Samoa – notes toward half a public law history

(1970s-1945)

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Introduction and the Powles family

I am very pleased to offer this tribute to Dr Guy Powles who, with his parents and brother Michael, was a good friend for more than 50 years, and in Michael's case still is.

The topic chooses itself – consider the time the Powles family spent in Western Samoa (as it was then called), in the 1950s when Sir Guy was the High Commissioner of the country. It was then a New Zealand administered trust territory under an agreement with the United Nations; it moved though developments in representative and responsible government; to independence, attaining that status on 1 January 1962 (the year in which Guy's father became the first Ombudsman in the English-speaking world). Consider too all the work that Guy did in the Pacific as a lawyer, magistrate, scholar and advocate for change; much of that work has related to Samoa, for instance his theses at the Victoria University of Wellington (of which a great uncle was the first Registrar and his father and brother graduates in law and his mother a graduate in arts) on the Status of Customary Law in Western Samoa and on Fundamental Rights in the Constitution of Western Samoa. I also had the good fortune of hearing Professor Colin Aikman, a principal drafter of the Constitution of Western Samoa, Sir Guy and Mary Boyd, an historian, talking about the making of the Constitution and reading their and Professor JW Davidson's accounts of the process.[1] Later I was a member of the Western Samoan Court of

* Professor emeritus of Law, Victoria University of Wellington. In addition to its temporal limit, this paper is limited in its sources; archives in Berlin, London, Washington and Wellington and elsewhere in the Pacific and published sources would provide more materials as appears in Tom Bennion "Treaty Making in the Pacific…" (2004) 35 VUWLR 165 to take just one example.

[1] Eg. CC Aikman, "Constitutional Development", and Mary Boyd, "*The Record in Western Samoa to 1945*" and "The Record in Western Samoa since 1945, in Angus Ross (ed) *New Zealand Record in the Pacific* (1969); Mary Boyd, "The Decolonisation of Western Samoa" in Peter Munz (ed), *The Feel of Truth* (1969); JW Davidson, *Samoa Mo Samoa* (1967); GR Powles, "Constitution Making in Western Samoa" (1961) 22 Indian Journal of Political Science 179; see also FH Corner "New Zealand and the South Pacific" in TC Larkin (ed), *New Zealand's External Relations* (1962), FLW Wood, *The New Zealand People at War* –

Appeal which ruled that its electoral law was not in breach of the Constitution. The Attorney-General, a former student and future member of the International Criminal Court, Neroni Slade, appeared as appellant and counsel, with Colin as his junior.[2]

1870s-1900: international rivalries

I begin not in the Pacific, in Apia or Pago Pago, but in Sydney and Wellington in 1883, with the holding of the inter-colonial conference on confederation or annexation, in the former, and, in the latter, the passing of the Confederation and Annexation Bill and its transmission to London in September 1883 for the signification of Her Majesty's pleasure.[3] The response of the Colonial Secretary given on 6 November was that Her Majesty would not be finally advised until after the approaching conference had been held.[4] Later that month the Foreign Office forwarded to the Colonial Office a letter from the Hawaiian Minister for Foreign Affairs protesting against the Annexation of Polynesian Islands by foreign powers – correspondence which was passed on to Wellington and no doubt other colonial capitals.[5] At the end of 1884 Bell was told that Her Majesty's Government thought "it preferable not to advise Her Majesty with regard to [the Bill] as at the present moment, as various questions connected with the islands of the Western Pacific are under consideration".[6] Her Majesty's pleasure was in fact never accorded.

The Sydney conference of the seven Australasian colonies, plus Fiji, was held in November-December 1883. It passed resolutions opposