrap, London, 1933, pp. 248-52. K. C. Wheare, *The Statute of Westminster and Dominion Status*, Clarendon Press, Oxford, 1938 and *Federal Government*, OUP, London, 1946, pp. 140, 178-96.

member, Archibald Charteris, inaugural professor of jurisprudence and international law, although his initial scholarly focus was not on the above issues. Moore, in his last years at Melbourne, joined the above-mentioned debate in British law journals (1922 and 1926); as did his ultimate successor (and future solicitor-general), Kenneth Bailey. Bailey's brief articles (1928 and 1929) were quite useful summaries, for their time, of the relationship between Australia and Britain's treaties, including for the period before 1919.¹⁵ At the University of Adelaide, the inclusion of public international law at the start of Australia's third law school (1883), had been downplayed by locally-born Jethro Brown (1906-16), but was revived by Englishman, Coleman Phillipson (1920-6), and continued under his locally-born, multi-lingual successor, Arthur Campbell (1926-49), a non-lawyer, who taught the history of English law. In 1933, *ANZSIL* was formed. That year lawyers Bailey, Garran and Eggleston, plus historian Hancock, examined the relationship between the Commonwealth and Imperial constitutions in a volume of *The Cambridge History of the British Empire* (1933).¹⁶ The involvement of Australians in the *League of Nations*, such as Sydney University historian, Duncan Hall, and West Australian lawyer, Joseph Staricoff, encouraged a greater interest in Australia's involvement in treaties.¹⁷ (Local *League of Nations Union* state branches were established from 1919.) The newer social science disciplines also fostered greater interest in international law. Melbourne University started teaching political science in 1919 and the *Australian Institute of Political Science (AIPS)* was formed in 1932. At its first conference, the next year, Bailey contributed to its study of the Commonwealth constitution.¹⁸ State-branches of the London-based *Royal Institute for International Affairs*, which had supported the publication of the *BYIL*, were established from the early 1920s, before federating in 1933 as the *Australian Institute for International Affairs (AIIA)*. At Sydney University, Charteris (1940) published his lectures but with only the briefest reference on the process for Australian engagement with international law. His successor, Julius Stone (1941),

¹⁵ W. Harrison Moore, 'The Powers of Colonial Legislatures', *JCL&IL*, 3d Series, 4 (1), 1922, pp. 11-23; 'The Dominions and Treaties', *JCL&IL*, Third Series, 8 (1), 1926, pp. 21-37. K. H. Bailey, 'Australia's Treaty Rights and Obligations', Persia Campbell, R.C. Mills and G.V. Portus (eds.), *Studies in Australian Affairs*, Macmillan, Melbourne, 1928, pp. 156-78. 'Australia's Treaty Rights and Obligations', *JCL&IL*, 3rd Series, Vol. 11. No. 4, 1929, pp. 190-3; see also his 'The Statute of Westminster', *ALJ*, 15 March 1932, pp. 362-66. Victor Allen Edgeloe, 'The Adelaide Law School, 1883-1983', *ALR*, 9, (1), April 1983, pp. 1-42.

¹⁶ K. H. Bailey, 'Self-Government in Australia, 1860-1900'; Sir Robert Garran, 'The Federation Movement and the Founding of the Commonwealth'; Sir W. Harrison Moore, 'The Constitution and Its Working'; W. K. Hancock, 'The Commonwealth, 1900-1914'; F. W. Eggleston, 'Australia and the Empire, 1855-1921', in J. Holland Rose, A. P. Newton & E. A. Benians (eds.), *The Cambridge history of the British Empire*, Vol. VII, CUP, Cambridge, 1933, pp. 397-545.

¹⁷ H. Duncan Hall, *The British Commonwealth of Nations: a study of its past and future development*, Methuen, London, 1920; see also A. Lawrence Lowell and H. Duncan Hall, *The British Commonwealth of Nations*, World Peace Foundation Pamphlets, Boston, 1927. J. G. Staricoff 'Australia and the Constitution of the International Labour Organisation', *ILR*, 32 (5), November 1935, pp. 577-609; 'The Privy Council and the Competence of Federal Legislatures to Legislate Pursuant to International Obligations', Parts 1 & 2, *ALJ*, 11, 15 June 1937 & 16 July 1937, 11, pp. 45-50, 87-92.

¹⁸ G.V. Portus and K.H. Bailey (eds.), *Studies in the Australian Constitution*, Angus & Robertson with AIPS, Sydney, 1933;

born in Leeds to Jewish-Lithuanian immigrants, raised the academic standing of international law in Australia, although he also did not focus on Australia itself.¹⁹

In 1936, the High Court gave its most significant consideration to that date of the ‘external affairs’ power and its relationship to treaties: *R v Burgess; ex parte Henry*. The specific issue under judgement was air navigation legislation but there were references to other treaty subjects, notably labour protection: an expansive view of the Commonwealth’s potential treaty power was expressed.²⁰ (There was a landmark case two years later, in Canada, on labour conventions and the Dominion’s treaty power.²¹) Coincidentally or not, the year before *R v Burgess*, *ANZSIL* held its first conference, where international law was academically studied in Australia for the first time, in a major sense. There was little historical background. Neither Bailey, Garran, Staricoff nor Melbourne lawyer P. D. Phillips, writing on the ‘external affairs power’ and Australia’s response to the *ILO* conventions, mentioned the pre-First World War treaties. At the second *ANZSIL* conference, in 1938, lawyer Thomas Penberthy Fry, presented a detailed study of ‘International and Legal Competence of Australian Parliaments to Legislate in Respect of Extra-Territorial Crime’, which mentioned in passing treaties on traffic in slaves, ‘white slaves’, narcotics and obscene publications, although his focus in its 1947 publication was on war crimes. Interestingly, another brief ‘nationalist’ work (1938) by non-academic and non-lawyer, David Campbell, inaugural *AIPS* director, did; including 1906’s Berne convention on prohibiting night work for women.²² Curiously, a later, detailed article on the Commonwealth’s constitutional powers over labour questions by historian, Oscar Foenander, makes no reference to labour treaties generally or, especially, the Berne conventions of 1906, despite the author’s father working directly under Atlee Hunt during the period while Australian governments decided to adhere to them.²³ On international law itself, only Starke (formerly Staricoff) considered the wider jurisprudential context of these issues in a minor article, with one brief reference to Australia.²⁴

In 1945, similar to 1919, the peace settlement and the creation of the *UNO* began a new phase in both international relations and law, as well as the study of these subjects, including, if

¹⁹ A. H. Charteris, *Chapters on International Law*, University of Sydney, Sydney, 1940, pp. 119-23.

²⁰ 55 C.L.R. 608, 642, 669, 687.

²¹ *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326.

²² *Proceedings of the Australian and New Zealand Society of International Law*, Vol. 1, The Society, Melbourne, 1935, includes K. H. Bailey, ‘Australia and the International Labour Conventions’, pp. 100-21. R. R. Garran, ‘The Aviation Case (*R v Burgess, Ex. p. Henry*)’, *ALJ*, 10, 15 December 1936, pp. 297-300. P. D. Phillips ‘External Affairs and the Commonwealth’, *Res Judicatae*, 1, 1937, pp. 200-10. Thomas Penberthy Fry, ‘The International and Legal Competence of Australian Parliaments to Legislate in Respect of Extra-Territorial Crime (Including War Crimes)’, *UQP*, 1(2), 1947; David A. S. Campbell, ‘A Foreign Policy for Australia’ in W. G. K. Duncan (ed.), *Australia's foreign policy*, Angus and Robertson, Sydney, 1938, especially pp. 163-8. K. H. Bailey, ‘Australia and the International Labour Conventions’, *ILR*, 54, 1946, pp. 285-90.

²³ O. de R. Foenander, ‘The Commonwealth Legislative Power under the Australian Constitution in Relation to Labour’, *The University of Toronto Law Journal*, 8 (1), 1949, pp. 7-31.

²⁴ J. G. Starke, ‘Monism and Dualism in the Theory of International Law’, *BYIL*, 17, 1936, pp. 66-81.

slowly, in Australia. The next surge in multilateral treaty-making raised the question of the treaty power in some increasingly globally-influential federations, notably the *USA*, but also Canada and Australia, which were explored together in comparative studies. The Commonwealth had just started to conclude its first treaties separately from Britain. In 1948, Labor politician and lawyer H. V. Evatt, was appointed president of the General Assembly and the Commonwealth elected to a temporary seat on the Security Council. Former foreign minister Percy Spender was appointed a judge on the *International Court of Justice* in 1958. The first omnibus text on international law by an Australian, Starke, fittingly the son of a European *émigré*, was published at the start of this period (1947). Understandably, for such a work, this said little on Australia itself.²⁵ He did attempt this in a minor work (1952), which is both general and not entirely accurate.²⁶ Seven law journals started between 1948 and 1974.²⁷

Initially, at least, in Australia the study of international law itself remained very secondary to that of the constitution, where the implications of the expansion of federal power as a result of the war was a growing interest. During this period, the number of major works by Australian legal scholars increased markedly, with most still being on the constitution. The rising legal and political science scholar, Geoffrey Sawer, dominated the earlier phase of this new scholarship, but largely ignored the international dimension.²⁸ Apart an article by him in 1955, the 'external affairs power' and treaty-making only began to feature more prominently in constitutional studies, including his, sometimes in a separate, brief chapter, from the mid-1960s. The focus was on the process, based on examination of High Court cases, rather than historical examination of how Australian governments had addressed treaty-making in specific instances. Two High Court cases--*Airlines of NSW Pty Ltd v NSW* (1965) and *NSW v Commonwealth (Seas and Submerged Lands)* (1975)--stimulated further discussion of these aspects and, so, reviving interest in earlier related cases. In the latter, Murphy J gave a lengthy

²⁵ J. McL. Hendry, *Treaties and federal constitutions*, Public Affairs Press, Washington D. C., 1955; Luzius Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative study*, Helbing & Lichtenhahn, Basel & Stuttgart, 1971, pp. 297-302; J. G. Starke, *An Introduction to International Law*, Butterworths, London, 1947.

²⁶ J. G. Starke, 'The Commonwealth in International Affairs' in R. Else-Mitchell (ed.), *Essays on the Australian Constitution*, Law Book Co. of Australasia, Sydney, 1952, pp. 287-314.

²⁷ *University of Queensland Law Journal* (1948), *Sydney Law Review* (1953), *Melbourne University Law Review* (1957), *Adelaide Law Review* (1960), *Federal Law Review* (1964), *Legal Service Bulletin* (1974) and *Monash University Law Review* (1974).

²⁸ H. S. Nicholas, *The Australian Constitution: An Analysis*, The Law Book Co. of Australasia Pty. Ltd, Sydney, 1948, pp. 44-5, 72-81; Geoffrey Sawer, *Cases on the Constitution of the Commonwealth of Australia*, The Law Book Co. of Australasia Pty. Ltd., Sydney, 1948, pp. 364-75; Geoffrey Sawer, 'Developments of the Last Twenty-Five Years' in Geoffrey Sawer *et al.*, *Federalism in Australia*, (for AIPS), F. W. Cheshire Pty. Ltd., London, 1949, p. 26; Geoffrey Sawer, 'Constitutional Law', in G. W. Paton (ed.), *The Commonwealth of Australia: The Development of its Laws and Constitution*, Stevens & Sons Limited, London, 1952, pp. 38-78; Geoffrey Sawer (ed.), *Federalism: An Australian Jubilee Study*, F. W. Cheshire, Melbourne, 1952; Ross Anderson, 'The States and Relations with the Commonwealth' in R. Else-Mitchell (ed.), *Essays on the Australian Constitution*, The Law Book Co. of Australasia Pty. Ltd., Sydney, 1952, p. 131.

and debatable account of the development of Australia's so-called independence.²⁹ There was virtually no reference to specific treaties or how the international legal system had developed and was developing. These were clearly seen as completely separate subjects.³⁰

On Australia's place in the international legal system, in terms of the Imperial constitution, the previous, extensive body of predominantly British and Canadian works was drying up, as Britain retreated from its global role and conceded even more autonomy to its colonies.³¹ Developments in international law rather than the Imperial constitution assumed centre stage for British Commonwealth scholars in the immediate aftermath of the formation of the *UNO*. A notable contribution was by *UCL*-educated Indian, Ramesh Chandra Ghosh, whose study of federalism and treaties included some useful secondary source-based details on Australia.³² The first stage of the Cold War had slowed international legal developments but, by the mid-1960s, a major revival began with several foundational multilateral treaties, especially on racial discrimination and human rights, plus, a little later, protection of the environment. The Commonwealth's long-running Coalition government was slow to legislate on such developments but legal scholars in Australia were, nonetheless, influenced by them.

From 1962, a young, *USA*-based German scholar, Günther Doeker, at the suggestion of his American political science supervisor, began a study, guided by Sawyer, while he was in

²⁹ *Airlines of New South Wales Pty Ltd v New South Wales* [No.2], (1965), 113 CLR 54; *New South Wales v Commonwealth (Seas and Submerged Lands)*, (1975) 135 CLR 337.

³⁰ Geoffrey Sawyer, 'Execution of Treaties by Legislation in the Commonwealth of Australia', *UQLJ*, 2, 1955, pp. 297-303; Zelman Cowen, *Federal Jurisdiction in Australia*, OUP, Melbourne, 1959, pp. 24-31; K. C. Wheare, *The Constitutional Structure of the Commonwealth*, Clarendon Press, Oxford, 1960. P.H. Lane, 'External Affairs Power', *ALJ*, 40, 1966, pp. 257-65; *Some principles and sources of Australian constitutional law*, The Law Book Co. of Australasia, Sydney, 1964; *An introduction to Australian constitutional law*, The Law Book Co., Sydney, 1967, pp. 55-7; *The Australian federal system with United States analogues*, Law Book Co., Sydney, 1972, pp. 137-54, 465-70; *An introduction to the Australian Constitution*, Sydney, Law Book Co., 1974, pp. 83-6; Geoffrey Sawyer, 'Australian Constitutional Law in relation to International Relations and International Law' in D. P. O'Connell (ed.), *International Law in Australia*, Law Book Co., Sydney, 1966, pp. 35-51; Sir Robert Menzies, *Central Power in the Australian Commonwealth*, Cassell, London, 1968, pp. 115-34; Percy Joske, *Australian Federal Government*, Butterworths, Sydney, 1967, pp. 213-215; Colin Howard, *Australian Federal Constitutional Law*, The Law Book Company Limited, Sydney, 1968, pp. 182-4 and 'The External Affairs Power of the Commonwealth', *MULR*, 1971, pp. 193-214; H. B. Connell, 'International Agreements and the Australian Treaty Power', in *AYBIL 1968-1969*, Butterworths, Sydney, 1971, pp. 83-101; Jacob I. Fajgenbaum and Peter Hanks, *Australian constitutional law: cases, materials and text*, Butterworths, Melbourne, 1972; R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia*, Butterworths, Sydney, 1974, pp. 145-53; Christopher Enright, *Constitutional Law*, Law Book Company Limited, Sydney, 1977, pp. 48-9, 152; James A. Thomson, 'A United States guide to constitutional limitations upon treaties as a source of Australian municipal law', *UWALR*, 13, 1977, pp. 110-134; H. Burmester, 'The Australian States and Participation in the Foreign Policy Process', *FLR*, 9, 1978, pp. 257-283.

³¹ The last of the significant works include Maurice Ollivier, *Problems of Canadian Sovereignty: From the British North America Act, 1867 to the Statute of Westminster, 1931*, Law Book Company, Toronto, 1945, especially pp. 82-7; George P. de T. Glazebrook, *A History of Canadian Relations*, OUP, Toronto, 1950; Nicholas Mansergh, *Survey of British Commonwealth Affairs: Problems of External Policy, 1931-39*, OUP, London, 1952 and *Survey of British Commonwealth Affairs: Problems of Wartime Co-operation and Post War Change, 1939-52*, OUP, London, 1958; R. Y. Jennings, 'The Commonwealth and International Law', *BYIL*, 30 (1), 1953, pp. 320-51; J. E. S. Fawcett, *The British Commonwealth in International Law*, Stevens, London, 1963.

³² Ramesh Chandra Ghosh, *Treaties and Federal Constitutions: their mutual impact*, The World Press Private Ltd, Calcutta, 1961, especially pp. 11-17.

Australia. This led to the only single-author, book-length study of Australia in international law: *Treaty-making Power in the Commonwealth of Australia* (1966). This devotes only ten pages to the period to 1919, using only secondary sources. He did not study how international law was developing at that time. His conclusions, as to Australian responses, are not only general but also debatable. For example, the focus on the colonies' development of international personality leads to his judgement:

Imperial control over foreign relations discouraged and even repressed attempts on the part of the Dominions to intervene on their own initiative in international politics.

This overall view, which runs prominently through subsequent Australian legal scholarship, is strongly challenged in this thesis.³³

At Sydney, Charles Alexandrowicz, Viennese-born and Polish-educated, contributed a minor but significant study (1964) of some instances where international law had been incorporated into Australian law, without touching on the pre-1919 period. He also wrote on international legal history but not with respect to Australia.³⁴ The following year, the *Federal Law Review* and *Australian Yearbook of International Law* were established (the latter, two years after Canada's). The next most important development was when Daniel O'Connell, NZ-born professor of international law at Adelaide University, who had been influenced by Hersch Lauterpacht at Cambridge, edited *International Law in Australia* (1966). His opening chapter, on the 'Evolution of Australia's International Personality', has just fifteen pages on the period to 1919. Using the conventional secondary and some official public sources, he begins with the Australian colonies' postal agreements with foreign countries, underestimating, like earlier scholars, the degree of imperial oversight. (He cites one archival source but that is actually taken from another book.) He then focuses on Britain's bilateral commercial treaties, highlighting the now conventional narrative of the colonies' desire for exception. Like Doeker, he misses the increasing number of multilateral treaties on a wide range of other subjects and how the imperial government drew Australian governments into engagement with them.³⁵

Scholars in Australia continued in the next decade to build on these foundations. English-born Donald Greig published an international law textbook (1970), which, like Starke's, is neither historical nor focused on Australia. The few works, which then emerged on the apparently

³³ Günther Doeker, 'The Prerogatives of the Crown in the Commonwealth of Australia and External Affairs', *AJCL*, 11, 4, Autumn, 1962, pp. 610-628 and *Treaty-making Power in the Commonwealth of Australia*, Martinus-Nijhoff, The Hague, 1966, p. 4. The suggestion for this study was by the American political scientist David R. Deener for reasons, which are not readily apparent. He had published previously *The United States Attorneys-General and International Law*, Nijhoff, The Hague, 1957.

³⁴ Charles Henry Alexandrowicz, 'International Law in the Municipal Sphere according to Australian Decisions', *ICLQ*, 13, 1, January 1964, pp. 78-95.

³⁵ D. P. O'Connell (ed.), *International Law in Australia*, Law Book Co., Sydney, 1966.

new treaty subjects of human rights and the environment, seemed to assume these were very new subjects. There was no historical examination of the period before the Second World War.³⁶ A few smaller, yet notable, works in this period did offer some historical context. These were by Indian-born Muhammad Kidwai (1976), educated in law at Harvard, Melbourne and Brisbane, and Leslie Zines (1977), Australian-born to a father from the British Palestinian Mandate, who had migrated to Australia, via Britain. Both are concerned with what Zines terms 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth', although Kidwai has a wider, imperial perspective. They focus narrowly on bilateral commercial treaties and the assertion of greater colonial freedom from imperial control. Their sources are mainly the well-known secondary works, although they do use some public official but not archival records. A notable thing about these works is how little they say on the development of international law itself. The role of the Empire in drawing its colonies into international legal engagement is neglected, just as Doeker and O'Connell had. Zines opening comment, 'For the purposes of international law the British empire in 1900 was one unit or "nation"', is correct constitutionally but does not capture the complexity of the colonies' then-role in international law.³⁷

The post-1945 period did see the emergence of the first scholarship on Australian laws in specific sub-fields, notably labour (Sawer, 1952; Kewley, 1952; Sykes & Glasbeek, 1972; Macken, 1974; Bennett, 1994; Stewart, 2001; Brooks, 2003.) These labour studies, however, were notable for focusing almost entirely, in whatever limited historical treatment they offer, on the federal power over conciliation and arbitration in industrial disputes. Beginning with Sawer and Kewley, the international, not to mention, imperial context of the development of labour laws (and related 'social' laws, such as on pensions) in Australia was almost entirely ignored, except more recently with a few passing references to the *ILO* and the use of the 'external affairs power', in essentially contemporary times. The parochialism of much historical scholarship, focusing on the 'national story', and that of political science due to its emphasis on sovereign, domestic representative government, is shared by much legal

³⁶ D. W. Greig, *International Law*, Butterworths, London, 1970. J. E. Richardson, 'Aviation Law in Australia', *FLR*, 1, 1965, 242-91; Dominique F. J. J. De Stoop, 'Australia's Approach to International Treaties on Human Rights', *AYBIL*, 27, 1970-73, pp. 27-39; Douglas J. Whalan, 'The Structure and Nature of Australian Environmental Law', *FLR*, 8 (3), 1977 pp. 294-318; Stephen Odgers, *Human Rights Legislation and the External Affairs Power*, (bachelor thesis), ANU, Canberra, 1979; E. Ward, *The Constitution Basis for Commonwealth Involvement in Environmental Matters*, Basic paper No. 10 of 1982, Parliamentary Research Service, Parliamentary Library, Canberra, 1982.

³⁷ M. H. M. Kidwai, 'International personality and the British Dominions: Evolution and Accomplishment', *UQLJ*, 9, 1, 1976, pp. 76-117 and 'External Affairs Power and the Constitutions of British Dominions', *UQLJ*, 9, 2, 1976, pp. 167-187. Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed.), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer*, Butterworths, Sydney, 1977, pp. 1-49 and 'Australia as a nation in External and Internal Affairs' in Leslie Zines (ed.), *High Court and the Constitution*, Butterworths, Sydney, 1981, pp. 220-255.

scholarship, in its case due to its jurisdictional focus.³⁸

The growing international interest of Australian legal scholars was reflected in an increasing output in political science, which was laying the foundations for greater study in Australia of international relations. The first such works, notably those by Gordon Greenwood (1946 and 1957)—actually of German parentage—although showing an interest in the ‘federal balance’ debate, essentially neglected the constitutional legal issues, as did the early forays into international affairs, which also ignored international law.³⁹ These disciplines also focused on the present, apparently leaving history to historians, although the latter were not studying the issue. Sawyer (1956) examined all federal legislation from 1901, through the period covered in this thesis. In a sense, it may be considered legal history, although he used only public records. He essentially lists legislation without much analysis. The most notable aspect is that, in no case, did he identify the many instances where Commonwealth legislation arose from treaty-making, despite having published on the general subject the year prior. He apparently assumed this only became an important issue much later. Alex Castles (1971) contributed the only work branded ‘legal history’ which, although valuable, ends in 1828 and only makes one reference to international law, and with that being to custom not treaties. O’Connell and Riordan (1971) at this time edited a useful collection of British records, which were becoming more accessible.⁴⁰

Mainstream historians, in Australia as elsewhere, largely ignored legal issues. The traditional focus of such historians on ‘nation-building’, however, inevitably led some to close examination of federation and, hence, on occasions, constitutional law. Some British historical studies of the Empire’s development were very useful. In Australia, the publication of Alfred Deakin’s memoirs (1944) on federation was important but, later, the increasing availability of primary source material, especially in the form of *Colonial Office* records, through the *Australian Joint Copying Project* (1945), and the first steps towards creating a Commonwealth archives, made such scholarly study both more possible and more detailed.⁴¹

³⁸ Geoffrey Sawyer, ‘Industrial Law’ and T. Kewley, ‘Social Services’ in G. W. Paton (ed.), *The Commonwealth of Australia: The Development of its Laws and Constitution*, Stevens & Sons Limited, London, 1952, pp. 289-313, 314-326; E. I. Sykes & H. J. Glasbeek, *Labour Law in Australia*, Butterworths, Sydney, 1972; J. J. Macken, *Australian Industrial Laws: The Constitutional Basis*, The Law Book Company Limited, Sydney 1974; Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, The Law Book Company Limited, Sydney 1994; Andrew Stewart, ‘Federal Labour law and New Uses for the Corporation Power’, *AJLL*, 14, 2001, pp. 145-169; Brian Brooks, *Labour Law in Australia*, Kluwer Law International, The Hague, 2003.

³⁹ Gordon Greenwood, *The future of Australian federalism: a commentary on the working of the constitution*, Carlton, Vic., MUP, 1946; Gordon Greenwood and Norman Harper (eds.), *Australia in world affairs 1950-55*, F.W. Cheshire, (for the AIIA), Melbourne, 1957. G. Campbell Sharman, ‘The Australian States and External Affairs: An Exploratory Note’ (1973) 27 *Australian Outlook*, 27, 1973, pp. 307-18

⁴⁰ Geoffrey Sawyer, *Australian Federal Politics and Law, 1901-1929*, MUP, Carlton, Vic. 1956. Alex C. Castles, *An introduction to Australian legal history*, Law Book Co., Sydney, 1971; D. P. O’Connell and Ann Riordan (eds.), *Opinions in Imperial Constitutional Law*, Law Book Co., Sydney, 1971.

⁴¹ Alfred Deakin, *The federal story: the inner history of the federal cause*, Robertson & Mullens, Melbourne, 1944;

The works by John La Nauze (1965 and 1972), Brian de Garis (1969), Don Wright (1970), Chris Cuneen (1973) and Ron Norris (1975)--particularly the former--provided a hitherto unknown wealth of archival detail on the development and early operation of the Commonwealth constitution, which, subsequently, has been used extensively by legal scholars. They said almost nothing on treaties.⁴²

From the early 1980s, two important High Court cases, on treaties and the 'external affairs' power, elevated the interest of Australian legal scholars in international law. The first was *Koowarta v Bjelke-Petersen and others, State of Qld v Commonwealth of Australia* (1982), which arose from the *Racial Discrimination Act 1975* and, ultimately, the *Convention for the Elimination of All Forms of Racial Discrimination* (1965) and, the second was the *Commonwealth v Tasmania (Tasmanian Dams)* (1983), arising from the *World Heritage Properties Conservation Act 1983*, which applied to Australia the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972). An unprecedented explosion of scholarship on Australia and international law, especially treaties, in so far as they were applied through legislation in Australia, then followed. The other causes of this were several: the multiplication of academic law journals, providing the necessary publishing platform, was important, though as yet there was only an additional one on international law (*Australian International Law News*, 1983); the number of law books, especially texts, also increased; and, the continued, acceleration in the growth of treaties, especially of the multilateral law-making kind, was also important. Notable among the latter were treaties on human rights and environmental protection. Another main factor was the willingness of Commonwealth government to be party to such treaties and, equally importantly, to legislate under them.⁴³

Understandably, the bulk of the new scholarship focused exclusively on the present. Some explored the line of High Court precedent, if not exactly the history of law. For those that did, with Mary Crock (1983) giving the most attention, constitutional rather than international law was still the main focus. Their historical sources, apart from the cases cited, were secondary, either relying on the, then-contemporaneous authorities on federation, notably Quick, Garran and Moore, or the later works of Sawyer and Howard, plus La Nauze for historical detail. In so far as international law and Australia were mentioned, O'Connell and Doeker were cited.

⁴² E. A. Benians, Sir James Butler and C. E. Carrington (eds.), *The Cambridge History of the British Empire, Vol. III, The Empire-Commonwealth, 1870-1919*, CUP, Cambridge, 1959; John Edward Kendle, *The Colonial and Imperial Conferences 1887-1911*, Longmans, London, 1967. J.A. La Nauze, *Alfred Deakin: a biography 2 vols.*, MUP, Carlton, Vic., 1965; B. K. de Garis 'The Colonial Office and the Commonwealth Constitution Bill' in A. W. Martin (ed.), *Essays in Australian federation*, MUP, Melbourne, 1969, pp. 94-121; D. I. Wright, *Shadow of dispute: aspects of Commonwealth-State relations, 1901-1910*, ANUP, Canberra, 1970; J. A. La Nauze, *The making of the Australian constitution*, MUP, Carlton, Vic., 1972; Christopher Cuneen, *King's Men: Australia's Governors-General from Hopetoun to Isaacs*, GA&U, Sydney, 1973; Ronald Norris, *Emergent Commonwealth: Australian federation, expectations and fulfillment 1889-1910*, MUP, Carlton, Vic., 1975.

⁴³ (1982) 153 CLR 168; (1983) 158 CLR 1.

Although individual treaties might be mentioned, there was little on the development of the international legal system as a whole. No new legal historical research emerged, with one notable exception--Sam Ricketson (1989) on copyright--although he also only used public and secondary sources.⁴⁴ The lack of good international legal history, especially in relation to Australia, was demonstrated at this time in the High Court itself. Mason J in *Koowarta* (1982) stated 'that international and regional co-operation of this kind and on this scale was unknown in 1900 and only began with the Treaty of Versailles and the Covenant of the League of Nations.' As will be shown below, this conclusion greatly underestimates the state of international law at that time.⁴⁵

The continued limitations in terms of historical knowledge of this last wave of new legal scholarship were most explicit in two instances. Triggs (1989) stated that 'International law, whether conventional or customary, has not had a significant influence upon the development of Australian law' and this only changed from the 1970s. As noted with regard to Sawyer (1959), this is not correct, with much federal and state legislation in the period to 1919, arising from treaty-making on extradition, environmental protection, drugs, pornography, transnational crime, people trafficking, public health and labour protection, just to mention some. Andrew Byrnes (1985) similarly adjudged.

The limited nature of the Australian government's participation in the international arena in the first quarter of the twentieth century meant that federal legislation in the area of external affairs was primarily concerned with the implementation of treaty obligations by which Australia had become bound as a member of the British Empire.

The second half of this statement is partly correct but, even then, does not necessarily support the first. For, despite their essentially reactive constitutional position, Britain's self-governing

⁴⁴ P. H. Lane, 'The Federal Parliament's External Affairs Power: *Koowarta's Case*', *ALJ*, 56, October 1982, pp. 519-23; Paul B. van Son, 'The Australian Constitution: The External Affairs Power and Federalism', *CWILJ*, 12, 1982, pp. 46-77; Geoffrey Sawyer, 'The external affairs powers of the Commonwealth and *Koowarta's case*', *AQ*, Summer 1982, pp. 428-34; Colin Howard, 'External Affairs Power of the Commonwealth', *CAB*, September 1983, pp. 16-24; Mary Crock, 'Federalism and the External Affairs Power', *MULR*, 14, December 1983, pp. 238-64; H. E. Renfree, *The Executive Power of the Commonwealth of Australia*, Legal Books Pty. Ltd., Sydney, 1984 p. 437; Andrew Byrnes and Hilary Charlesworth, 'Federalism and the International Legal Order: Recent Developments in Australia', *AJIL*, 79, 3, July 1985, pp. 622-40; Geoffrey Sawyer, 'Australian Constitutional Law in Relation to International Relations and International Law', James Crawford and W.R. Edeson, 'International Law and Australian Law', J. G. Starke, 'Australia and the International Protection of Human Rights', I. A. Shearer, 'Extradition and Asylum', in K. W. Ryan (ed.), *International Law in Australia*, 2nd ed., Law Book Co. for the AIIA, Sydney 1984, pp. 35-51, 71-135, 136-54, 179-209. Andrew C. Byrnes, 'The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism', *BCI&CLR*, 8, 2, 1985, pp. 275-339, especially p. 282; R. D. Lumb, 'The External Affairs Power and Constitutional Reform', *ALJ*, 62, September 1988, 679-89; Sam Ricketson, 'Australia and International Copyright Protection' and Gillian Triggs, 'Customary International Law and Australian Law' in M.P. Ellinghaus, A. J. Bradbrook and A. J. Duggan (eds.), *The Emergence of Australian Law*, Butterworths, Sydney, 1989, pp. 144-75, 376-93, especially p. 376.

⁴⁵ (1982) 153 CLR 168, 223.

colonies, including those in Australasia, were actively involved in responding to international treaty making, albeit almost solely through the imperial government.⁴⁶

The bicentennial of Australian federation in 1988 stimulated further scholarly interest in the history of the making of the Commonwealth constitution. The Commonwealth also continued to sign multilateral treaties, such as the *Convention on the Rights of the Child* (1989), which led to domestic legislation. The Commonwealth's passage of the *Industrial Relations Reform Act 1993* and *Human Rights (Sexual Conduct) Act 1994*, purportedly in relation to multilateral treaty obligations, renewed attention in the 'external affairs power'. A number of additional journals, devoted specifically to international law, commenced, notably: the *Australian International Law Journal* (1996), *Melbourne Journal of International Law* (2000) and *Macquarie Journal of International and Comparative Law* (2004).⁴⁷ There was no major new primary source scholarship but there were a number of non-legal historical works, relying mainly on secondary sources, and with a continued focus on the issues of federalism and the so-called Australian independence from Britain.⁴⁸ Subsequently, some legal scholars relied on these but, more usually, on the more superficial, completely secondary source-based works from international relations and political science. Australian legal scholars, as normal, remained most concerned with important High Court cases, several of which in this period were notable for their judgement on the 'external affairs' and treaty-making powers of the Commonwealth constitution, including: *Richardson v Forestry Commission of Tasmania* (1988), *Polyukovich v The Commonwealth* (1991), *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995), *Victoria v Commonwealth (Industrial Relations Act case)* (1996) and *R v Tang* (2008).⁴⁹ Most of these works refer briefly to what might be termed the 'history' of their respective subject. Of those that do, for example, on protection of the environment, human rights and labour (Reade, 1995; Saunders, 1995; Marlin, 1996; Macdermott, 1998; Hyndman, 2001), there seems no awareness of the major international legal developments on these issues, including for Australia, before Versailles in 1919 or, for most, even before the 1970s. It seems odd that the multi-authored work of Alston and Chiam, *Treaty Making and Australia: Globalisation Versus Sovereignty* (1995) found no place for an historical background, unless it was assumed, wrongly, that transnationalism, now re-branded 'globalisation', is only a recent development.

⁴⁶ See footnote 42.

⁴⁷ Other broader journals included *Alternative Law Journal* (1992), *Deakin Law Review* (1993), *James Cook University Law Review* (1994) and *University of Western Sydney (Macarthur) Law Review* (1997).

⁴⁸ Bruce W. Hodgkins, Don Wright and W. H. Heick (eds.), *Federalism in Canada and Australia: the early years*, Wilfrid Laurier University Press, Waterloo, Ont., 1978, pp. 173-193, 211-35, 267-75; W. J. Hudson and M. P. Sharp, *Australian independence: colony to reluctant kingdom*; MUP, Carlton, Vic., 1998.

⁴⁹ (1988) 164 CLR 261; (1991) 172 CLR 501; (1995) 183 CLR 273; (1996) 187 CLR 416; (2008) 237 CLR 1.

Those works, which did make historical references, were often at fault in being incomplete or just plain wrong. For example, Saunders (1995) suggests Australian representation at international conferences on treaty matters dates from the post-Federation period. In fact, Britain had been forwarding invitations to its self-governing colonies to attend international conferences—though not initially treaty-making ones—from as early as 1877. Thereafter, as lines blurred between what were official or unofficial international conferences, some Australian colonies attended the treaty-making *Universal Postal Union* congress in Vienna in 1891. Reade (1995) says the first official consideration of the use of the ‘external affairs’ power was by the High Court in *R v Burgess* in 1936, whereas it goes back to 1908—albeit, by legal officials not the courts—with consideration of the Berne labour conventions of 1906. On female trafficking, Dorevitch and Foster (2008) state that the 1902 *projet* was succeeded by the convention of 1933, completely missing the head convention of 1910. Saunders (1995) says the *Venice Sanitary Convention 1897* simply ‘concerned sanitation on ships’, when it was far more than that, involving obligations for signatories regularly to report plague outbreaks in their ports and take prescribed, reciprocal preventative measures for shipping movements: leading to the Commonwealth’s *Quarantine Act 1908*.⁵⁰ The most explicit

⁵⁰ R. D. Lumb, ‘The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change’, *UQLJ*, 15, 1, 1988, pp. 3-32; G. P. J. McGinley, ‘The status of treaties in Australian municipal law: the principle of *Walker v Baird* reconsidered’, *AdelLR*, 12, 1990, pp. 367-88; Peter M. McDermott, ‘External Affairs and treaties-The Founding Fathers’ Perspective’, *UQLJ*, 16, 1, pp. 123-36; H. P. Lee, ‘The High Court and the External Affairs Powers’, in H. P. Lee and George Winterton (eds.), *Australian Constitutional Perspectives*, The Law Book Company Limited, Sydney, 1992, especially pp. 60-61; Brian Opeskin, ‘The Role of Government in the Conduct of Australia’s Foreign Affairs’, *Australian Yearbook of International Law*, 15, 1994, especially pp. 129-30; Stephen Donaghue, ‘Balancing Sovereignty and International Law: The Domestic Impact of International law in Australia’, *ALR*, 17, 1995, pp. 213-67; Cheryl Saunders, ‘Articles of Faith or Lucky Breaks? The Constitutional Law of International Agreements in Australia’, *SLR*, 17, 1995, pp. 150-176; Penelope Mathew, ‘International Law and the Protection of Human Rights in Australia: Recent Trends’, *SLR*, 17, 1995, pp. 177-203; Roma Mitchell, ‘The effect of the external affairs power upon the balance of power between Commonwealth and States’, *CaLR*, 2, 2, 1995, pp. 103-17; G. Winterton, ‘Limits to the Use of the “Treaty Power”’ and Philip Alston, ‘Reform of Treaty-Making Processes: Form Over Substance?’ in Philip Alston and Madelaine Chiam (eds.), *Treaty Making and Australia: Globalisation Versus Sovereignty?* Federation Press, Sydney, 1995 pp. 1-50; Brian R. Opeskin and Donald R. Rothwell, *CWRJIL*, 27, 2-3, 1995, pp. 1-59; Katy Reade, *The Use of the External Affairs Power in the Industrial Relations Reform Act 1993*, University of Melbourne, Faculty of Law, Centre for Employment & Labour, Parkeville, Vic., 1995. Richard Marlin, ‘The external Affairs Power and Environmental Protection in Australia’, *FLR*, 24, 1, 1996, pp. 71-92. Donald R. Rothwell, ‘International law and Legislative Power’ and Rosalie Balkin, ‘International law and Domestic Law’, both in Sam Blay, Ryszard Piotrowic and B. Martin Tsamenyi (eds.), *Public International Law: An Australian Perspective*, OUP, Melbourne, 1997, pp. 104-111. 119-45. James Crawford, ‘International Law and Australian Federalism: Past, Present and Future’, in Brian R. Opeskin and Donald R. Rothwell (eds.), *International Law and Australian Federalism*, MUP, Carlton, 1997, especially pp. 325-27; Therese Macdermott, ‘Labour law and Human Rights’, David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential*, The Federation Press, Leichhardt, 1998, especially p. 194; Hilary Charlesworth, ‘Dangerous Liaisons’ Globalisation and Australian Public Law’, *AdelLR*, 20, 1998, pp. 57-72, especially p. 58; Katharine Young, ‘The Implementation of Domestic Laws of Germany and Australia: Federal Parliamentary Comparisons’, *AdelLR*, 21, 1999, especially pp. 190-95; Richard Dalton and Richard Groom, ‘The Right to Strike in Australia: International Treaty Obligations & the External Affairs Power’ *MJIL*, 1, 2000, pp. 162-8; Patricia Hyndman, ‘Constitutions, Constitutionalism and the Effective Implementation of the International Standards of Human Rights’, *AYBIL*, 21, 2001, pp. 95-112; G. Winterton, ‘The Acquisition of Independence’; Geoff Lindell, ‘Further reflection on the Date of Acquisition of Australia’s Independence’; D. F. Jackson, ‘Internationalisation of Rights and the Constitution’, in Robert French, Geoffrey Lindell and Cheryl Saunders (eds.), *Reflections on the Australian Constitution*, The Federation Press, Leichhardt, 2003, pp. 31-59; 105-15; 2008 Elise Edson, ‘Section 51(xxix) of the *Australian Constitution* and ‘matters of international concern’: Is there

example of this lack of detailed knowledge of the history of international law and Australian responses to it, is by Charlesworth (1998). She states:

At Federation, of course, the relationship between international law and the Australian Constitution was not an issue. International law was then basically concerned with relations between countries in a fairly literal way: it dealt with principles of boundary drawing, of diplomatic relations, of war and peace.

This is a strikingly inaccurate description of both subjects and underlines the need for detailed histories of both international law and Australian responses to it.⁵¹

The only works that might be considered legal history on this subject are those by Anne Twomey. Her coverage of the period examined in this thesis is quite limited, being contained in some early, non-academic, minor publications and in a few pages of more significant academic works. Her sources, generally, were secondary, with some from public official records. Her focus, like all the above scholarship, is on the constitutional question of treaties, not the treaties themselves, of which she only briefly gives a few, sporadic examples. So, the treaty issues covered in this thesis remain completely unexamined.⁵² There are some other recent works touching, if only slightly, upon the subjects of this thesis. Pert (2014) revisits the narrative first constructed by O'Connell and, to some extent, Doeker in the mid-1960s, on the 'development of Australia's legal personality'. This is a very useful summary, reprised in a shorter article (2017), which, however, has the same limitations of those earlier works, of trying to cover a lengthy period in a short space and relying mainly on much older secondary sources. She does make greater efforts to use official public records.⁵³ Of the most recent studies of Australian constitutional law, many are essentially just teaching texts which, like earlier such studies, make separate, brief references to treaties and the 'external affairs' power. Due to their methodological focus on High Court cases, rather than other treaty-

anything to be concerned about?', *AdelLR*, 29, 2008, pp. 269-314; Anna Dorevitch and Michelle Foster, 'Obstacles on the road to protection: assessing the treatment of sex-trafficking victims under Australia's migration and refugee law', *MJIL*, 9 (1), 2008, pp. 1-46; Elise Edson, 'Section 51(xxix) of the *Australian Constitution* and 'matters of international concern': Is there anything to be concerned about? 'AdelLR, 29, 2008, pp. 269-314.

⁵¹ See footnote 46.

⁵² Anne Twomey, *The Constitution--19th Century Colonial Office Document or People's Constitution*, Background Paper No. 1 of 1994, Parliamentary Research Service, 1994; 'International Law and the Executive', in Brian R. Opeskin and Donald R. Rothwell (eds.), *International Law and Australian Federalism*, Melbourne University Press, Melbourne, 1997, especially p. 69-77; *Federal Parliament's Changing Role in treaty making and external affairs*, Background Paper No. 15 of 1999-2000, Parliamentary Research Service, 2000; 'Sue v Hill--The Evolution of Australian Independence', in Adrienne Stone and George Williams (eds.), *High Court at the Crossroads: essays in constitutional law*, The Federation Press, Leichhardt, N.S.W., 2000, pp. 77-108; *Chameleon Crown: the Queen and her Australian Governors*, The Federation Press, Annandale N.S.W., 2006, especially pp. 1-43; *Australia Acts 1986: Australia's statutes of independence*, The Federation Press, Annandale, N.S.W., 2010, especially pp. 1-17.

⁵³ Alison Pert, *Australia as a Good International Citizen*, Federation Press, Sydney, 2014 and 'The Development of Australia's International Legal Personality', *AYIL*, 34, 2017, pp. 149-89.

connected legislation or treaties themselves, they only start their analysis with *Burgess* (1936). These works add little, apart from some updating of the subject matter.⁵⁴

Some forays into Australia's international legal history are contained in chapters of Donald R. Rothwell and Emily Crawford (eds.), *International Law in Australia*. Understandably, most of the authors presumably did not see it as necessary to include an historical background. Of those that did, the opening chapter by Tyler, Crawford and Scott briefly traverses briefly the period up to the First World War, focusing on Australia, without commenting on the immense changes which the international legal system itself was, by then, undergoing. It mentions the Australian colonies' conclusion of bilateral postal agreements, claiming they were concluded with 'essentially unfettered competence' when, in fact, the *CO* insisted they be reviewed before legal sanction. Separate colonial adhesion to the *Universal Postal Union* and *International Telegraphic Union* are not mentioned. Pert's and Nasu's chapter on international organizations mentions the former but not other memberships, such as the *International Institute of Agriculture* (forerunner of the *FAO*), *International Bureau of Public Health* (forerunner of *WHO*) or *International Copyright Union*. Warner's and McAdam's chapter on transnational crime begins with Australia being party to the *Single Convention on Narcotic Drugs* (1961) but not the *Opium Convention* (1912) and associated protocols (or the League's convention of 1925). Devereux's and McCosker's chapter on the relationship between international and Australia's domestic law states: 'In recent decades th[at] relationship . . . has become increasingly important'. While true, this overlooks the fact that treaties were already having a major impact on Australian law--federal and state--by the First World War, on such issues as labour legislation, social insurance, environmental protection, drug control, crime, conduct of war, commerce, navigation and communications.

As well as the need for more detailed histories on Australian responses to international law, as suggested by the above examples, Peel's and Stephen's statement that, 'It was only from the 1970s that it becomes possible to identify a distinctive body of "international environmental law"' (p. 460), in the chapter on this subject, demonstrates the additional need for detailed histories of international law.⁵⁵

⁵⁴ Tony Blackshield, George Williams and Brian F. Fitzgerald, *Australian constitutional law and theory: commentary and materials*, The Federation Press, Leichhardt, NSW, 1996; Patrick Keyzer, *Constitutional Law*, LexisNexis Butterworths, Sydney (1998), 2013, pp. 197-214; Suri Ratnapala, *Australian constitutional law: foundations and theory*, OUP, South Melbourne, 2002, p. 220; Geoffrey Lindell, *Responsible government and the Australian Constitution: conventions transformed into law?*, Federation Press, Annandale, NSW, 2004; Scott Guy, *Constitutional Law*, Frenchs Forest, NSW, 2010, pp. 243-6, 352-63; Rosland Dixon and George Williams (eds.), *The High Court, the Constitution and Australian Politics*, CUP, Melbourne, 2015, pp. 231-2; John Pyke, *Constitutional Law*, Palgrave Macmillan, South Yarra, 2013, pp. 205-12 and *Government Powers under a Federal Constitution: Constitutional Law in Australia*, Law Book Co., Sydney, 2017, pp. 302-9.

⁵⁵ Donald R. Rothwell and Emily Crawford (eds.), *International Law in Australia*, 3rd ed., Law Book Co., Pyrmont, NSW, 2017, especially pp. 2-7, 23, 95-6, 233-4, 460.

Appendix 3

Literature Review: Rules on the Conduct of War

There is relatively little detailed scholarship on the conferences and treaties, concerning rules for the conduct of war, examined in this thesis. Given the iconic status of several of these in the public mind, this seems, to this author, remarkable, although it matches the pattern of the other treaty subjects here examined, perhaps so, even more. Part of this pattern, here again evident, is that the earliest, contemporary works, despite having access only to published official records, remain among the most useful. Later, as governmental archives were variously made publicly available, through (selective) printed or original forms, some historians made even more valuable contributions, especially from the 1960s to the 1980s. Thereafter, much historical scholarship turned away from study of the state to that of civil society. This was a justified redress of earlier shortfalls though, in many cases, it resulted in such studies being based almost entirely on secondary sources. Scholarly historians have largely avoided tackling international history, in its truest sense, because of the obstacles of time, language, knowledge and cost, in so doing. Studies of an individual state's foreign policy or bilateral (rarely plurilateral) relations were the preferred focus, though individual international organisations have lately been studied. The gap, thereby, created by historians' understandable reserve, has been filled in the last two to three decades by international relations and political science scholars, on whom, rather than historians, legal scholars have tended to rely, and who employ their overwhelmingly secondary source based methodology.

Of recent non-legal works, Dutch historian Maartje Abbenhuis does use some governmental primary source material in *The Hague Conferences and International Politics, 1898-1915* (2019).¹ Stockholm's maritime historian, Leos Müller, who specialises on the 18th century, uses only secondary sources in *Neutrality in World History* (2019), which is understandable, given the book covers the vast period from 1500 to 2016. There are only a few general pages on the Hague peace conferences.² Britain's 'international historian', James Crossland, covers a much narrower but still large period (1853-1914) in *War, Law and Humanity: The Campaign to Control Warfare* (2018) and, though, he uses a small amount of USA governmental archival sources, the bulk of his source material is secondary and his focus is more on civil society than government.³ Tuna Inal, a Swedish-based political scientist, only relies on secondary sources in her specifically focused study, *Looting and rape in wartime: law and change in international relations* (2013), which has a chapter on the

¹ Maartje Abbenhuis, *The Hague Conferences and International Politics, 1898-1915*, Bloomsbury Academic, London, 2019.

² Leos Müller, *Neutrality in world history*, Routledge, London, 2019.

³ James Crossland, *War, Law and Humanity: The Campaign to Control Warfare, 1853-1914*, Bloomsbury, London, 2018.

Hague conferences but adds little to long established detail.⁴ American political scientists, David P. Forsythe and Barbara Ann J. Rieffer-Flanagan, have just a few, secondary source-based pages of historical background in *The International Committee of the Red Cross: a neutral humanitarian actor* (2007).⁵ Arthur Eyffinger is a Dutch scholar, trained in the classics not history or law, though he has worked at the *International Court of Justice* and is styled a legal historian. *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World'* (1999) is very large (around 500 pages) with many illustrations and, again, is essentially secondary source-based, with a focus on the actions of individuals.⁶

Of the legal scholarship in this period, German editors Robin Geiss, Andreas Zimmermann and Stefanie Haumer include only a few pages of historical background but, at least, refer to treaty texts in *Humanizing the laws of war: the Red Cross and the development of international humanitarian law* (2017).⁷ The University of Geneva's international law professor, Robert Kolb, has a chapter of nearly fifty pages, 'The main epochs of humanitarian law since 1864 and their related dominant legal constructions', in *Searching for a 'principle of humanity' in international humanitarian law* (2013).⁸ He uses only secondary sources and adds little new detail, although his citations are very extensive, covering a large body of legal scholarship in multiple languages. His judgement, that the 'modern movement for developing the law of war sprung from a deeply rooted sense of progress, philanthropism and civilisation' (p. 25), which he says was predominant in 19th century Europe, while somewhat true, suggests the weakness of such methodology. This relies more on public expressions, including by governments, rather than then classified sources. Ironically, immediately after, he mentions Karl Marx, who would have welcomed studying the British records, which show clearly that that government was largely uninterested in the Geneva Convention of 1864, while at The Hague in 1907, was mainly concerned with the impact of war on maritime trade. American law professor, John Fabian Witt, focuses very much on the *USA* rather than the international conferences studied here, to which he devotes less than 10 pages, in his large *Lincoln's code: the laws of war in American history* (2012).⁹ He relies almost entirely on secondary sources but does make an important contribution in showing the *USA's* influence, mainly through Francis Lieber, on the largely European-led effort to develop the laws of

⁴ Tuba Inal, *Looting and rape in wartime: law and change in international relations*, UPP, Philadelphia, 2013.

⁵ David P. Forsythe and Barbara Ann J. Rieffer-Flanagan, *The International Committee of the Red Cross: a neutral humanitarian actor*, Routledge, Abingdon, 2007.

⁶ Arthur Eyffinger, *The 1899 Hague peace Conference: 'The Parliament of Man, the Federation of the World'*, Kluwer International, The Hague, 1999.

⁷ Robin Geiss, Andreas Zimmermann and Stefanie Haumer (eds.), *Humanizing the laws of war: the Red Cross and the development of international humanitarian law*, CUP, Cambridge, 2017.

⁸ Robert Kolb, 'The main epochs of humanitarian law since 1864 and their related dominant legal constructions', in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a 'principle of humanity' in international humanitarian law*, CUP, Cambridge, 2013, pp. 23-71.

⁹ John Fabian Witt, *Lincoln's code: the laws of war in American history*, Freeview Press, New York, 2012.

war. NZ-educated lawyer, Alexander Gillespie has less than twenty, secondary source-based, pages on the period 1865 to 1945, in *A History of the Laws of War: Volume 1: The Customs and Laws of War with regards to Combatants and Captives* (2011).¹⁰ The twelve pages on ‘Historical Development’ by former ICJ judge, Britain’s Sir Christopher Greenwood, in *The Handbook of International Humanitarian Law* (2009) are very general.¹¹ The USA’s Stephen Neff organises *War and the Law of Nations: A General History* (2005) thematically not chronologically and only makes occasional reference to the developments examined here, citing treaty texts and only a few older secondary sources.¹² C. F. Amersinghe’s ‘History and Sources of the Law of War’ (2004) is brief and shallow with few sources.¹³ Germany’s Karl-Heinz Ziegler provides a better brief study (2004).¹⁴ There is small amount of historical detail on the maritime aspects of the treaties in *The Law of Naval Warfare* (1988) by Italy’s international law professor, Natalino Ronzitti.¹⁵

The late Australian law professor, Robin Sharwood, opens *A century of war and peace: Asia-Pacific perspectives on the centenary of the 1899 Hague Peace Conference* (2001) with a thirteen page ‘historical’ chapter.¹⁶ Despite the existence of a body of historical works, 20 of his 33 citations are from either a 120-year old American autobiography or the populist, not scholarly, *The Proud Tower: A Portrait of the World before the War—1899-1914*, by writer Barbara Tuchman (1966).¹⁷ Sharwood’s claim that Eyffinger’s study, which he admits to not using, is the most authoritative history of the conferences, exposes how difficult it is for non-historians to distinguish between standards of historical scholarship. The above more recent works contain no original research and rely entirely on earlier legal and historical scholarship.

Rules for the conduct of war had been a major interest for international legal scholars since Grotius. The mid-19th century wars of unification in Europe stimulated, as did the Civil War in the USA, even greater interest, just as they did the creation of the *International Committee of the Red Cross* (ICRC, 1863) and the first *Geneva Convention* (1864). Heidelberg-based Swiss, Johann Bluntschli, who corresponded with Lieber, dealt with the broad subject

¹⁰ Alexander Gillespie, *A History of the Laws of War: Volume 1: The Customs and Laws of War with regards to Combatants and Captives*, Hart Publishing, Oxford, 2011.

¹¹ Christopher Greenwood, ‘Historical Development’, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., OUP, Oxford, 2009, pp. 15-27.

¹² Stephen C. Neff, *War and the Law of Nations: A General History*, CUP, Cambridge, 2005, see pp. 188-203.

¹³ C. F. Amersinghe, ‘History and Sources of the Law of War’, *SLJIL*, 16, 2004, pp. 263-87.

¹⁴ Karl-Heinz Ziegler, ‘Zur Entwicklung von Kriege recht und kriegsverhütung im Völkerecht des 19. und frühen 20. Jahrhunderts’, *AV*, 42(3), 2004, p. 271-93.

¹⁵ Natalie Ronzitti, (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff Publishers, Dordrecht, 1988.

¹⁶ Robin Sharwood, ‘Princes and Peacemakers: The Story of the Hague Peace Conference of 1899’, in Timothy L. H. McCormack, Michael Tilbury and Gillian D. Triggs (eds.), *A century of war and peace: Asia-Pacific perspectives on the centenary of the 1899 Hague Peace Conference*, KLI, The Hague, 2001, pp. 3-15.

¹⁷ Barbara W. Tuchman, *The Proud Tower: A Portrait of the World before the War—1899-1914*, Macmillan Co., NY, 1966.

extensively in *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt* (1866). From the Franco-Prussian war (1870-71), such scholarship grew extensively. In 1870, Gustave Moynier, a Swiss co-founder of the ICRC, published the first study of the convention while an associate, French jurist Achille Morin published *Les lois relatives à la Guerre* (1872).¹⁸ In between, Germany's law professor, Felix Dahn, provided German soldiers with a brief guide, *Des Kriegerrecht* (1870) and, later, Carl Lueder, an historical study, *Die Genfer Convention* (1876), which also advocated further reform.¹⁹ In the next two decades to 1900, there were a succession of such works by noted Austrian, Belgian, German and French legal scholars, including Ferdinand Lentner, *Das Recht im Krieg* (1880), Jules Guelle, *La guerre continentale et les personnes* (1881) and *Précis des lois de la guerre* (1884), C. A. Notebaert, *Droit, lois et coutumes de la Guerre* (1881), Peter Resch, *Das moderne Kriegerrecht des civilisierten Staatenwelt* (1885), E. Linde, *Das Völkerrecht im Kriege* (1888), Franz von Holtzendorff, *Handbuch des Völkerrechts* (1889), H. Hetzel, *Die Humanisierung des Krieges in den letzten hundert Jahren, von der französischen Revolution bis zur Gegenwart 1789-1889* (1891), Heinrich Triepel, *Die neuesten Fortschritte auf dem Gebiete des kriegsrechtes* (1894) and France's renowned Antoine Pillet, with *Le droit de la guerre* (1892) and *Les lois actuelles de la guerre* (1898).²⁰ Some of these, notably Hetzel, provided historical context. Robert Kolb (above) observed that British general international law volumes paid less attention to the *Geneva Convention* than Continental scholars and the only comparable British work in this period is John Risley, *The Laws of War* (1897).²¹

Early contemporary legal scholarship on these issues was encouraged by the first journal of international law, *Revue Générale de Droit International Public (RGDIP)*, which started in

¹⁸ Gustave Moynier, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés les armées en campagne* (1864 and 1868), Librairie de Joël Cherbuliez, Paris, 1870; Achille Morin, *Les lois relatives à la Guerre Selon le Droit des Gens Moderne le droit Public et le droit Criminel des pays Civilisés*, Cosse, Marchal & Billard, Paris, 1872.

¹⁹ Felix Dahn, *Des Kriegerrecht: Des Kriegerrecht: kurze, volksthümliche Darstellung für Jedermann, zumal für kurze, volksthümliche Darstellung für Jedermann, zumal für den deutschen Soldaten*, Stuber, Würzburg, 1870; C. Lueder, *Die Genfer Convention*, Historisch und kritisch-dogmatisch mit Vorschlägen zu ihrer Verbesserung, unter Darlegung und Prüfung der mit ihr gemachten Erfahrungen und unter Benutzung der amtlichen, theilweise ungedruckten Quellen bearbeitet, Verlag von Eduard Besold, Erlangen, 1876.

²⁰ Ferdinand Lentner, *Das Recht im Krieg: Kompendium des völkerrechts im kriegsfalle*, L. W. Seidel und sohn, Vienna, 1880; Jules Guelle, *La guerre continentale et les person es*, G. Pedone-Lauriel, Paris 1881 and *Précis des lois de la guerre: commentaire pratique à l'usage des officiers de l'armée active, de la réserve et de la territoriale*, 2 vols., G. Pedone-Lauriel, Paris 1884; C. A. Notebaert, *Droit, lois et coutumes de la Guerre*, Dequesne-Masquiller, Mons 1881; Peter Resch, *Das moderne Kriegerrecht des civilisierten Staatenwelt, Systematisch dargestellt*, Graz/Liepzig, 1885; E. Linde, *Das Völkerrecht im Kriege: ortrag, gehalten am 25 november 1887 vor dem officiercorps der 1. combinirten infanteriebrigade*, Mittler, Berlin, 1888; Carl Lueder, 'Krieg und Kriegerrecht im Allgemeinen' and 'Das Landkriegerrecht im Besonderen', and F. H. Geffcken, 'Das Seekriegerrecht', in Franz von Holtzendorff, *Handbuch des Völkerrechts, vol. iv*, AG Richter, Hamburg, 1889; H. Hetzel, *Die Humanisierung des Krieges in den letzten hundert Jahren, von der französischen Revolution bis zur Gegenwart 1789-1889: Die Tatsachen und die Literatur*, Königliche Hofbuchdruckerei Trowitsch & Sohn, Frankfurt 1891; Antoine Pillet, *Le droit de la guerre*, Librairie nouvelle de droit et de jurisprudence Arthur Rousseau, Paris, 1892 and *Les lois actuelles de la guerre*, A. Rousseau, Paris, 1898.

²¹ J. S. Risley, *The Laws of War*, Innes & Co., London, 1897.

1894. This date largely explains the lack of such scholarship on the Paris *Declaration on Maritime Warfare* (1856) and even the Geneva (1864), St. Petersburg (1868) and Brussels (1874) conferences and resulting agreements. This would also explain the continuing neglect of the first and last of these developments. The Hague conferences of 1899 and 1907 interested European legal scholars immediately, with numerous articles between 1898 and 1908 in *RGDIP*²² and one book-length study (1900).²³ These conferences also revived interest in the first Geneva Convention, which then extended to the second of 1906.²⁴ The rising, specific issue of arbitration was also the subject of much comment.²⁵

The *American Journal of International Law*, the first such in the English-language, began in 1907, with numerous articles on the peace conferences and arbitration up to the war, by American, British and European scholars.²⁶ In 1909, two law professors, the USA's

²² A. Pillet, Paul Fauchille, Félix Stoerk, H. Lammasch, Frantz Despagne, A. Mérignhac, Rouard de Card, E. Brusa, Pasquale Fiore, Milenk R. Vesnitch and Numa Droz, 'La question du désarmement et la Note du Tsar Nicholas II', *RGDIP*, 5, 1898, pp. 687-743; A. Grouffre de Lapradelle, 'La Conférence de la Paix (La Haye, 18 mai-29 juillet 1899)', *RGDIP*, 6, 1899, pp. 651-851; Félix Stoerk, R. de Olivart, Frantz Despagne, A. Mérignhac and E. Brusa, 'La Conférence de la Haye et ses résultats', *RGDIP*, 6, 1899, pp. 846-901; L. Renault, 'La convention de la Haye du 29 juillet concernant les lois et coutumes de la guerre sur terre et attitude de la Suisse', *RGDIP*, 9, 1901, pp. 5-15; A. Pillet, 'La guerre du Transvaal et la Conférence de la Paix', *RGDIP*, 9, 1901, pp. 15-28; Jacques Dumas, 'Les Sanctions du Droit International l'après les conventions de la Haye de 1899 et 1907', *RGDIP*, 15, 1908, pp. 557-68.

²³ A. Mérignhac, *La Conférence Internationale de la Paix: Étude Historique, Exégétique et Critique*, Librairie Nouvelle de Droit et de Jurisprudence, Paris, 1900.

²⁴ Gustav Münzel, *Untersuchungen über die Genfer Konvention: Eine darstellung und kritik des nach diesem vertrage geltenden lankriegsrechtes, mit cinm geschichtlichen überblick über die bestrebungen bis zum abschlusse des vertrages und üind über die versuche zu seiner fortbildung*, G. Ragoczy, Freiburg im Breisgau, 1901; L. E. Visser, *La Convention de Genève du 22 aout 1864 et les Sociétés de la Croix Rouge*, Librairie Belinfante, Le Haye, 1902; Christian Meurer, *Die Genfer Konvention und ihre Reformen*, J. Schweitzer Verlag, Munich, 1906; C. J. Delpech, 'La Conférence de revision de la convention de Genève (11 juin-6 juillet 1906)', *RGDIP*, 13, 1906, pp. 629-724; T. E. Holland, 'Lettre sur la convention de Genève (du 6 juillet 1906)', *RGDIP*, 14, 1907, pp. 189-95.

²⁵ Alexander Corsi, 'Un Nouveau Traite D'arbitrage Permanent', *RGDIP*, 6, 1899, pp. 9-27; A. Pillet, 'Lettre à M. Stead sur la question de l'arbitrage international', *RGDIP*, 6, 1899, pp. 28-112. C. Godefroy, Quarante ans de guerre et l'arbitrage', *RGDIP*, 13, 1906, pp. 559-629; Jacques Dumas, 'Les Sanctions du Droit International l'après les conventions de la Haye de 1899 et 1907', *RGDIP*, 15, 1908, pp. 557-68.

²⁶ George B. Davis, 'Doctor Francis Lieber's Instructions for the Government of Armies in the Field', *AJIL*, 1(1), January 1907, pp. 13-25; Jackson H. Ralston, 'Some Suggestions as to the Permanent Court of Arbitration', *AJIL*, 1(2), April 1907, pp. 321-9; William L. Penfield 'International Arbitration', *AJIL*, 1(2), April 1907, pp. 330-341; R. Floyd Clarke, 'A Permanent Tribunal of International Arbitration: Its Necessity and Value', *AJIL*, 1(2) April 1907, pp. 342-408; David J. Hill, 'The Second Peace Conference at the Hague', *AJIL*, 1(3), July 1907, pp. 671-691; James Brown Scott, 'The Work of the Second Hague Peace Conference', *AJIL*, 2(1), January 1908, pp. 1-28; Amos S. Hershey, 'Convention for the Peaceful Adjustment of International Differences', *AJIL*, 2(1), January 1908, pp. 29-49; Ellery C. Stowell, 'Convention Relative to the Opening of Hostilities', *AJIL*, 2(1), January 1908, pp. 50-62; George B. Davis, 'The Amelioration of the Rules of War on Land', *AJIL*, 1(1), January 1908, pp. 63-77; George Winfield Scott, 'Hague Convention Restricting the Use of Force to Recover on Contract Claims', *AJIL*, 2(1), January 1908, pp. 78-94; Antonio S. de Bustamante, 'The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare', *AJIL*, 2(1), January 1908, pp. 95-120; James Brown Scott, 'Status of Enemy Merchant Ships', *AJIL*, 2(2), April 1908, pp. 259-70; George Grafton Wilson, 'Conversion of Merchant Ships into War Ships', *AJIL*, 2(2), April 1908, pp. 271-5; C. H. Stockton, 'The Use of Submarine Mines and Torpedoes in Time of War', *AJIL*, 2(2), April 1908, pp. 276-84; James Brown Scott, 'Bombardment by Naval Forces', *AJIL*, 2(2), April 1908, pp. 285-94; Louis Renault, 'Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare', *AJIL*, 2(2), April 1908, pp. 295-306; Simeon E. Baldwin, 'The Eleventh Convention Proposed by the Hague Conference of 1907', *AJIL*, 2(2), April 1908, pp. 307-12; Charles Cheney Hyde, 'The Hague Convention Respecting the Rights and Duties of Neutral Powers in Naval War', *AJIL*, 2(2), April 1908, pp. 507-27; Charles Noble Gregory, 'The Proposed International Prize Court and

Canadian-born, James Brown Scott, who was in the USA's delegation at the 1907 conference, and Britain's A. Pearce Higgins, who had just succeeded Lassa Oppenheim at the LSE, published, respectively, *The Hague peace conferences of 1899 and 1907* and *The Hague peace conferences and other international conferences concerning the laws and usages of war*.²⁷ These are still cited by scholars today. The related London conference on maritime warfare of 1909 engaged much contemporary partisan interest²⁸ but less scholarly attention, especially among Americans, though the question of prize courts continued to feature, after the war, in the new *British Yearbook of International law* (1920-21).²⁹

Some of Its Difficulties', *AJIL*, 2(3), July 1908, pp. 458-475; Henry B. Brown, 'The Proposed International Prize Court', *AJIL*, 2(3), July 1908, pp. 476-489; Thos. Raeburn White, 'Constitutionality of the Proposed International Prize Court--Considered from the Standpoint of the United States', *AJIL*, 2(3), July 1908, pp. 490-506; Frederick Charles Hicks, 'The Equality of States and the Hague Conferences', *AJIL*, 2(3), July 1908, pp. 530-61; 'Recent Arbitration Treaties Concluded by the United States', *AJIL*, 2(3), July 1908, pp. 624-630; Wm. I. Hull, 'Obligatory Arbitration and the Hague Conferences', *AJIL*, 2(4), October 1908, pp. 731-42; Richmond Pearson Hobson, 'Disarmament', *AJIL*, 2(4), October 1908, pp. 743-57; Benjamin F. Trueblood, 'The Case for Limitation of Armaments', *AJIL*, 2(4), October 1908, pp. 758-71; James Brown Scott, 'The Proposed Court of Arbitral Justice', *AJIL*, 2(4), October 1908, pp. 772-810; George B. Davis, 'The Second, Third, and Fourth Vœux of the Conference', *AJIL*, 2(4), October 1908, pp. 811-14; James Brown Scott, 'Recommendation for a Third Peace Conference at the Hague', *AJIL*, 2(4), October 1908, pp. 815-22; Elihu Root, 'The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts', *AJIL*, 3(3), July 1909, pp. 529-36; Heinrich Lammasch, 'Compulsory Arbitration at the Second Hague Conference', *AJIL*, 4(1), January 1910, pp. 83-94; William Cullen Dennis, 'The Orinoco Steamship Company Case Before the Hague Tribunal', *AJIL*, 5(1), January 1911, pp. 35-64; J. B. S[cott], Review of 'The Hague Peace Conferences of 1899 and 1907.[lecture] by J. Ph. Suijling', *AJIL*, 5(2), April 1911, pp. 571-2; Paul S. Reinsch, 'The Concept of Legality in International Arbitration', *AJIL*, 5(3), July 1911, pp. 604-14; Jacques Dumas, 'Sanctions of International Arbitration', *AJIL*, 5(4), October 1911, pp. 934-57; M. Jarousse de Sillac, 'Periodical Peace Conferences', *AJIL*, 5(4), October 1911, pp. 968-86; 'The Pending Treaty of Arbitration Between the United States and Great Britain', *AJIL*, 6(1) January 1912, pp. 167-177; James Brown Scott, 'The Evolution of a Permanent International Judiciary', *AJIL*, 6(2), April 1912, pp. 316-358; Richard Olney, 'General Arbitration Treaties', *AJIL*, 6(3) July 1912, pp. 595-600; William Cullen Dennis, 'The Arbitration Treaties and the Senate Amendments', *AJIL*, 6(3), July 1912, pp. 614-628; A. Pearce Higgins, 'Armed Merchant Ships', *AJIL*, 6(4), October 1912, pp. 705-22; George C. Butte, 'The "Protocole Additionnel" To the International Prize Court Convention', *AJIL*, 6(4), October 1912, pp. 799-829; Baron S. A. Korff, 'The Ninth International Red Cross Conference', *AJIL*, 6(4), October 1912, pp. 858-64; William Cullen Dennis, 'The Necessity for an International Code of Arbitral Procedure', *AJIL*, 7(2), April 1913, pp. 285-300; Hans Wehberg, 'Restrictive Clauses in International Arbitration Treaties', *AJIL*, 7(2), April 1913, pp. 301-314; Mr. Bryan's Proposed Commissions of Inquiry', *AJIL*, 7(3), July 1913, pp. 566-570; Denys P. Myers, 'The Origin of the Hague Arbitral Courts', *AJIL*, 8(4), October 1914, pp. 769-801; Simeon E. Baldwin, 'An Anglo-American Prize Tribunal', *AJIL*, 9(2), April 1915, pp. 297-304; R. Y. Hedges, 'The Juridical Basis of Arbitration', *BYIL*, 7(110), 1926, pp. 110-20.

²⁷ James Brown, Scott, *The Hague peace conferences of 1899 and 1907*, 2 vols., TJHP, Baltimore, 1909; A. Pearce Higgins (ed.), *The Hague peace conferences and other international conferences concerning the laws and usages of war. Texts of conventions with commentaries*, CUP, Cambridge (UK), 1909.

²⁸ Norman Bentwich, *The Declaration of London: with an Introduction and notes and appendices*, E. Wilson, London, 1909; Thomas Gibson Bowles, *Sea Law and Sea Power: As they would be affected by recent proposals; with reasons against those proposals*, John Murray, London, 1910; John Pawley Bate, *An Elementary Account of the Declaration of London, 1909, and Some Kindred Matters*, Longmans, London, 1911; Nathaniel Dunlop, *A British Shipowner and the Declaration of London*, McCorquodale, Glasgow, 1911; F. E. Bray, *British Rights at Sea under the Declaration of London*, P. S. King & Son, London, 1911; B. Eyres, Monsell, *The Declaration of London: A Simple Explanation*, Wyman & Sons, Limited, London, 1911.

²⁹ C. H. Stockton, 'The International Naval Conference of London, 1908-1909', *AJIL*, 3(3), July 1909, pp. 596-618; Elihu Root, 'The Real Significance of the Declaration of London', *AJIL*, 6(3), July 1912, pp. 583-94; James Brown Scott, 'The Declaration of London of February 26, 1909', *AJIL*, 8(2), April 1914, pp. 274-329; Erle Richards, 'The British Prize Courts and the War', *BYIL*, 1, 1920-1921, pp. 11-34; A. Pearce Higgins, 'Enemy Ships in Port at the Outbreak of War', *BYIL*, 3, 1922-1923, pp. 55-78; C. J. B. Gaskoin, 'Prize Case Notes in the Days of Stowell', *BYIL*, 4, 1923-1924, pp. 78-89; A. Pearce Higgins, 'Ships of War as Prize', *BYIL*, 6, 1925 pp. 105-9; J. W. Garner, 'Immunities of State-Owned Ships Employed in Commerce', *BYIL*, 6, pp. 125-43.

The publication by some participating governments of some of the documents on the two Hague conferences facilitated early scholarly research. The published recollections of president, Andrew White, and secretary, Frederick Holls, of the *USA's* delegation were also useful.³⁰ Legal scholars, who were not historians, did not continue to study these past developments, although they still cited the treaties themselves. The first works on these subjects, which could be considered scholarly history, emerged relatively early, despite the restricted availability of governmental archives. The increasing armed conflicts of the 1930s, leading to the Second World War, may have been the stimulus. American Thomas Ford's 'The Genesis of the First Hague Peace Conference' (1936) uses published British, American and other governmental records in a significant, if small, contribution.³¹ Ground-breaking African-American diplomatic historian, Merze Tate, made an even greater contribution with *The Disarmament Illusion: The Movement for a Limitation of Armaments to 1907* (1942), which focuses more on public movements.³² Physician, Martin Gumpert, was born German-Jewish, before emigrating to the *USA* in 1936, where his *Dunant: The Story of the Red Cross* (1938), not a scholarly biography, was translated by notorious ex-communist, Whittaker Chambers.³³ This was the first of several European-authored works, most of which were published in the *International Review of the Red Cross (IRRC)* and, although useful, were all, secondary source-based and mainly reflected more sympathetic and commemorative rather than detached scholarship. Those dealing with the Geneva Convention and Brussels conference of 1874 were by Henri Coursier (1952 and 1954)³⁴ Pierre Boissier (1963, in English 1985, and 1964³⁵), Henri Meyrowitz (1968)³⁶ and Danièle Bujard (1974)³⁷. Later such works, focussing more on the Red Cross than the treaties, were by Hans Haug and Hans-Peter Gasser (1993)³⁸, François Bugnion (1994)³⁹ and Jean de Senarclens (2000, in English 2005).⁴⁰

³⁰ Andrew White, *Autobiography of Andrew White*, 2 vols., Macmillan, London, 1905; Frederick W. Holls, *The Peace Conference at The Hague and its bearings on international law and policy*, Macmillan, NY, 1900.

³¹ Thomas K. Ford, 'The Genesis of the First Hague Peace Conference', *PSQ*, 51(3) 1936, pp. 354-82.

³² Merze Tate, *The Disarmament Illusion: The Movement for a Limitation of Armaments to 1907*, MacMillan and Co., NY, 1942.

³³ Martin Gumpert, *Dunant, The Story of the Red Cross*, OUP, NY, 1938.

³⁴ Henri Coursier, 'Études sur la formation du droit humanitaire', *IRRC*, 34(403), July 1952, pp. 550-78 and 'The Geneva Convention of 1864 in International Law', *RICR*, Supplement, 7(7), pp. 144-157.

³⁵ Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross*, Henry Dunant Institute, Geneva, (1963, French) 1985.

³⁶ Henri Meyrowitz, 'Reflections on the Centenary of the Declaration of St. Petersburg' *IRRC*, 8(93), December 1968, pp. 611-25.

³⁷ Danièle Bujard, 'The Geneva Convention of 1864 and the Brussels Conference of 1874', *IRRC*, 14(163), October 1974, pp. 527-37.

³⁸ Hans Haug and Hans-Peter Gasser, *Humanité pour tous: La Mouvement international de la Croix-Rouge et du Croissant Rouge*, Haupt, Berne, 1993.

³⁹ François Bugnion, *La Comité international de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 2004.

⁴⁰ Jean de Senarclens, *The Founding of the Red Cross: Gustave Moynier, its Master Builder*, Slatkine, Geneva, 2005.

The first archive-based historical studies on these subjects appeared in the early 1960s, mainly in the *USA*. The Paris *Declaration on Maritime Warfare* seems to have been overlooked, as were the Geneva (1864), St. Petersburg (1868) and Brussels (1874), Hague (1904) and Geneva (1906) conferences, certainly in the *USA*, which had not been a participant. Most such study was on the two Hague conferences (1899 and 1907), which the *USA* had attended. Calvin Dearmond Davis's Indiana University doctorate was published, the following year, as *The United States and the First Hague Peace Conference: American diplomacy and international organization, 1899-1914* (1962). This is a well-researched study of both public movements and diplomacy, which extensively uses private papers in both those areas. He used the published documents of Britain, Germany and the *USA*, while he found the then available State Department archives disappointing. In 1975, he published a comparable account of the second conference.⁴¹ A doctorate at the City University of New York by Sheila Iris Kaplan, *Great Britain and the first Hague Conference: An Episode in Internationalism* (1973) was unpublished, as was that by the University of Kentucky's David Bettez, *France, Germany and the Hague Peace Conferences* (1982), although his later, brief article (1988) shows his extensive use of British, German and French official sources.⁴² Dan Morrill's article (1974) used two primary-source based Russian articles from 1932, to examine Russian policy, with *détente*, perhaps, reviving interest in the conferences.⁴³

Continental historians have also made several valuable contributions to the literature in this period. The two conferences were also treated, although not the focus, of the published Swiss dissertation of Othmar Uhl, *Die diplomatisch-politischen Beziehungen zwischen Grossbritannien und der Schweiz in den Jahrzehnten vor den Ersten Weltkrieg (1890-1914)*, (1961).⁴⁴ In an article (1978), Solomon Wank examined Austria's attitude to the second conference.⁴⁵ The 1979 University of Cologne doctoral thesis by Jost Dülffer was published as *Regeln gegen den Krieg?: die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik* (1981).⁴⁶ Klaus Schlichtmann's article (2003) made a

⁴¹ Calvin Dearmond Davis, *The United States and the First Hague Peace Conference: American diplomacy and international organization, 1899-1914*, CLUP, NY, 1962 and *The United States and the Second Hague Peace Conference: American diplomacy and international organization, 1899-1914*, DUP, Durham, N. C. 1975

⁴² David Bettez, *France, Germany and the Hague Peace Conferences*, Ph. D, University of Kentucky, 1982 and 'Unfulfilled Initiative: Disarmament Negotiations and the Hague Peace Conferences of 1899 and 1907', *RUSIJ*, 133(3), June 1988, pp. 57-62.

⁴³ Dan Morrill, 'Nicholas II and the Call for the First Hague Peace Conference', *JMH*, 46(2), June 1974, pp. 296-311.

⁴⁴ Othmar Uhl, *Die diplomatisch-politischen Beziehungen zwischen Grossbritannien und der Schweiz in den Jahrzehnten vor den Ersten Weltkrieg (1890-1914)*, Helbing & Lichtenhahn, Basle, 1961.

⁴⁵ Solomon Wank, 'Diplomacy against the Peace Movement: The Austro-Hungarian Foreign Office and the Second Hague Peace Conference of 1907' in Solomon Wank (ed.), *Doves and Diplomats foreign offices and peace movements in Europe and America in the twentieth century*, Greenwood Press, Westport, Conn., 1978.

⁴⁶ Jost Dülffer, *Regeln gegen den Krieg?: die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik*, Ullstein, Frankfurt/Main, 1981.

contribution by using Japanese records in examining its and Germany's approach to the conferences.⁴⁷ The only significant if brief, British (in fact, Northern Irish) contribution in this period was an excellent article by Stephen Barcroft (1989), which is notable for its use of the main *FO* files on the conferences, which no other scholar has.⁴⁸

British scholars were more noticeable in the related civil society aspects, a direction to which much historical scholarship was then turning. In the post-*détente* era, after the Soviet invasion of Afghanistan (1979), peace movements and peace research flourished. This shift also featured a greater contribution by females. Britain's Geoffrey Best was a peace activist, as well as historian, and his general and secondary source-based work (1980), reflected his convictions.⁴⁹ Peter van den Dungen, a Bradford-based peace studies scholar, examined the role behind the first Hague conference of Polish financier and peace activist, Jean de Bloch, in a lengthy paper (1983).⁵⁰ American Sandi Cooper briefly examined the role of women in pre-World War One European peace movements.⁵¹ German-Austrian, Brigitte Hamann, completed for a peace research centre a sympathetic study of Bertha von Suttner (1986), who was also involved with promoting the conferences.⁵² Australians, through, peace researchers, Malcolm Saunders and Ralph Summy, made a rare, if modest, contribution, with a study of the local peace movement (1986).⁵³ More recently, Martin Ceadel (2000) and Paul Laity (2001) have completed major studies on the British peace movement, covering the period before 1914 in detail.⁵⁴ Straddling these two works, have been three major studies of the origins of the Red Cross, one by American, John F. Hutchinson (1996), and two by Britain's Caroline Moorehead (1998) and Angela Bennett (2005).⁵⁵ These are less focused on governmental policy and do not use such sources, although they do touch upon the original Geneva Convention.

⁴⁷ Klaus Schlichtmann, 'Japan, Germany and the Idea of the two Hague Peace Conferences', *JPR*, 40(4), 2003, pp. 377-94.

⁴⁸ Stephen Barcroft, 'The Hague Peace Conference of 1899', *ISIA*, 1989, 3(1), pp. 55-68.

⁴⁹ Geoffrey Best, 'Peace Conferences and the Century of Total War', *IA*, 75(3), July 1999, pp. 619-34 and *Humanity in Warfare: The Modern History of the International Law of Armed Conflict*, Methuen, London, 1980.

⁵⁰ Peter van den Dungen, *The making of peace: Jean de Bloch and the First Hague Peace*, Occasional Paper Series no. 12, CSAD, CSU, Los Angeles, 1983.

⁵¹ Sandi E. Cooper, 'Women's Participation in European Peace Movements: The Struggle to Prevent World War I', Paper presented at the Berkshire Conference on the History of Women, North Hampton, M.A., ERIC Clearinghouse, Washington D. C., 1984.

⁵² Brigitte Hamann, *Bertha von Suttner: A Life for Peace*, SUP, Syracuse, N. Y., 1986.

⁵³ Malcolm Saunders, and Ralph Summy, *The Australian peace movement: a short history*, Peace Research Centre, ANU, Canberra, 1986.

⁵⁴ Martin Ceadel, *Semi-detached Idealists: The British Peace Movement and International Relations, 1845-1945*, OUP, Oxford, 2000; Paul Laity, *The British Peace Movement, 1870-1914*, CUP, Cambridge, 2001.

⁵⁵ John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder Co., 1996; Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, HarperCollins, London 1998; Angela Bennett, *The Geneva Convention: The Hidden Origins of the Red Cross*, The History Press, Stroud, 2005.

That there is no complete archive-based multilateral study of these conferences and conventions reflects the scale of such a task. Yet, there is not even a major single nation study, apart from those of the *USA*, which has made exhaustive use of any country's government's archives. This would be the start point to realise the first objective, a multilateral study.

Appendix 4

Literature Review: Transnational criminal law

The English-language term ‘transnational criminal law’ is now widely used in distinction to the original term, ‘international criminal law’, which, since the mid-1990s and the *Rome Statute of the International Criminal Court (ICC)*, is seen as referring exclusively to war crimes, crimes against humanity and genocide; the heads of law under the jurisdiction of the *ICC*. The subjects, thereby under transnational criminal law include, piracy, slavery, terrorism, extradition and illegal trafficking such as in humans, drugs, arms, liquor, antiquities, animals, counterfeit currency or pornography.¹

In the period covered in this thesis, to the First World War, all of these transnational criminal issues arose in governmental policy-making, with the exception of trafficking in antiquities and counterfeit currency (both of which arose just after that war). Slave trafficking is such a large and distinct subject (often related in British bilateral treaties to piracy), that it is not covered in the thesis or its literature reviewed specifically here. Terrorism arose in this study period only in the limited sense of the pluri-lateral *Secret St. Petersburg Protocol* of 1904, to which Britain was not a party. The literature on extradition is so large it needs to be reviewed separately.

Of the remaining sub-fields, illegal trafficking in animals arose in the period, here studied, on the issue of bird plumage and skins but is categorised separately in the literature of the protection of nature, not transnational crime. Arms and liquor trafficking only arose as treaty issues with respect to protection of ‘natives’, which are also large distinct subjects, not included in the thesis and so not reviewed here separately. The literature on drug trafficking is also very large and, arguably, more a matter of international health; so, it has been reviewed separately. Trafficking in women (or ‘white slaves’) and obscene publications were, if one excludes the several multi-party treaties between 1885 and 1910 on Africa, the only two subjects of multilateral treaties on transnational crime in the period examined in this thesis.

* * *

In the early days of modern international law, individuals were only a very minor part, if at all included. States not individuals were the basic subjects of international law. Acts of piracy or offences against ambassadors were essentially the only international ‘crimes’ in customary

¹ Interestingly, suppression of international terrorism was the sole rationale for the first formal proposal for an *ICC* in 1934-37, along with a multilateral extradition agreement. Neither scheme were realised and, much later, because of political disagreement and difficulties associated with reaching international agreement on terrorism, this subject was not included in the *Rome Statute* of 1998 founding the *ICC*.

international law and, even, then there was no ‘international court’ to try such criminal cases. The execution of criminal law remained a subject confined to the jurisdictions of respective states, as were criminal offences, with these few extra-territorial exceptions. The development of an extensive and inter-locking network of bilateral extradition treaties through the 19th century, whereby offenders could be returned to the jurisdiction of the offence, in one sense, made the development of ‘international criminal law’ and related courts less necessary. The Great Powers’ treatment of *Napoleon I*, who, significantly they did not recognize as a royal sovereign, was an early step in holding individuals not states responsible for supposed international infractions. The explosion in anti-slave trafficking treaties was another factor.

The first scholarly literature, on what is now called transnational criminal law, emerged, as is the case with most subjects of international law, in Continental Europe. Modern legal scholars have hailed the published doctoral thesis, *Das internationale Privat und Strafrecht / International Civil and Criminal Law* (1862) of Saxon jurist, Ludwig von Bar, and his better known, *Lehrbuch des internationalen Privat und Strafrechts* (1892), as the first such works.² In fact, it would appear that the proposal of French legal scholar, de Gregory, for a ‘*droit pénal universel*’ for Europe in 1832, deserves the credit. His ambition reflected Napoleon’s codification of law during its partial and temporary ‘unification’ of Europe but, perhaps, due to that legacy, his project was still born.³

Codification of laws had already begun in parts of German-speaking Europe (1756, 1794 and 1797) before Napoleon and it is certainly true that, after the hiatus following de Gregory, the next works, to the First World War, on what they termed *internationalen Strafrecht*, were overwhelmingly German-language. The unification process after 1871, through which the numerous German states underwent, explains this predominance. Significantly, after international prison congresses in London (1872) and Stockholm (1878), Sweden-Norway took steps, which led to the formal creation of *The International Penitentiary Commission (IPC)* in 1880, confirmed in 1886. In 1889 in Vienna, the *International Union of Penal Law (IUDP)* was established. Both bodies, non-governmental but officially-supported, were concerned with reform, modernization and standardisation of criminal law.⁴

² (Karl) Ludwig von Bar, *Das internationale Privat und Strafrecht*, Hahn'sche hofbuchhandlung, Hannover, 1862; *Lehrbuch des internationalen Privat und Strafrechts*, F. Enke, Stuttgart, 1892. The claim, that these are the first such works, was made by Gerhard Mueller in his landmark *International Criminal Law* (1965).

³ Chevalier G. de Gregory, *Projet de droit pénal universel suivi du Système pénitentiaire*, Chez Videcoq Libraire, Paris, 1832. See the list of works in Bart de Schutter with Christian Eliaerts, *Bibliography on International Criminal Law*, A. W. Sijthoff, Leiden, 1972. The next substantial French works were M. C. Marin, *Du droit criminel international: Vol. 1, Théorie de l'extradition. Vol. 2, Étude de la loi du 27 juin 1866*, (Thèse de doctorat), Rennes, 1878; Alphonse Bard, *Précis de droit international: Droit pénal et privé*, Thorin, Paris, 1883.

⁴ Thorsten Sellin, ‘Lionel Fox and *The International Penal and Penitentiary Commission*’ in Manuel Lopez-Rey and Charles Germain (eds.), *Studies in penology, dedicated to the memory of Sir Lionel Fox*, M. Nijhoff, The Hague, 1964, pp. 194-207; the founders of the *IUDP* were Frans von Liszt, Gerard von Hamel and Adople Prins.

At this stage, the ‘international’ approach to realizing more effective criminal laws in Europe focused on greater uniformity of countries’ respective domestic laws and, also, extra-jurisdictional questions, rather than treaties. Switzerland and Italy had also undergone a similar unification process similar to Germany’s around this time, so their legal scholars, notably, Frederick Meili,⁵ in the former and Pasquale Fiore,⁶ in the latter, examined similar and related questions, as did some Dutch legal scholars.⁷ The common borders and Spanish language in South America also raised these questions among legal scholars there.⁸ There was nothing in English, apart from that on extradition. The main NGOs interested in criminal questions there, the *Howard Association* (1866) and *Penal Reform League* (1907), were not internationally-linked and more interested in improving the treatment not prosecution of criminals.⁹

Aside from slave trafficking, the first proposal for a multi-party treaty on what could be categorized as a subject of international or transnational criminal law was on white slave trafficking. When France took the lead to organise the first official conference (1902), which would lead to the treaty’s conclusion, French legal scholars began to pay close attention to what they called ‘*la droit pénal international*’. These included: Jules Lenoble’s published, *University of Paris* law thesis (1900), supervised by professor Alfred Le Poittevin; an article

The other major, foundational German-language works include: Woldemar von Rohland, *Das internationale Strafrecht: Abteilung 1, Kritik der internationalen Strafrechtstheorien*, Breitkopf & Härtel, Leipzig, 1877; Ferdinand von Martitz, *Internationalen Rechtshilfe in Strafsachen, Abteilung 1, beiträge zur theorie des positiven völkerrechts der gegenwart*, H. Haessel, Leipzig, 1888; Emil Jettel, *Handbuch des internationalen Privat und Strafrechts, mit rücksicht auf die Gesetzgebungen Oesterreichs, Ungarns, Croatiens u. Bosniens*, W. Braumüller, Vienna, 1893; K. Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus: Erstes stück: Die geltung der stammesrechte in Ober- und Mittelitalien*, J. Schweitzer, Munich, 1901; Friedrich von Kitzinger, *Die Internationale kriminalistische vereinigung: Betrachtungen über ihr wesen und ihre bisherige wirksamkeit*, C.H. Beck, Munich, 1905; August von Hegler, *Prinzipien des Internationalen Strafrechts*, Schlette, Breslau, 1906; Fritz Koenig, *Grundzüge des internationalen strafrechts: Mit besonderer Berücksichtigung der neuen Entwürfe Deutschlands, Oesterreichs und der Schweiz*, Lüdin, Liestal, 1915; Josef Kohler, *Internationales strafrecht*, Ferdinand Enke, Stuttgart, 1917.

⁵ Frederick Meili, *Über der historische Debüt der Doktrin des internationalen Privat und Strafrechts*, Duncker & Hombolt, Leipzig, 1899; *Bartolus als Haupt der ersten Schule des internationalen Strafrechts, ein historisches Bild*, O. Fussli, Zurich, 1908; *Die Doktrin des internationalen Strafrechts: und ihre heutigen Aufgaben*, Druck und verlag von Schulthess, Zurich, 1908; *Die hauptsächlichen Entwicklungsperioden des internationalen Strafrechts seit der mittelalterlich-italienischen Doktrin*, O. Füssli, Zurich, 1908; *Lehrbuch des internationalen Strafrechts und Strafprozessrechts*, O. Füssli, Zurich, 1910.

⁶ Pasquale Fiore, *Traité de droit pénal international et de l’extradition*, 2 vols., Pédone-Lauriel, Paris, 1879; Adriano de Cupis, *La giustizia penale nelle relazioni internazionali*, Milan, 1886; Lanfranco Bellegotti, *Nozioni elementari di diritto penale internazionale e delle procedure as esso attinenti*, Rossetti, Pontremoli, 1889; Prospero Fedozzi, *Delle possibili conseguenze del positivismo penale nel sistema di diritto penale internazionale*, Fratelli Bocca, Turin, 1897; Salvatore Adinolfi, *Diritto Internazionale penale*, Hoepli, Milan, 1913.

⁷ E. M. Meyers, *Bijdrage tot de geschiedenis van het international privaats en strafrecht in Frankrijk en de Nederlanden*, H. D. Tjeenk Willink en zoon, Haarlem, 1914; Leo van Praag, *Jurisdiction et droit international publique: La jurisdiction nationale d’après le droit international public coutumier en temps de paix*, Librairie Belinfante Frères, Le Haye, 1915.

⁸ Santiago Vaca-Guzmán, *Derecho internacional penal: proyecto de decisiones redactado*, Imprenta de P.E. Coni é hijos, Buenos Aires, 1888; Miguel P. Díaz, *Derecho penal internacional*, 2nd ed., V. Suarez, Madrid, 1911.

⁹ These two merged in 1921 to form the *Howard League for Penal Reform*.

(1902) by Louis Renault, the famed University of Paris international law professor, in the new *Revue générale de droit international public*, the world's first such journal (which had only started six years prior); and, a published doctoral thesis at the *University of Lyon's* law faculty by Paul Appleton, the third generation of a leading French legal family, descended from a former *US* consul.¹⁰

The one scholar from the English-speaking world who took note of these developments at this time was the American political scientist and diplomat, Paul Reinsch. He used French and German sources, official public and secondary, in what he subtitled a '*study in international administrative law*' (1911). He devoted a page to slavery and the associated liquor trafficking to natives, mentioning the evolution of Britain's bilateral anti-slave trafficking treaties into the general act of Brussels in 1890 and the establishment in Zanzibar of the *BIMT*. Citing the published treaty texts, he mentioned the revisions of the foundational convention at the conferences of 1899, 1906 and 1908, though not that of 1910, which was too close to his publication. There is a detailed page on white slave trafficking and he also mentioned the Buenos Aires administrative, not diplomatic, conference on police cooperation in South America in 1905.¹¹

There were no works by British legal scholars equivalent to that in Europe, despite the public interest there in white slavery. Lassa Oppenheim (1905) devoted less than a page to the 'so-called "International Crimes"' of piracy and slavery. He did not mention the multiparty treaty Britain had just signed (1904) on the white slave traffic.¹² By contrast, Sir John MacDonnell, professor of Comparative and Historical Law at the *London School of Economics*, after the conclusion of the two conventions of 1910, spoke publicly of the 'serious obstacles to anything like an international criminal law'. He blamed the 'archaic beliefs' and 'jealousy' of states, living in 'splendid isolation', despite common interests, for the fact there 'had been so far (except as to extradition)', he continued, 'little co-operation'. Nonetheless, identifying a remarkable 'advance to uniformity', among many states' criminal laws, he observed:

At the first blush there seemed neither order nor principle in the mass of unconnected criminal legislation. But closer examination seemed to show something like a plan; what looked at first like the work of chance resembled the arrangements made by one directing hand and mind for a distinct end.

¹⁰ Jules Lenoble, *La traite des blanches et le congrès de Londres de 1899, étude sur la protection de la jeune fille en France et à l'étranger*, Paris, L. Larose et Forcel, 1900; Louis Renault, 'La "traite des blanches" et la Conférence de Paris au point de vue du droit international', *RGDIP*, Extracted and published by A. Pédone, Paris, 1902 pp. 1-36; Paul Appleton, *La Traite des Blanches* (1903) A. Rousseau, Paris, 1903; Paul Robiquet, 'La traite des blanches (rapport au 5^e congrès pénitentiaire international)', *Histoire et Droit*, 2nd series, Librairie Hachette et C., Paris, 1907, pp. 177-92.

¹¹ Paul Reinsch, *Public Unions: Their Work and Organization: A Study in International Administrative Law*, Ginn & Company, Boston, 1911, especially pp. 64-66.

¹² L. Oppenheim, *International Law: a Treatise, Vol. 1, Peace*, Longmans, Green & Co., London, 1905, pp. 201-2.

No English-speaking legal scholar, however, had yet decided this was a field which required more study. There were just a few books by non-scholars campaigning in both Britain and the USA on this issue.¹³

The peace settlement for the First World War elevated the notion of ‘international crimes’, with the focus now on those connected to war-making, especially aggressive war. Together with this, the new League of Nations and its legal secretariat encouraged greater consideration of achieving international uniformity of criminal law. This was linked to the promotion of the idea of a European federation. In 1920, Belgium proposed the drafting of an international criminal code. The League’s *Committee of Jurists*, which had drafted the statute for the *Permanent Court of International Justice (PCIJ)*, recommended the creation of an *International Criminal Court (ICC)*. The Council thought this worth discussing with the relevant *NGOs* but the *Assembly* ruled this premature, with some member states rejecting the very notion of an international criminal law.

The growing body of *NGOs* interested in this issue did not give up. In 1921, Britain’s *Howard League for Penal Reform* was created by merger of the two earlier organisations. The long-standing *International Law Association (ILA)*, which had been leading the cause, was encouraged by the formation of the *International Criminal Police Commission* in Vienna in 1923, resulting from a conference in Monaco just before the war. The next year, a group of European lawyers formed *L’Association Internationale de Droit Pénal (AIDP)* in Paris, to replace the dissolved *UIDP*, which, four years later, created the *Bureau International pour l’Unification du Droit Pénal*. Behind these developments were France’s Henri Donnedieu de Vabres and Jean-Andre Roux, Romania’s Vespasian Pella, Belgium’s Carton de Wiart, Poland’s Emil Rappaport and Greece’s Megalos Caloyanni. These activists were also among the major legal scholars on this subject at this time.¹⁴ In 1926 the *IPC* established a permanent office in Berne and was renamed *The International Penal and Penitentiary Commission* in 1929. In the 1930s, a seminar on foreign and international criminal law was held at Albert

¹³ *Times*, 6 June 1913. One of many examples is Ernest A. Bell, *Fighting the traffic in young girls; or, War on the white slave trade*, Chicago, 1910.

¹⁴ Maurice Travers, *Le Droit Pénal International et sa Mise en Ouvre en Temps de paix et en temps de Guerre*, 5 vols., Librairie de la Société du Recueil Sirey, Paris, 1920-22; Henri Donnedieu de Vabres, *Introduction à l’étude de droit pénal international: essai d’histoire et de critique sur la compétence criminelle dans les rapports avec l’étranger*, Sirey, Paris, 1922, *Les Principes modernes du droit pénal international*, Sirey, Paris, 1928 and *La crise moderne du droit pénal*, Sirey, Paris, 1938. Arthur Wegner, *Kriminelles Unrecht, Staatsunrecht und Völkerrecht*, W. Gente, Hamburg 1925; Quintiliano Saldaña, *Projet de Code Pénal international*, Goddé, Paris, 1926; Georg Solna, *Das Weltrechtsprinzip im internationalen Strafrecht*, Zahn & Baendel, Zurich, 1927; Nicolas Politis, *Les nouvelles tendances du droit international*, Hachette, Paris, 1927; Vespasian V. Pella, *La Criminalité Collective des Etats et le droit International de l’Avenir*, Imprimerie de l’État, Paris, 1928; *La codification du droit international*, Vacaresti, Bucharest, 1928; A. Roth, *Das völkerrechtliche Delikt vor und den Verhandlungen auf der Haager Kodifikationskonferenz*, 1930, Noske, Leipzig, 1932; Hellmuth von Weber, *Internationale Strafgerichtsbarkeit*, Ferd. Dümmlers, Berlin 1934; G. Padoux, *International Unification of Criminal Law, CLR*, 7(1), 1934, pp. 1-10; Niko Gunzburg, *Les transformations récentes du droit pénal interne et international*, L’Églantine, Bruxelles, 1935; Ulrich Rausch, *Der internationale Rückfall*, Neukirch-Kurtz, Breslau, 1937.

Ludwig's University of Freiburg, which would lead in 1947--after being delayed by the *Nazi* era--to the establishment of the *Institut für Ausländisches und Internationales Strafrecht*.¹⁵

Many of the legal scholars promoting the creation of an international criminal legal code came from countries, which had benefitted from the post-war peace settlement and, thus, may have wanted a stronger international legal regime to protect the status quo. This meant a focus on laws against violent actions by states, such as aggressive war. This emphasis was reflected in the conclusion of the *Geneva Protocol for the Pacific Settlement of International Disputes* (1924) and *General Treaty for Renunciation of War as an Instrument of National Policy* (1928). Nevertheless, the draft codes presented by Pella at the *Inter-parliamentary Union* in Washington D.C. in 1925, at the *ILA* conference at Vienna in 1926 and supported by the *IADP* at Brussels (1926) and Bucharest (1929), included other international offences, including trafficking in drugs, counterfeit currency, humans and obscene publications. These matters were discussed at the first international conference for the *Unification of Criminal Law* at Warsaw in 1927. There were suggestions the *PCIJ* should have a criminal chamber to deal with such infractions.

In 1930, the League then embarked on a major program to explore the codification of international law and, after its experts reported in 1931, the Assembly referred the matter to the seven *NGO*'s named above for further advice. Inevitably there was some disagreement but, in the end, these bodies cautiously recommended that standardisation was desirable for the: definition of offences the suppression of which was important from an international point of view; agreement on fundamental rules of criminal law, beginning with those intended to insure the effective suppression of offenses of an international character; and, achieving greater uniformity of certain branches of the criminal law of countries, whose civilisations possessed common features. The League referred these results to member governments, inevitably encountering doubts. Britain cautioned against the possibility and wisdom of realising universality but though there was hope for agreement on trafficking in drugs, counterfeit currency, women and children. The differences between the approaches of Continental and Anglo-American law were patent. The idea of an *ICC* arose again in 1935-37, on the specific subject of terrorism, but again there was no agreement or concrete progress before war again broke out.

In Latin America at this time, legal scholars were debating the desirability and possibility of not only a common or uniform civil but, also, criminal code for the entire continent. This was reflected in the works of two Uruguayans---Eustaquio Tomé, *Derecho penal internacional-de*

¹⁵ This body (the *International Criminal Justice Institute; or Foreign and International Criminal Law*) would join the *Max-Planck Society* in 1966

la jurisdiction (1922) and Carlos Alcorta, *Principios de Derecho Penal Internacional* (1931). Italy's Francesco Cosentini attended a law conference in Cuba at this time, which led to his *Essai d'un Code Pénal International Dressé sur la Base Comparative des projets et Textes Récents des Code Pénaux* (1937).¹⁶

In the USA, which had famously not joined the League and was, even, now more diffident over Pan-Americanism, there were few echoes of these developments in its governmental and legal circles. There was little on this in the then most recent international law textbook by Charles Cheney Hyde (1922), who also was a legal adviser to the State Department. In 1926, the year after Hyde joined Columbia University, Nicolas Politis, one of Europe's leading legal scholars advocating international criminal law, lectured there on the European developments, for the *Carnegie Endowment for International Peace*. Probably, this was related to the efforts of the university's international relations professor, Canadian-born Quaker, James T. Shotwell, who was director of research at the *Endowment*. Albert Levitt, an American legal scholar at New York's Brooklyn Law School and the Universalist Church-founded St Lawrence University, wrote on the same subject after attending the *AIDP* conference in Paris in 1924. Arthur Kuhn, an American-born legal scholar, also of Columbia University and an *ILA* member, frequently visited law faculties in Europe. He translated the work of Frederick Meili at Zurich and engaged with Antoine Pillet and Louis Renault in Paris. In 1934, he briefly advised the USA's legal scholars on the above European developments but this did not lead to any major studies. The membership of former secretary of state, Elihu Root, on the League's original *Committee of Jurists*, had led to the establishment in 1927 at Harvard of the 'Research into International Law' project, under Manley O. Hudson, though its results were limited before it ended just after the outbreak of war.¹⁷

A striking thing about the scholarly legal literature on these major developments is the complete absence of major English-language works. In Britain, there was a similar, very limited echo, to that in the USA, in its legal scholarship on the Continental developments on international criminal law. The *ILA*'s Hugh Bellot and Lord (Sir Walter) Phillimore (Sir Robert's son) were directly involved in the League's first steps to codify

¹⁶ Eustaquio Tomé, *Derecho penal internacional-de la jurisdiction*, C. Garcia, Montevideo, 1922; Carlos Alberto Alcorta, *Principios de derecho penal internacional: Territorialidad y extraterritorialidad de la ley penal*, Talleres graficos 'Editorial Italia', Buenos Aires, 1931; Francesco Cosentini, *Essai d'un Code Pénal International Dressé sur la Base Comparative des projets et Textes Récents des Code Pénaux* (Marchal & Billard, Paris 1937).

¹⁷ Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2 Vols., Little Brown, Boston, 1922; Nicolas Politis, *The new aspects of international law*, Carnegie Endowment for International Peace, Washington D.C., 1928; Arthur K. Kuhn, 'International Cooperation in the Suppression of Crime', *AJIL*, 28 (3) July 1934, pp. 541-4; George A. Finch, 'Arthur K. Kuhn, November 11, 1876-July 8, 1954', *AJIL*, 48 (4) October 1954, pp. 592-7; James T. Kenny, 'Manley O. Hudson and the Harvard Research in International Law 1927-1940', *IL*, 11 (2), Spring 1977, pp. 319-29.

international law, including on crimes, but were not major figures among Britain's legal scholars. So, it was a minor figure, Glover Alexander, who first informed that legal community about European scholarship, notably the major works of the University of Lille's Maurice Travers and the University of Paris's Henri Donnedieu de Vabres (see note 13). He bemoaned the lack of engagement between British and the Continental legal scholars, who were leading the current push to make criminal law a more central part of international law. Stanislaus Rappaport, law professor and judge visiting from Warsaw, also advised Britain's international law scholars of the Continental developments, in which he had been a leader, in 1932.

Significantly, Oxford's rising international legal scholar, James Brierly, made no mention of this development in his brief, if celebrated, *The Law of Nations* (1928), despite his appointment as one of the League's legal experts. There was also no sign of this Continental development in the works of British-based, Polish-educated, Hersch Lauterpacht, who updated Oppenheim's volumes and published Britain's next major international law text, *The Function of Law in the International Community* (1933). There were no legal works on this subject at all in Australasia.¹⁸

Similar to the League, the *United Nations* (UN) sought to promote the 'progressive development of international law'.¹⁹ The new organization referred the question of international criminal law to its *International Law Commission*, at the same time as making the twin declarations on genocide and universal human rights. Understandably, the focus on international criminal law at that time was overwhelmingly on 'crimes against humanity', such as genocide and aggressive war. This emphasis is reflected in the next wave of works of international legal scholars in this field. Continental European (notably Italian, Spanish, Polish, French and German) scholars continued to dominate this body of work.²⁰

¹⁸ G. Glover Alexander, 'International Criminal Law', *JCL&IL*, 3rd Series, 3 (4), 1921, pp. 237-244 and 3rd Series, 5 (1), 1923, pp. 90-98; H. C. Gutteridge, 'The Study of Comparative Law in France and England', *JCL&IL*, 3rd Series, 4 (1), 1922, pp. 84-88. J. L. Brierly, *The Law of Nations; An Introduction to the International Law of Peace*, The Clarendon Press, Oxford, 1928; E. Stanislaus Rappaport, 'The Problem of the Inter-State Criminal Law', *TGS*, 18, 1932, pp. 41-64; Hersch Lauterpacht, *The Function of Law in the International Community*, The Clarendon Press, Oxford, 1933.

¹⁹ The phrase is from the Charter.

²⁰ Notable examples include: Rolando Quadri, *Diritto Penale Internazionale*, CEDAM, Padua, 1944; Nino Levi, *Diritto Penale Internazionale*, A. Giuffrè, Milan, 1949; Antonio Quintano Ripollés, *Tratado de Derecho Penal Internacional e Internacional Penal*, 2 vols., Institute F. de Vitoria, Madrid, 1956-7; Hans-Heinrich Jeschek, *Die Verantwortlichkeit der Staatsorgane Nach Völkerstrafrechts*, Röhrscheid, Bonn, 1952; George Dahm, *Zür Problematik des Völkerstrafrechts* Vandenberg & Ruprecht, Göttingen, 1956; Stefan Glaser, *Introduction a l'étude du Droit International Pénal* E. Brulyant, Brussels, 1954; *Infractions Internationales*, Librairie général de droit et de jurisprudence, Paris, 1957 and *La Droit International Pénal Conventionnel*, E. Brulyant, Brussels, 1971; Dietrich Oehler and Paul G. Potz (eds.) *Actuelle Probleme des Internationalen Strafrechts*, G. Schenk,

Legal scholarship in the English-speaking world essentially continued the pattern of previous years, with little notice of these developments. In the *USA*, apart from Kuhn (1947), Max Radin, a Jewish *émigré* from Poland, drew attention to the possibility of agreement on 'International crimes' (1946-7). The fact this minor work is still cited today by legal scholars highlights how little was published at that time in English. The next American international law textbook since Hyde, by his former student, Philip Jessup, had almost nothing to say on the subject. The only other significant American work at this time, *Crimes against International Law* (1950), focused solely on war crimes.²¹ The Australian-born but American-based political scientist, Linden A. Mander, has a chapter, 'The International Prevention of crime', in his study of international institutions. Using only some sparse secondary sources, he covers piracy, slavery, liquor, forced labour and counterfeit currency, plus several pages respectively on trafficking in narcotics and women, including about a page each on the pre-First World War treaties.²²

In Britain after the war, it was also an *émigré*, University College, London's German-Jewish international lawyer, Georg Schwarzenberger, who revived attention in international criminal law', though only to say its 'problem' was that, 'in any true sense,' it 'does not exist', 'as only states were the subjects of international law'.²³ After Nuremberg, as the Cold War set in, there seemed little further interest in the subject in those parts of the world, until another German *émigré*, Gerhard Mueller, by 1965 an American law professor, published the co-edited *International Criminal Law* (1965). This does not contain much legal history. Whereas European scholars, originally and surprisingly, credited '*La paternité*', of the term '*le droit pénal international*' or 'international criminal law', to Jeremy Bentham, since then, English-language scholars have credited the more recent term, 'transnational criminal law', to Mueller. His pioneering role was acknowledged by the subsequent and, still, major English-language legal scholar in the field, M. Cherif Bassiouni, thereby appointing himself the successor. Where Mueller could read the large body of German-language work, Egyptian-born Bassiouni spoke six languages, including French and German. Educated in law at Dijon and Geneva, he spent most of his career, like Mueller, as an American law professor and official adviser. His contribution is vast in scale, even if the historical sections are repetitive,

Hamburg, 1970; Stanislaw Plawski, *Étude des Principes Fondamentaux du Droit International Pénal*, Paris, LGDJ, 1972; Claude Lombois, *La Droit Pénal International*, Précis Dalloz, 2nd ed., 1979

²¹ Max Radin, 'International Crimes', *IoLR*, 32, 1946-47, pp. 33-50; Arthur K. Kuhn, 'International Criminal Jurisdiction', *AJIL*, 41 (2), April 1947, pp. 430-3; Philip Jessup, *A modern law of nations: an introduction*, Macmillan Co., NY, 1948; Joseph B. Keenan and Brendan F. Brown, *Crimes against International law*, Public Affairs Press, Washington, D.C., 1950.

²² Linden A. Mander, *Foundations of Modern World Society*, StUP, California, 1947, pp. 38-103.

²³ Georg Schwarzenberger, 'The problem of an International Criminal Law', *CLP*, 3 (1), pp. 263-96; F. B. Schick, 'International Criminal Law: Facts and Illusions', *MLR*, 11 (3), July 1948, pp. 290-305.

superficial and mainly secondary source-based, with some official public documents. He briefly mentioned the pre-1914 treaties on opium, white slavery and obscene publications in passing, as examples, without any further description or analysis. Nonetheless, later legal and social science scholars rely on his not historians' work as the basis for their own historical background.²⁴

Subsequently, a few English-language legal scholars, in North America only, now began to pay more attention to some aspects of the subject. Papers read at a *colloquia* at the University of Virginia law school in 1980 were published by Richard Lillich, as *International aspects of criminal law: enforcing United States law in the world community* (1981). The disparate articles focused mainly on extra-territorial enforcement rather than trafficking, as did Sharon Williams in *Canadian criminal law, international and transnational aspects* (1981) and Edward Morgan in *International law and the Canadian courts: sovereign immunity, criminal jurisdiction, aliens' rights, and taxation powers* (1991). The publication of the latter, small work by the *Max-Planck-Institut für Ausländisches und Internationales Strafrecht*, highlights the continuing leadership of Continental legal scholarship in this field.²⁵

The discipline of history invariably provides the detailed research that social scientists rely upon for their more general works. This is also true of legal scholars, when they include some historical material in their work, although they tend to derive this material second-hand, through the social scientists, rather than direct from the historical works. In the 1970s, the focus of historical scholarship broadened from a generally narrow focus on the (male-dominated) state to wider society and more women engaged in higher research. Women's role in history, thereby, received more attention, including quite a flood of works on prostitution. Generally, like most historians, legal, especially, international legal issues were ignored or only in passing, especially legal issues. Nonetheless, several British, European and American works provided some valuable detail, especially on the non-governmental aspects. Of these Corbin (1978; in English, 1990) and Walkowitz (1980) are the most useful. Bristow (1982) focuses on the Jewish campaigns against white slavery. Grittner (1990) and Langum (1994) consider legal issues but only in the *USA*. De Vries's article (2008) is social science in methodology but quite detailed for such disciplines; it does consider the international

²⁴ M. Cherif Bassiouni and Ved P. Nanda (eds.) *A treatise on international criminal law*, 2 vols., Thomas, Springfield, Ill., 1973; M. Cherif Bassiouni, *International extradition and world public order*, Sijthoff, Leyden, 1974; 'An Appraisal of the Growth and Developing Trends of International Criminal Law', *RIDP*, 46, (1-2), 1974, pp. 405-433; *International Criminal Law: a draft international criminal code*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1980.

²⁵ Richard B. Lillich (ed.), *International aspects of criminal law: enforcing United States law in the world community*, Michie Co., Charlottesville, Va., 1981; Sharon A. Williams, *Canadian criminal law, international and transnational aspects*, Butterworths, Toronto, 1981; Edward M. Morgan, *International law and the Canadian courts: sovereign immunity, criminal jurisdiction, aliens' rights, and taxation powers*, Carswell, Toronto, 1990.

dimension. Irwin's article (1996) is the best account of the early emergence of the white slave issue.²⁶

The end of the Cold War at this time facilitated not only a growth in treaty-making but also a greater scholarly interest in the emerging and potential new areas of international law. In 1996 US president Bill Clinton proclaimed 'international organized crime' a national security issue, thereby highlighting its growing importance in policy and hence scholarship. Revived concerns over terrorism were another factor. Then, in the wake of several major international human catastrophes, leading to the *Rome Statute* of 1998 and the resulting establishment of the *ICC* in 2000, English language scholars in law and the social sciences, mainly international relations, belatedly from 1996 began examining international criminal law. Most of these works were of the omnibus type, covered international criminal law as a whole, and included slight, historical backgrounds based on secondary sources, especially those by Bassiouni. They offered little, detailed historical knowledge, including on the specific subjects examined in this thesis. An article by Bruch (2004), specifically on the white slave traffic, devotes only one page to the pre-1914 period.²⁷

Dugard and van den Wyngaert (1996) reprinted Schwarzenberger's 1950 article and had Bassiouni reprise his earlier 'historical' work, while the other chapters were on contemporary issues. Natarajan (1996) mentions the opium convention of 1912 in passing but the chapter on treaties by Browne-Marshall ignores the white slave and obscene publications conventions. Sunga (1997) briefly mentions the origins of international criminal law in the slave-trading and piracy concerns, 'developed within the context of the Congress of Vienna', before stating

²⁶ Charles Winnick and Paul M. Kinsie, *The Lively Commerce: Prostitution in the United States*, Quadrangle Books, Chicago, 1971, especially pp. 269-80; Glen Petrie, *A Singular Iniquity: The Campaigns of Josephine Butler*, Viking Press, NY, 1971, p. 209-10; J., David L. Pivar, *Purity Crusade: Sexual Morality, and Social Control, 1868-1900*, Praeger, NY, 1973, p. 137; Edward J. Bristow, *Vice and Vigilance*, Rowman & Littlefield, Totowa, NJ, 1977; Alain Corbin, *Women for Hire: Prostitution and Sexuality in France After 1850*, HUP, London, (1978) 1990; J. Walkowitz, *Prostitution and Victorian society: Women, Class and the State*, CUP, Cambridge, 1980; Paul McHugh, *Prostitution and Victorian Social Reform*, Croom Helm, London, 1980, pp. 104-6; Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918*, JHUP, Baltimore, Md., 1982; Edward J. Bristow, *Prostitution and Prejudice: The Jewish Fight Against White Slavery, 1870-1939*, Schocken Books, NY, 1982, especially pp. 35-38; Jill Harsin, *Policing Prostitution in Nineteenth-Century Paris*, PUP, Princeton, N.J., 1985, especially pp. 324-25; Mary Gibson, *Prostitution and the State in Italy, 1860-1915*, RUP, New Brunswick, N.J., 1986, pp. 41-48; Vern Bullough and Bonnie Bullough, *Women and Prostitution: A Social History*, Prometheus Books, Buffalo, NY, 1987, p. 265; Barbara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition*, Basic Books, NY, 1987, p. 142; Gail Pheterson (ed), *A Vindication of the Rights of Whores*, Seal Press, Seattle, 1989; Frederick K. Gritner, *White Slavery: Myth, Ideology and American Law*, Garland Publ: Distinguished Studies in American Legal and Constitutional History, NY, 1990; David J. Langum, *Crossing over the line: legislating morality and the Mann Act: Prostitutes, Progressives, and Moral Panic, 1907-1914*, UCP, Chicago, 1994; Nora V. Leitner, 'Forced Prostitution: Naming of an International Offense', *FILJ*, 18, pp. 163-97; Mary Ann Irwin, "'White Slavery' as Metaphor: Anatomy of a Moral panic", *Ex Post Facto: The History Journal*, V, 1996, at <https://www.walnet.org/csis/papers/irwin-wslavery.html#whiteslavery>; Petra De Vries, 'Josephine Butler and the Making of Feminism: international abolitionism in the Netherlands (1870-1914)', *WHR*, 17 (2), April 2008, pp. 257-77.

²⁷ Elizabeth M. Bruch, 'Models Wanted: The search for an effective response to Human Trafficking', *StJIL*, 40, 2004, pp. 1-45.

that until 1945 ‘the normative material of international criminal law remained almost completely deficient’. This latter conclusion is open to serious disagreement and shows the problem of not having good international legal history. Morton’s brief historical account (2000) relies on Bassiouni to claim that there were 312 conventions from 1815, covering twenty-two subjects of international criminal law. He mentions, in passing, slavery, piracy, terrorism and, what he vaguely calls, ‘drug offences’, but ignores the white slave and obscene publications conventions, before jumping quickly to the 1930s. Bantekas, Nash and Makarel (2001) have a few lines on the opium convention of 1912; mention the obscene publications but not the white slave convention of 1910, before moving to the 1920s. Cassese (2003) focuses on the crimes covered by the *ICC* but, at least, acknowledges, without examining, what, ‘especially in the French, German, Italian, and Spanish legal tradition’, is also ‘criminal international law’ (*droit pénal international*), dealing with its enforcement by ‘national courts’. Although not entirely clear, this seems to be referring to matters such as illegal international trafficking. O’Keefe (2015) makes the same distinction but only cites piracy, as an example of the latter. Albanese (2005) has several chapters on human trafficking but only in recent times. Cryer, Friman, Robinson, Wilmschurst (2007) and Kelly D. Askin in Brown (2011) begin their respective studies of slavery with the convention of 1926, not the earlier bilateral and multilateral treaties. Gallagher (2010) does mention the white slavery conventions of 1904 and 1910 but only in one paragraph. Gerry Simpson’s brief and secondary source-based historical chapter, in Kastner (2018), focuses almost entirely on *ICC* crimes.²⁸

Social scientists, particularly from international relations, turned their attention to this subject around same time as legal scholars. Generally, they only use as sources the works of historians and other social scientists and, so, add little if any new information and, at best, offer brief summaries, from which they provide purportedly fresh theoretical insights or reinterpretations. Nadelmann (1990) is a good example of this approach, as he summaries the literature, in five to nine pages each, on piracy, the slave trade, extradition, drugs and the white slave traffic, to illustrate what he calls ‘global prohibition regimes’. Doezeema (2000

²⁸ John Dugard and Christine van den Wyngaert (eds.), *International criminal law and procedure*, Dartmouth, Aldershot, 1996; Mangai Natarajan (ed.), *International Crime and Justice*, CUP, Cambridge, 1996; Lyal S. Sunga, *The emerging system of international criminal law: developments in codification and implementation*, Kluwer Law International, The Hague, 1997; Alfred P. Rubin, *The Law of Piracy*, Transnational, Irvington-on-Hudson, NY, 1998; Jeffrey S. Morton, *The International Law Commission of the United Nations USCP*, Columbia, S.C., 2000; Ilias Bantekas, Susan Nash & Mark Makarel, *International criminal law*, Taylor & Francis Group, London, 2001; Antonio Cassese, *International criminal law*, OUP, Oxford, 2003; Jay S. Albanese (ed.), *Transnational crime*, de Sitter Publications, Whitby, ON, 2005; Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, CUP, Cambridge, 2007; Anne T. Gallagher, *The international law of human trafficking*, CUP, Cambridge, 2010; Bartram S. Brown (ed.), *Research handbook on international criminal law*, Edward Elgar Publishing Limited, Cheltenham, UK; Roger O’Keefe, *International Criminal Law*, OUP, Oxford, 2015, Phillip Kastner (ed.), *International Criminal Law in Context*, Routledge, Abingdon, Oxon., 2018.

and 2010), typical of recent social science, using only secondary sources, examines the ‘narratives’ and ‘discourses’ of white slavery, rather than what actually happened. Scully in Kyle and Koslowski (2001) has a useful six pages on the white slave traffic before the First World War. The articles on transnational crime in Berdal and Serrano (2002) only consider recent developments. Maogoto (2003) starts his account in 1919. Andreas and Nadelmann (2006) have a general historical chapter focusing on slavery, while mentioning pre-First World War trafficking of drugs, white slavery, liquor and arms in passing but not obscene publications or extradition. Efrat (2012) has chapters respectively on trafficking of humans, opium, small arms and antiquities. He does use a light sprinkling of official public documents, including of both international and national organisations, along with mainly secondary sources. The first two of his subjects have a historical introduction of about one page each.²⁹

Very recently, two articles have been published which represent good, detailed legal history on the transnational criminal law subjects covered in this thesis. Stark (2014) examines the development of legislative policy on obscene publications in Germany. His focus is on the domestic scene but he does mention the convention of 1910. Allain examines in equal detail the developments leading to the white slave trafficking treaties. He uses official public documents but no internal governmental records. So, he does not examine any government’s policy approach in detail. This, like Stark’s, is still a very valuable if limited contribution.³⁰

²⁹ E. A. Nadelmann, ‘Global Prohibition regimes: The Evolution of Norms in International Society’, 44 (4), *IO*, Autumn 1990, pp. 479-526; Jo Doezeema, ‘Loose Women or Lost Women: The Re-emergence of the Myth of “White Slavery” in Contemporary Discourses of “Trafficking in Women”’, *GI*, 18 (1), Winter 2000, pp. 23-50; Mara L. Keire, ‘The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917,’ *JSH*, 35 (1), 2001, pp. 5-41; David Kyle and Rey Koslowski (eds.) *Global Human Smuggling: Comparative Perspectives*, JHUP, Baltimore, M.D., 2001; Mats Berdal and Mónica Serrano (eds.), *Transnational organized crime and international security: business as usual?*, Lynne Rienner Pub., Boulder, Co., 2002; Jackson Nyamuya Maogoto, *State sovereignty and international criminal law: Versailles to Rome*, Transnational Publishers, Ardsley, NY, 2003; Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations*, OUP, Oxford, 2006; Jo Doezeema, *Sex Slaves and Discourse Masters: The Construction of Trafficking*, Zed Books Ltd., London, 2010, pp. 109-110; Asif Efrat, *Governing guns, preventing plunder: international cooperation against illicit trade*, OUP, NY, 2012.

³⁰ Gary D. Stark, ‘Pornography, Society, and the Law in Imperial Germany’, *Grand Valley State University, ScholarWorks@GVSU, Peer Reviewed Articles*, 21, 2014, pp. 200-29; Jean Allain, ‘White Slave Traffic in International Law’, *Journal of Trafficking and Human Exploitation*, 1 (1), 2017, pp. 1-40.

Appendix 5

Literature Review: International Labour Law

The international legal protection of labour is a relatively recent subject in modern international law. The first concrete steps by governments to reach international agreements on the subject date only from the late 19th century, with four multilateral protocols in 1890 and the first major treaties concluded in the next century's first decade. The creation of the inter-governmental *International Labour Organisation (ILO)* in 1919 marked a further spurt of major growth in non-legal scholarly literature, certainly in the English-speaking world, which, as was usual in international law, followed at some pace behind Continental Europe. Major English-language legal scholarship, however, only appeared nearly a century after Europe's first such legal scholarship. The growth of international labour laws has been examined by scholars of law, history, international relations, political science, political economy and sociology. Some were participants in these developments, either in a governmental or private capacity. There is sometimes an element of advocacy rather than detached, scholarly analysis in many of these works but some remain valuable records of this development.

The initiatives of the new German state in introducing state workers' insurance in 1884 and convening the first international conference on labour protection in 1890 led to some of the first scholarly literature analysing, as well as advocating, these developments. As with so many other subjects of international law at this time, Continental scholars (especially German, French and Belgian) led the way, with very few English language works. Many of these early works have been over-looked by today's English-language scholars. Understandably, a German scholar was first, with Dr Georg Adler, writing *Die Frage des internationalen Arbeiterschutzes (The Question of International Worker Protection)* in 1888. French writers soon followed, notably, Paul Boilley, *La législation internationale du travail* (1892), a work more of advocacy than scholarship, and Lyon law professor, Paul Pic, with his prize-winning *Traité élémentaire de législation industrielle* (1894), which went through five editions to 1922.¹ Comparative legal studies also flourished, with Belgian economist and minister, Maurice Ansiaux's official report, *Travail de nuit des ouvrières de l'industrie dans les pays étrangers* (1898), which compared the industrial laws on night work in Austria, Britain, France, Germany and Switzerland. Barthélemy Raynaud, later law professor at *l'Université d'Aix-Marseille*, published *Les accidents du travail des ouvriers étrangers*

¹ Georg Adler, *Die Frage des internationalen Arbeiterschutzes: einer Kritik der Ansicht Gustav Cohns*, G. Hirth's Verlag, Munich & Leipzig, 1888; Paul Boilley, *La législation internationale du travail*, F. Alcan, Paris, 1892; Paul Pic, *Traité élémentaire de législation industrielle: première partie, Législation du Travail et Industriel*, A. Rousseau, Paris, 1894.

(1902), just before the first bilateral reciprocal treaties on workers' accident insurance were signed in Europe.²

The decision of various European non-governmental parties in Paris in 1900 to establish the *Association Internationale pour la protection légale des travailleurs/International Association of Labour Legislation (IALL)* and its *Office Internationale du travail* in Bâle in 1901, further stimulated not only governmental policy but, also, scholarship. France's Georges Alfassa drew public attention to the first major concerns of the *IALL* by publishing two successive addresses to its congresses on '*Le Travail du Nuit des Femmes*' and '*L'interdiction de l'emploi de la ceruse et du Phosphore blanc*' (1904). These seem to be the first works on what became the subject of the two 1906 Berne conventions.³ Those first steps were detailed by German-influenced, Liège law professor, Ernest Mahaim (1904), French lawyer Louis Auvillain in *Les ouvriers étrangers en France et les accidents du travail* (1905), French economist, Daniel Crick (1905) and Raynaud with *Droit international ouvrier* (1906). Pic (1904 and 1905) also wrote on the world's first bilateral social insurance treaty; '*La convention franco-italienne du travail du 16 avril 1904 et le droit international*'.⁴

The Berne conferences of 1905 and 1906, leading to the first two multi-party conventions on labour protection, encouraged many more European (but no English-language) publications. French history professor, Albert Métin, appointed to a senior labour ministry position in 1906, after returning from Australasia, where he had studied and written about the labour laws there, published his doctorate as *Les Traités ouvriers, accords internationaux de prévoyance et de travail* (1908). Pic continued to report on international developments, as well as publishing two major works; *La protection légale des travailleurs et le droit international ouvrier* (1909) and *Les assurances sociales en France et à l'étranger* (1913). In 1911, Marcel Caté published his *University of Paris* doctoral law thesis, which was on the Berne night work convention (1911), as did Ignace Sinzot, later a prominent Belgian political figure and, two

² Maurice Ansiaux's *Travail de nuit des ouvrières de l'industrie dans les pays étrangers: (France, Suisse, Grande-Bretagne, Autriche, Allemagne): rapport présenté à M. le ministre de l'industrie et du travail*, J. Lebègue et cie., Impr. Hayez, Brussels, 1898; Barthélemy Raynaud, *Les accidents du travail des ouvriers étrangers*, Arthur Rousseau, Paris, 1902 and *Droit international ouvrier*, Paris, A. Rousseau, 1906.

³ Georges Alfassa, '*Le Travail du Nuit des Femmes et L'interdiction de l'emploi de la céruse et du Phosphore blanc*' with Phosphore blanc', *REP*, 17 (7), 1903, pp. 637-659 and '*Le Travail du Nuit des Femmes*', *RP*, 5, September 1904, pp. 367-89. See also University of Paris law professor, Raoul Jay, *La Protection légale des travailleurs en France* (Extrait de la Revue d'Économie Politique, 1903, Librairie de la Société du Recueil Legales Lois et des Arrêts, Paris, 1903).

⁴ Ernest Mahaim, '*L'Association internationale pour la protection légale des travailleurs: son histoire-son but-son oeuvre*', *REI*, 1, 1904, pp. 3-40; Paul Pic, '*La convention franco-italienne du travail du 16 avril 1904 et le droit international*', *RGDIP*, 11 (5), September-October 1904, pp. 515-30; '*Du contrôle de la durée légale du travail dans l'industrie: Projet de loi Français: Traite de travail franco-italien*', *REP*, 19 (1), 1905, pp. 1-45 and '*Les congrès de l'Association internationale pour la protection légale des travailleurs*', *RDIP*, 1905, 1, pp. 259-68; Louis Auvillain, *Les ouvriers étrangers en France et les accidents du travail*, Librairie générale de droit & de jurisprudence, F. Pichon et Durand-Auzias, Paris, 1905; Daniel Crick, '*La législation internationale du travail*', *RDI&LC*, 2nd serie, 7, 1905, pp. 432-64, 543-68.

years later, Roger Fighiéra, soon to be a senior French commerce bureaucrat. Belgian economist, Ernest Mahaim, a *Walloon*, partly educated in Austria and Germany, where he was influenced by Lujo Brentano and Adolf Wagner, published his major work, *Droit International Ouvrier* (1913), covering not only the historical background and the two Berne conventions of 1906 but also the bilateral labour insurance treaties, overlooked by most modern scholars. Arthur Fontaine, who headed France's labour bureau, explained how his office dealt with the emerging labour treaties (1914). Of all these, Mahaim's detailed account is the important historical work not only for this period but also through today.⁵

In the English-language world, there was only a slight echo of these scholarly developments. Cornell University's economics professor, Jeremiah Jenks, noted Adler's advocacy of 'International Worker Protection' but judged that he 'seems to underestimate the influence of national legislation in lessening the need for such international arrangements' (1888). This was very much also the British official view including, initially, at the Berne conferences of 1905-06. The USA's *Bureau of Labor*, established in 1884, the year of Germany's pioneering labour legislation, however, did take an interest in that subject alone, which led to its publications, *Compulsory Insurance in Germany* (1893) and *Workingmen's Insurance* (1898). Perhaps the first English-language work on the imminent labour treaties was a brief article by the Viennese-educated Stefan Bauer, secretary of the *OIT*, who provided useful background to British readers in *The Economic Journal* (1903), as he tried to encourage British involvement. After the first bilateral social insurance treaties were signed in Europe from 1904, several American non-governmental experts examined Europe's embrace of the German initiative and advocated its application to the USA, notably, Frank W. Lewis (1909), Lee K. Frankel and Miles M. Dawson (1911). This revived the interest of the now, Department of Labor, which published *Workmen's Compensation Laws of the United States and Foreign Countries*.⁶ In a more detached scholarly vein, American political scientist and

⁵ Albert Métin, *Les Traités ouvriers, accords internationaux de prévoyance et de travail: textes officiels, commentaire et historique*, Librairie Armand Colin, Paris 1908; L. Chatelain, *La protection Internationale Ouvrière*, A. Rousseau, Paris, 1908; M. A. Boissard, *La Réalisation de l'Égalité entre Nationaux et Étrangers au point de vue de l'Indemnisation des Accidents du Travail par voie de Convention Internationale*, Librairie Felix Alcan & Guillaumin, Paris, 1908; Paul Pic, 'Les récent progrès du droit international ouvrier: les conférences de Berne et leurs résultats', *RDIP*, 5, 1909, pp. 501-20; *La protection légale des travailleurs et le droit international ouvrier*, Felix Alcan Paris, 1909; *Les assurances sociales en France et à l'étranger*, Paris, F. Alcan, 1913; Marcel Caté, *La Convention de Berne de 1906: sur l'interdiction du travail de nuit des femmes employées dans l'industrie*, Emile Larose, Paris, 1911; Ignace Sinzot, *Les traités internationaux pour la protection des travailleurs*, Impr. C. Peeters, Louvain, 1911; Roger Fighiéra, *La protection légale des travailleurs en France*, Berger-Levrault, Paris, 1913; Loubat, *Les Accidents du Travail en Droit International*, Librairie Générale & de Jurisprudence, Paris, 1911; Jean Sigg, *La protection légale du travail en Suisse*, F. Alcan, Paris, 1911; Maurice Dewavrin and Georges Lecarpentier, *La protection légale des travailleurs aux États-Unis, avec exposé comparatif de la législation française*, M. Rivière, Paris, 1913; Ernest Mahaim, *Droit International Ouvrier*, Librairie de la société Recueil Sirey, Paris, 1913; Arthur Fontaine, 'La Legislation internationale du travail', *Revue Politique et Parlementaire*, February 1914, pp. 225-44

⁶ J. W. Jenks, 'Reviewed Work(s): Die Frage des Internationalen Arbeiterschutzes. Nebst einer Kritik der Ansicht Gustav Cohns: by Georg Adler', *PSQ*, 3 (4), December 1888, pp. 707-709; John Graham Brook, *Compulsory*

diplomat, Paul Reinsch, in his invaluable *Public International Unions: their work and organization: a study in international administrative law* (1911), devoted nine pages to a detailed account of such developments, based on many of the German, Belgian and French secondary sources detailed above and which is still used by social science scholars today.

The English parliament had passed its landmark *Workmen's Compensation Act 1897*, which many of its self-governing colonies followed, including those in Australasia, but there appears to have been less scholarly interest in these subjects.⁷ One notable exception was the groundbreaking *A History of Factory Legislation* (1903) by Betty Hutchins and Amy Harrison. Normally, historians wait until much later to examine past events, if only because originally confidential records are not available. In this case, pressed by Sidney and Beatrice Webb on the current importance of the subject, these two women completed a major study, who used extensive public official sources, which has been used by scholars since, even to today. This is primarily a study of English law, reflecting the British government's initial attitude that treaties were unnecessary, given the supposedly advanced state of its own domestic law. Hutchins and Harrison did become aware of the international dimension and, in their second edition (1911), made brief reference to the background of the two Berne conventions of 1906 but not the labor insurance question or its European treaties.⁸

The formation of the inter-governmental *ILO* in Washington D. C. in 1919 clearly and understandably promoted interest in labour law, both domestic and international, among non-legal scholars, as well as lawyers. Various, some of these works contain information on the pre-1919 period. Many were by governmental or *ILO* officials. As usual, the Europeans were most prominent. Bauer (1919), Fontaine (1920) and Mahaim (1924) published new works, which gave some background on the pre-*ILO* developments, as did France's trade union leader Leon Jouhaux (1921), labour lawyer Maurice de Guerreau (1923), famed University of Paris law professor, Georges Scelle (1930) and *ILO* legal adviser, Jean Morellet (1938). Switzerland's Max Turman (1922) and Belgium's Max Dreschel (1926) also contributed to this growing body of works.⁹ In this period, English-language publications by Europeans,

Insurance in Germany, Govt. Print. Off., Washington D. C., 1893; William Franklin Willoughby, *Workingmen's Insurance*, Thomas Y. Crowell, NY, 1898; Stephan Bauer, 'The International Labour Office in Basle', *EJ*, 13 (51), September 1903, pp. 438-44; Charles Richmond Henderson, *Industrial Insurance in the United States*, UCP, Chicago, 1909; Frank W. Lewis, *State Insurance: a social and industrial need*, Houghton Mifflin, Boston, 1909), which surveys the European embrace of the German initiative. Lee K. Frankel and Miles M. Dawson, *Workingmen's Insurance in Europe*, Russell Sage foundation publication, NY, 1911; Lindley Daniel Clark and Charles H. Verrill, *Workmen's Compensation Laws of the United States and Foreign Countries*, Govt. Print. Off., Washington D. C., 1913.

⁷ Paul Reinsch, *Public Unions: Their Work and Organization: A Study in International Administrative Law*, Ginn & Company, Boston, 1911, especially pp. 42-9.

⁸ B. L. Hutchins and A. Harrison, *A History of Factory Legislation*, P. S. King, London, 1903 (2nd ed. 1911).

⁹ Stephan Bauer, 'International Labor Legislation and the Society of Nations', *Bulletin of the U. S. Bureau of Labor Statistics*, Miscellaneous Series, 254, Govt. Print. Office, Washington D. C., May 1919; Arthur Fontaine, 'A

Bauer (1919) and Fontaine (1920, whose 34 pages are just a summary of Mahaim), cited above, plus others later by Mahaim (1933 and 1934) contributed to the growing interest in this subject in the English-language world, especially in the *USA*.

Even before these works, New York school-teacher, Boutelle Ellsworth Lowe, had published his Columbia University political science doctoral thesis, as *International aspects of the labor problem* (1918). He provided copies of labour treaties and a report to the *US Bureau of Labor Statistics*, which had just translated and published Bauer's pamphlet and now published Lowe's *Historical Survey of International Action Affecting Labor* (1920). Lowe then extended his study to the newly-formed *ILO* in *The international protection of labor: International Labor Organization, History and Law* (1921). His contribution, largely overlooked today, is outstanding, especially for its time, as he did not have access to internal official records.¹⁰ Lowe was possibly a Quaker (as, his parents had adopted the common Quaker practice of preserving the mother's maiden name as his middle name), and he was probably influenced and supervised by Columbia University's famed Canadian, Quaker professor, James T. Shotwell. Also the research director of the Carnegie Endowment for International Peace, Shotwell was then supervising two Chinese students, researching the opium treaties of 1912 and 1914. (Shotwell had been in the *US* delegation, which negotiated the establishment of the *ILO*.) Another likely Shotwell doctoral student at this time, was Iwao Frederick Ayusawa, definitely a Quaker though, unusually, a Japanese one. His thesis, published as *International Labor Legislation* (1920), is short of analysis but devotes over 80 detailed, factual pages to pre-1919 developments. This is one of the three most useful English-language works on that period and is still widely used by social scientists today, instead of them undertaking their own fresh, primary-source research.¹¹

Several other American scholars contributed during this early inter-war period to the body of work on the *ILO*, which included information on the pre-1914 period. They included W. Jett Lauck, secretary of the *US National War Labor Board*, with 'The International Labor

Review of International Labour Legislation' in E. John Solano (ed.), *Labour as an International Problem: a series of essays comprising a short history of the International Labour Organisation and a review of general industrial problems*, Macmillan and Co., London, 1920, pp. 161-194; Leon Jouhaux, *L'Organisation Internationale du Travail*, Éditions de la Sirène, Paris, 1921; Max Turman, 'The Christian Social Movement and International Labour Legislation', *International Labour Review*, 6 (1), 1922, pp. 3-10; Maurice de Guerreau, *L'Organisation permanente internationale du Travail*, Librairie Arthur Rousseau, Paris, 1923; Ernest Mahaim, *L'Organisation permanente du Travail*, RCADI Vol. III, Brussels, 1924; Max Dreschel, *Le traité de Versailles et le mécanisme des conventions internationales du travail*, L'Églantine, Brussels, 1926; Georges Scelle, *L'Organisation Internationale du Travail et le BIT*, M. Rivière, Paris, 1930; Jean Morellet, 'Un type original de traités: les conventions internationales du travail', *Revue critique de droit international privé*, 1, Jan-Mar 1938, pp. 1-219.

¹⁰ Boutelle Ellsworth Lowe, *International aspects of the labor problem*, ColUP, NY, 1918; *The international protection of labor: International Labor Organization, History and Law*, Macmillan, NY, 1921; and Leifur Magnusson, *Historical Survey of International Action Affecting Labor*, Bulletin of the U. S. Bureau of Labor Statistics, Miscellaneous Series, 268, Govt. Print. Office, Washington D.C., 1920.

¹¹ Iwao Frederick Ayusawa, *International Labor Legislation*, East-West Center Press, Honolulu, 1920.

Situation' (1919). John R. Commons and John B. Andrews, *Principles of Labor Legislation* (1920) is a more substantial coverage of similar issues. Andrews, who was secretary of the *American Association for Labor Legislation*, also advocated treaties on labour protection, although his un-sourced sixteen pages in *The League of Nations* (1919) do not cover the pre-*ILO* period. David Hunter Miller, a New York lawyer, whose expertise on treaties saw him serve as legal adviser to the *USA's* delegation at Versailles and help draft the peace treaties, gave a series of lectures at Harvard University afterwards, published as *International Relations of Labor* (1921), which has some brief details; as does, French-born but *USA*-educated Paul Perigord in *The International labor organization* (1926). Mary Hopkins, for the *US Department of Labor's Women's Bureau*, gave a good background to one of the Berne conventions in 'The Employment of Women at Night' (1928). Florence Boeckel, from the *Society for Prevention of War*, published 'Women in International Affairs' (1929), which does little more than list relevant *NGOs* in the *USA*, including before 1914. There is only a small amount of pre-1919 detail in the Brookings Institute's *Labor and Internationalism* (1929) by Lewis L. Lorwin, the Carnegie Endowment's 'The Cooperation of the United States with the International Labor Organisation' (1929) by Ursula P. Hubbard and *Labor in the League System* (1934) by political scientist Francis Graham Wilson.¹²

In the mid-1930s, Shotwell teamed with Mahaim to produce several works on international labour protection of great historical value, albeit focusing like most, on the post-1919 period. They first published, respectively, articles on 'The Principles of International Labor Legislation' and 'The International Labor Organization as an Alternative to Violent Revolution' (1933). The next year, Shotwell edited *The Origins of the International Labor Organization* (1934), which is one of the three most cited English-language works on this subject. Mahaim provided a welcome English-language chapter on the pre-1919 period, as did Sir Malcolm Delevingne, the just-retired senior *HO* official who had attended (sympathetically) the 1905 and 1906 Berne conferences. (His own *Huguenot* background suggests an explanation for his linkage with the Quaker, Shotwell.) Both chapters are based on secondary sources, some official public records and their personal knowledge. Legal scholar, Abraham C. Weinfeld (1936 and 1937), considered the *USA's* constitutional issues

¹² W. Jett Lauck, 'The International Labor Situation', *AAAPSS*, 83, May 1919, pp. 186-201; John R. Commons and John B. Andrews, *Principles of Labor Legislation*, Harper and Bros., NY, 1920; John B. Andrews, 'Labor in the Peace Treaty' in Stephen Pierce Duggans (ed.), *The League of Nations: the principle and the practice*, The Atlantic Monthly Press, Boston, 1919, pp. 237-253; David Hunter Miller, *International Relations of Labor*, Knopf, NY, 1921; Paul Perigord, *The International labor organization. A study of labor and capital in cooperation*, D. Appleton and Company, NY, 1926; Mary D. Hopkins, 'The Employment of Women at Night', *Bulletin of the Women's Bureau*, U. S. Department of Labor, Govt. Print. Office, Washington D.C., 1928; Florence Brewer Boeckel, 'Women in International Affairs', *AAAPSS*, 143, May 1929, pp. 230-48; Lewis L. Lorwin, *Labor and Internationalism*, Macmillan, NY, 1929; Ursula P. Hubbard, 'The Cooperation of the United States with the International Labor Organisation', *IC*, 274, 1931, pp. 675-825; Francis Graham Wilson, *Labor in the League System: A Study of the International Labor Organization*. STUP, Stanford, Ca., 1934.

involved in signing labour treaties (1937).¹³

British enthusiasm for international organisations, including on labour legislation, also increased after the war, though not, perhaps to the extent as in the *USA*, with the formation of the *ILO*. There is some slight pre-1919 historical background in *International Labour Legislation* (1920) by Scottish philosopher, Sir Hector Hetherington and *International Social Progress* (1924) and 'The International Labour Organisation' (1925) by, respectively, two future *ILO* director-generals, Englishman George Johnston and Irishman Edward Phelan, with the latter drawing attention to the importance of the 1906 Berne conventions and the *IALL*. There is a small amount of relevant information in the *History of International Labour Office* (1926) by Scottish trade union leader and politician, George Barnes, and *The Origin, Structure and Working of the League of Nations* (1928) by Charles Howard-Ellis—an Australian-born, British spy and possible double-agent. Lancashire-born international lawyer, C. Wilfred Jenks, who would also later serve as *ILO* legal adviser and director-general, published a number of articles in the latter 1930s, which have some useful information.¹⁴ In the late 1930s, interest in labour protection treaties also started belatedly among Australian legal scholars but there was almost no reference to the pre-1919 period. Overall, there was no detailed historical work in the Empire on this subject.¹⁵

After 1945, the *ILO* and labour conventions had an increasing profile, with the *USA* now a member of the *UN*. This was reflected in the publication of what is still the most important

¹³ Ernest Mahaim, 'The Principles of International Labor Legislation' and James T. Shotwell, 'The International Labor Organization as an Alternative to Violent Revolution', *AAAPSS*, 166, March 1933, pp. 10-25. James T. Shotwell (ed.), *The Origins of the International Labor Organization*, ColUP, NY, 1934; Abraham C. Weinfeld, 'Are Labor Conditions a Proper Subject of International Conventions and May the United States Government Become a Party to Such Conventions Though They Regulate Matters Ordinarily Reserved to the States', 24 *CalLR*, 24, 1936, pp. 275-87 and *Labor treaties and labor compacts*, The Principia Press, Inc., Bloomington, Ind., 1937.

¹⁴ H.J.W. Hetherington, *International Labour Legislation*, Methuen, London, 1920; George Johnston, *International Social Progress: the work of the International Labour Organisation of the League of Nations*, Allen & Unwin, London, 1924; Edward Phelan, 'The International Labour Organisation: Its ideals and results', *Studies: An Irish Quarterly*, 14, 1925, pp. 611-622; George Barnes, *History of International Labour Office*, William and Norgate, London, 1926; Charles Howard-Ellis, *The Origin, Structure and Working of the League of Nations*, George Allen & Unwin, London, 1928; C. Wilfred Jenks, 'The Revision of International Labour Conventions', *BYIL*, 14, 1933, pp. 43-64; 'The Origins of the International Labour Organization', *ILR*, 30 (5), November 1934, pp. 575-581; 'Some characteristics of International Labour Conventions', *CBR*, 13 (7), September 1935, pp. 448-462 and 'The significance for International Law of the Tripartite character of the International Labour Organisation', *TGS*, 22, 1936, pp. 45-81; 'Are International Labour Conventions Agreements between Governments?', *CBR*, 15, 1937, pp. 574-578.

¹⁵ J. G. Staricoff 'Australia and the Constitution of the International Labour Organisation', *ILR*, 32 (5), November 1935, pp. 577-609; 'The Privy Council and the Competence of Federal Legislatures to Legislate Pursuant to International Obligations', Parts 1 & 2, *ALJ*, 11, 15 June 1937 & 16 July 1937, 11, pp. 45-50, 87-92; K. H. Bailey, 'Australia and the International Labour Conventions', *Proceedings of the Australian and New Zealand Society of International Law*, Vol. 1, The Society, Melbourne, 1935, pp. 100-21; David A. S. Campbell, 'A Foreign Policy for Australia' in W. G. K. Duncan (ed.), *Australia's foreign policy*, Angus and Robertson, Sydney, 1938, especially pp. 163-8; K. H. Bailey, 'Australia and the International Labour Conventions', *ILR*, 54, 1946, pp. 285-90; O. de R. Foenander, 'The Commonwealth Legislative Power under the Australian Constitution in Relation to Labour', *The University of Toronto Law Journal*, 8 (1), 1949, pp. 7-31.

English-language historical work on international labour protection, before the establishment of the *ILO*, being heavily sourced, albeit still only with secondary works and public records. University of Wisconsin's John Follows had begun his research as a minor thesis at Oxford in 1932, under the influence of the famed international relations scholar, Alfred Zimmern. After he completed his political science doctorate at Cornell, he published *Antecedents of the International Labour Organization* (1952). This details the intellectual origins, key *INGOs*, international congresses and individuals. He alone has examined various government responses to the 1906 Berne conventions, though without going behind the public aspects to the internal treaty and statute making processes. He does not cover the social insurance issue and its associated bilateral treaties.¹⁶ Charles Alexandrowicz, a Viennese-born international law scholar, then at the University of Madras (before going to Sydney University), gave a brief, unsourced, summary of key labour developments before 1919, in *International Economic Organisations* (1952), which adds nothing new but is widely cited by social scientists, perhaps because it is short. At the end of his *ILO* career, England's George Johnston published *The International Labour Organization* (1970), which has a historical background chapter, with seven pages on the pre-1919 period, summarizing the already published detail, with Shotwell as his sole source. His chapter on labour is a very useful summary, also covering, unlike Follows, the social insurance bilateral treaties, by using mainly French-language, secondary sources and one official document. The above works are best categorized as social science or contemporary history. Among historians, 'labour history' was one of the new areas, which was explored more extensively in the post-war years, as they broke away from the then predominant practice of writing histories on the state. Traditionally, however, historians only explore an issue when the necessary records are made publicly available. In the interim, personal accounts and biographies often make useful contributions. Moreover, most labour historians took a 'national' rather than international approach. There were some useful biographical or autobiographical works. Gertrude Tuckwell, daughter of the Christian Socialist rector of New College, Oxford, was involved in establishing the *BALL*. Her article (1946) has only a few pages on the pre-1919 period but does cover how Britain became involved in what was originally a purely European development. Allen (1958) has a biography of Sophy Sanger, the secretary of the *BALL* and who wrote directly to the Commonwealth government on the labour treaties. Stefan Bauer was studied by von Bergen (1990) and French labour official, Arthur Fontaine, by Cointepas (2008).¹⁷

¹⁶ John W. Follows, *Antecedents of the International Labour Organization*, Clarendon Press, Oxford, 1951; Charles Henry Alexandrowicz, *International Economic Organisations*, Stevens & Sons, London, 1952; George Johnston, *The International Labour Organization: its work for social and economic progress*, Europa Publications, London, 1970.

¹⁷ Gertrude Tuckwell, 'The First International Labour Association: The Passing of the British Section', *JCL&IL*, 28 (3-4), 1946, pp. 53-6; A.M. Allen, *Sophy Sanger: A Pioneer in Internationalism*, Robert Maclehose and Co.,

On labour history, Moss (1996) covers American labour campaigns. The legislative results are mentioned but there is no examination on the detailed governmental policy process behind them. The 1906 Berne conventions are mentioned briefly. Montgomery (1996) has a very disappointing nine-page 'Historical perspective' in a *Yale Law School* work. Thinly-sourced, without any reference to the early works on the subject, this rushes to more recent events, before returning briefly to cover the eight-hour day campaign in the *USA*, and with nothing on pre-1919 developments.¹⁸ Recently, there has been a number of works on the international aspects of trade unionism (Milner, 1990; Carew, 1990; van Goethem, 2006) but it is measure, not necessarily of the quality of these works but the lack of trade union involvement in the development of national and international legal protection, that these histories have nothing on the pre-1914 treaty-making. The only notable historical work is by Bartrip (2002). Using *HO* files, this is very good on the English but less so, on the international aspects¹⁹

Among with the new historical sub-disciplines, like labour history, was another, emerging slightly later with the increase in female historians, which focused on women. Some of the latter took a special interest in female workers. Canadian, Mary Lynn Stewart (1989), provides a well-researched account, from public but not governmental internal sources, on those seeking to protect French female workers. She mentions the international labour congresses from 1890, relevant *INGOs* and the two 1906 Berne conventions. She does not look at other countries, the bilateral social insurance treaties or the legislative processes. Daly and Nolan's, *Suffrage and Beyond: International Feminist Perspectives* (1994), particularly the last chapter by Marilyn Lake, does not go much 'beyond' suffrage, ignoring some of the major international issues in which women were very much involved. Rupp's, *The Making of an International Women's Movement* (1997), makes one brief reference to the night work convention but not that on white phosphorus. Her later chapter in another edited work (2001), on the same theme, says nothing on either subject. Thébaud, *Femmes et relations*

University Press, Glasgow, 1958; Matthias von Bergen, 'Nationalökonomie und Weltbürgertum. Ein Beitrag zur Biographie des internationalen Sozialpolitikers Stephan Bauer', [Thesis], Bern, 1990; M. Cointepas, *Arthur Fontaine, 1860-1931: un réformateur, pacifiste et mécène au sommet de la Troisième République*, PUR, Rennes, 2008

¹⁸ David A. Moss, *Socializing Security: Progressive-era Economists and the Origins of American Social Policy*, HUP, Cambridge, Mass., 1996; David Montgomery, 'Labor Rights and Human Rights: A Historical Perspective' in Lance A. Compa and Stephen F. Diamond (eds.) *Human Rights, Labor Rights, and International Trade*, UPP, Philadelphia, 1996, pp. 13-21.

¹⁹ Susan Milner, *The dilemmas of internationalism: French syndicalism and the international labour movement, 1900-1914*, Berg, NY, 1990; Anthony Carew, *The International Confederation of Free Trade Unions*, P. Lang, Amsterdam, 2000; Geert van Goethem, *The Amsterdam International: The World of the International Federation of Trade Unions (IFTU), 1913-1945*, Routledge, London, 2006. P. W. J. Bartrip, *The Home Office and the Dangerous Trades: Regulating Occupational Disease in Victorian and Edwardian Britain*, (The Wellcome Series in the History of Medicine), Editions Rodopi B. V., Amsterdam: 2002, pp. 171-232.

internationales au XXe siècle (2006), similarly concentrates on the post-1919 period.²⁰

The strengths and weaknesses of this type of historical scholarship are shown clearly in Wikander, Kessler-Harris and Lewis, *Protecting women—Labor legislation in Europe, the United States, and Australia, 1880-1920* (1995). Using mainly secondary sources and some *INGO* conference records, some of the articles make an important contribution by highlighting the role of women's organisations in these labour issues. A significant point is made that there were divisions over whether or not restricting women's night work was a good thing. The chapter by Wikander, a Swedish economic historian, in the 'International Congresses on Protecting Women Workers', integrates the international women's movement into the well-known account of the labour *INGOs*. The other authors study their respective countries, with only the European chapters, especially on Switzerland, Germany, Sweden and Norway, making some passing notice to the international context. Reflecting the limited scale of their societies' and governments' involvement in these issues at the time, the British, *USA* and Australian chapters ignore this completely. The latter work is particularly disappointing, examining factory legislation without consideration of even the imperial context and ignoring social insurance legislation and the Berne conventions. A chapter by Wikander, in a later edited work (2010), touches briefly on the Berne conventions.²¹ Easily the best historical work on the night work convention is, surprisingly, an official study. Prepared by the *ILO* in 2001 to convince recalcitrant governments to sign the *ILO's* successor convention, this anonymous report begins with a very good historical background of the 1906 convention, using many of the main early secondary sources cited above, and examines the treaty text. This is a much more useful work than the academic works before or since, essentially because it concentrates on policy-making, not just the activities of females.²²

International labour law had still not taken-off in English-speaking scholarship at the outbreak of the Second World War. Afterwards, unsurprisingly, the lead again came from Europe. Belgian lawyer Leon Troclet published *Legislation sociale internationale* (1952). His student, Elaine Vogel-Polsky, followed with her published doctoral thesis, *Du tripartisme a*

²⁰ Mary Lynn Stewart, *Women, Work, and the French State: Labour Protection and Social Patriarchy, 1879-1919*, MQUP, Kingston, 1989; Caroline Daly and Melanie Nolan (eds.), *Suffrage and Beyond: International Feminist Perspectives*, NYUP, NY, 1994; Leila J. Rupp, *Worlds of Women: The Making of an International Women's Movement*, PUP, Princeton, N.J., 1997 and 'The making of International Women's Organizations' in Martin H. Geyer and Johannes Paulmann (eds.), *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War*, OUP, Oxford, 2001, pp. 205-26; Francoise Thébaud, 'Les femmes au BIT: l'exemple Marguerite de Thibert' in J. M. Delaunay and Y. Denéchère (eds.), *Femmes et relations internationales au XXe siècle*, Presses Sorbonne Nouvelle, Paris, 2006, pp. 177-87.

²¹ Ulla Wikander, Alice Kessler-Harris and Jane E. Lewis (eds.), *Protecting women—Labor legislation in Europe, the United States, and Australia, 1880-1920*, UIP, Urbana, Ill., 1995; Ulla Wikander, 'Demands on the ILO by Internationally Organized Women in 1919' in Ulla Wikander, Jasmien van Daele and Magaly Rodriguez Garcia (eds.), *ILO Histories: Essays on the International Labour Organization, and Its Impact on the World During the Twentieth Century*, Peter Lang, Bern, 2010, pp. 67-90.

²² Report (III (1B)-2001), Geneva, 2001.

l'Organisation Internationale du Travail. Neither covered the pre-1919 period.²³ Then, as with the legal scholarship on international criminal law (similar M. Sherif Bassiouni), it was a European-educated multi-linguist, who really started the English-language literature on international labour law. Nicolas Valticos, born in Egypt of Greek parentage and educated in law in Paris, was both an academic and long-time policy-maker in those French and international bureaucracies concerned with labour laws. He had earlier published some minor French-language articles, then his major work, *Droit International du Travail* (1970), which was republished as *International Labour Law* (1979). The first chapter is a nine page historical background with only one useful page on the pre-*ILO* developments, relying on earlier secondary sources, such as Shotwell. This is similar to his contribution to the later joint work, *The International Labour Organisation* (1989), which has five pages of a similar quality on the pre-1914 period.²⁴ American academic, Virginia Leary, educated in international law in Chicago and The Hague, before working for the *Intercultural Cooperation Association* in Geneva, produced a major work, *International labour conventions and national law* (1982). This begins with the formation of the *ILO* in 1919. She has far more secondary source citations than Valticos, including important French-language works. This should have prevented her from writing 'Prior to the founding of the *ILO*, labour problems had traditionally been considered matters of domestic concern.' This is not accurate. She also says the *ILO* conventions 'were virtually the first multilateral treaties primarily intended to improve the lot of individuals within states', which ignores not only the 1906 conventions but also earlier treaties on indigenous people, health and suppression of crime.²⁵

In Australia, there were no comparable developments. This period did see the emergence of the first scholarship on Australian labour laws (Sykes & Glasbeek, 1972; Macken, 1974; Bennett, 1994; Brooks, 2003.) These, however, are notable for focusing almost entirely, in whatever limited historical treatment they offer, on the federal power over conciliation and arbitration in industrial disputes. The international, not to mention, imperial context of the development of labour laws in Australia is almost entirely ignored, except for a few passing references to the *ILO* and the use of the 'external affairs power', in essentially contemporary times. The parochialism of much historical scholarship, focusing on the 'national story', and that of political science due to its emphasis on sovereign, domestic government, is shared by

²³ Leon Eli Troclet, *Legislation sociale internationale*, Librairie encyclopédique, Brussels, 1952; Elaine Vogel-Polsky, *Du tripartisme à l'Organisation Internationale du Travail*, Éditions de l'Institut de sociologie de l'Université libre de Bruxelles, Brussels, 1966.

²⁴ Nicolas Valticos, *International Labour Law*, Kluwer, Deventer, 1979; Victor-Yves Ghebali, Roberto Ago and Nicolas Valticos (eds.), *The International Labour Organisation: a case study on the evolution of U.N. specialised agencies*, M. Nijhoff, Dordrecht, 1989.

²⁵ Virginia A. Leary, *International labour conventions and national law: the effectiveness of the automatic incorporation of treaties in national legal systems*, M. Nijhoff, The Hague, 1982

much legal scholarship due to its jurisdictional focus.²⁶

The number of legal works on international labour law in the English-language, albeit by authors of diverse background, now began to appear with some regularity. Ebere Osieke, considered Nigeria's, possibly Africa's, leading international law authority, has one page on the pre-*ILO* period in his *Constitutional Law and Practice in the International Labour Organisation* (1985), based on one (Shotwell) secondary source, mentioning only the supposed intellectual origins of the subject and not any pre-1919 treaties. Argentinian, von Potobsky, first published on the *ILO* in Spanish in 1990, before joining with Valticos for a revised second edition of the latter's *International Labour Law* (1994). His own earlier, main work was jointly translated, revised and published as *The International Labor Organization: the international standards system and basic human rights* (1996). This uses the major, early secondary sources for a detailed two-page summary of developments before the *ILO*. Fellow Argentinian, Bronstein, has only one page in *International and comparative labour law* (2009), on the background of the 1906 Berne convention prohibiting night work for women but none on the convention prohibiting white phosphorus in matches. Easily the best of these more general international labour law works, from the historical point of view, is by the Belgian, Jean-Michel Servais. His *International Labour Law* (2005) begins with a detailed four-page historical summary on the pre-1919 period using, as one would expect, the main early French and Belgian, along with the major English-language, works. He cites Valticos as well, although, as seen above, that earlier work had little on the period. His is still a very limited coverage of the pre-1919 period, mentioning only the main landmark developments without examining any statutes or treaty making in detail.²⁷

International labour laws on restricting juveniles' hours of work only arose in preliminary negotiations in the period covered by this thesis and, so, was not examined. Nonetheless, it is worth noting here that quite recently there has been an emerging sub-field of international labor law, on child labour. The legal and international scholarship on this subject has, like in the other sub-fields, focused on the present. Any historical material included, usually begins in 1919. This is the case with the works by Britain's Holly Cullen, including 'Child Labor Standards: From Treaties to Labels' (2005) and the opening, 'Historical Perspective' chapter

²⁶ E. I. Sykes & H. J. Glasbeek, *Labour Law in Australia*, Butterworths, Sydney, 1972; J. J. Macken, *Australian Industrial Laws: The Constitutional Basis*, The Law Book Company Limited, Sydney 1974; Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, The Law Book Company Limited, Sydney 1994; Brian Brooks, *Labour Law in Australia*, Kluwer Law International, The Hague, 2003.

²⁷ Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation*, M. Nijhoff, Dordrecht, 1985; Hector G. de la Cruz, Geraldo W. von Potobsky and Lee Swepsto, *The International Labor Organization: the international standards system and basic human rights*, Westview Press, Boulder, Colo., 1996; Arturo Bronstein, *International and comparative labour law*, Palgrave Macmillan, NY, 2009; Jean-Michel Servais, *International Labour Law*, Kluwer Law International, The Hague, 2005.

in *The role of international law in the elimination of child labor* (2007). Similar are the several contributions in Nesi, Nogler and Pertile (eds.), *Child Labour in a Globalized World: A Legal Analysis of ILO Action* (2008). Matteo Borzaga, for example, says the ‘remote origin’ of the ILO’s action in the field of child labour was in 1919 when, in fact, there was a considerable pre-history before 1915. The many articles in the large edited work by Hindman, *The World of Child Labor: An Historical and Regional Survey* (2009) are organized on a traditional, nationally focused basis, though some comparative method study is used. This has several ‘historical’ chapters, which mention national legislation pre-1919 but all seem to assume the international legal context only began with the ILO’s first convention in 1919. Lieten, for example, in ‘International Labor Organization (ILO) and the International Program for the elimination of child labor’, has only four pages, with one brief reference to the preliminary conference in Berne in 1913.²⁸

Historians committed to detailed research have not attempted truly international histories because of the daunting if not impossible scale of required research. Northern Ireland’s Francis Lyons, *Internationalism in Europe 1815-1914* (1963), was ambitious and not entirely unsuccessful, though it is necessarily limited, mainly to NGOs and uses only secondary sources, with little detail of their influence on government policy or any specific issue. Social scientists, especially in international relations, are less deterred from embarking on such large subjects, if only because they rely on a small number of secondary sources, rather than the necessarily large volume of primary sources, and are comfortable with making wide, supposedly theoretical, generalisations, with little supporting evidence. The inherent limitations of these efforts are very clearly seen in the most recent works of relevance to this topic.²⁹

Herren (1992 and 1993) and Gregarek (1995 and 1999) provide good secondary source-based intellectual background, if not policy detail, on the emergence of legal protection of labour, including social insurance, as an issue in Europe before the First World War. Two chapters by Donald and Rupp (2001) respectively on socialist and women’s internationalism have nothing

²⁸ Hugh Cunningham & Shelton Stromquist, ‘Child Labor and the Rights of Children: Historical Patterns of Decline and Persistence’ & Holly Cullen, ‘Child Labor Standards: From Treaties to Labels’ in Burns H. Weston (ed.), *Child Labor and Human rights: making Children matter*, Lynne Rienner Publishers, Boulder, Co., 2005, pp. 55-83, 87-115; Holly Cullen, *The role of international law in the elimination of child labor*, (The Procedural Aspects of International Law Monograph Series, Vol. 28), Martinus Nijhoff Publishers, Leiden, 2007, especially pp. 1-3; Matteo Borzaga, ‘Limiting the Minimum Age: Convention 138 and the Origin of the ILO’s Action in the Field of Child Labour’ in Giuseppe Nesi, Luca Nogler & Marco Pertile (eds.), *Child Labour in a Globalized World: A Legal Analysis of ILO Action*, Ashgate, Aldershot, 2008, pp. 39-64; G. K. Lieten, ‘International Labor Organization (ILO) and the International Program for the elimination of child labor (IPEC)’ in Hugh D. Hindman (ed.), *The World of Child Labor: An Historical and Regional Survey*, M.E. Sharpe, Armonk, NY, 2009, pp. 139-42.

²⁹ F. S. L. Lyons, *Internationalism in Europe, 1815-1914*, A.W. Sythoff, Leyden, 1963.

of relevance on labour protection. Herren and Zala (2002) make a brief reference to the 1906 Berne conference. Tosstorff's article (2005) has just one half-page on the pre-1914 labour developments. Van Daele's article (2005) has about three pages on this period and is very representative of this discipline, summarising a few secondary sources, providing no new data only new jargon: terming the *IALL* superfluously and inscrutably as an 'epistemic community'. Sandrine Kott (2008) writes usefully both on the *ITO* and the neglected subject of social insurance but only in the inter-war period. Reinalda (2009) details the growth of international organisations, including the *ILO*, but is merely summarizing Reinsch, Lyons, Johnston and others. Similarly Davies (2013), does little more than, essentially, list *INGOs*, without analysis of policies. Hidalgo-Weber (2013) has only a few lines on the pre-1914 period. Kott (2015) does examine the pre-1919 period in some detail and is notable for her use of *NGO* archival records. This is easily the best of these limited works. Marx, Wouters, Beke and Rayp (2015) begin with an introduction: 'Attempts to internationally coordinate the improvement of labour conditions date back from 1919', seemingly meaning post-1919. This simple statement highlights the lack of historical depth common in these disciplines.³⁰

³⁰ Madeleine Herren, 'La Formation d'une Politique du Travail Internationale avant la Première Guerre Mondiale' in J. Luciani (ed.), *Histoire de l'Office du travail, 1890-1914*, Syros-Alternatives, Paris, 1992, pp. 409-26 and *Internationale Sozialpolitik vor dem Ersten Weltkrieg: Die Anfänge europäischer Kooperation aus der Sicht Frankreichs*, Duncker & Humblot, Berlin, 1993, pp. 109-31; Rainer Gregarek, 'Une législation protectrice: les Congrès des assurances sociales, Association pour la protection légale des travailleurs et l'Association pour la lutte contre le chômage, 1889-1914' in Christian Topalov (ed.), *Laboratoires du nouveau siècle le nébuleuse réformatrice et ses réseaux en France, 1880-1914*, Editions de l'EHESS, Paris, 1999, pp. 317-33 and 'Le mirage de l'Europe sociale: Associations internationales de Politique sociale au tournant du 20^e siècle', *RH*, 48 (1), 1995, pp. 103-18; Moira Donald, 'Workers of the World Unite? Exploring the enigma of the Second International' in Martin H. Geyer and Johannes Paulmann (eds.), *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War*, OUP, Oxford, 2001, pp. 177-204; M. Herren and S. Zala, *Netzwerk Aussenpolitik: internationale Kongresse und Organisationen als Instrumente der schweizerischen Aussenpolitik, 1914-1950*, Chronos, Zurich, 2002; R. Tosstorff, 'The International Trade-Union Movement and the Founding of the International Labour Organization', *IRSH*, 50 (3), pp. 399-433; Jasmien Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization', *IRSH*, 50 (3), 2005, pp. 435-466; Sandrine Kott, 'Une "communauté épistémique" du social? Experts de l'OIT et internationalisation des politiques sociales dans l'entre-deux guerres', *Genèses*, 71 (2), 2008, pp. 26-46; Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day*, Taylor & Francis Limited, London, 2009, pp. 163-9; Thomas Davies, *NGOs: a new history of transnational civil society*, Hurst & Company, London, 2013; Olga Hidalgo-Weber, 'Social and Political Networks and the ILO: The Role of British Actors' in Sandrine Kott and Joëlle Droux (eds.), *Globalizing Social Rights: The International Labour Organization and Beyond*, Palgrave Macmillan, London, 2013, pp. 17-31; Sandrine Kott, 'From Transnational Reformist Network to International Organization' The International Association for Labour Legislation and the International Labour Organization, 1900-1930s' in Davide Rodogno, Bernhard Struckn and Jakob Vogel (eds.), *Shaping the Transnational Sphere: Experts, Networks and Issues from the 1840s to the 1930s*, Berhahn Books, Oxford, 2015, pp. 239-58; Axel Marx, Jan Wouters, Laura Beke and Glenn Rayp, (eds.), *Global governance of labour rights: assessing the effectiveness of transnational public and private policy initiatives*, Edward Elgar Publishing, Cheltenham, 2015, especially p. 1.

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CO18 Western Australia – Original Correspondence

CO42 Canada – Original Correspondence

CO201 New South Wales – Original Correspondence

CO209 New Zealand – Original Correspondence

CO234 Queensland – Original Correspondence

CO309 Victoria – Original Correspondence

CO323 Colonies General – Original Correspondence

CO361 New Zealand - Correspondence Register

CO374 Victoria – Correspondence Register

CO378 Colonies General – Correspondence Register

CO418 Australia-General - Original Correspondence

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A1

A2

A6

A8

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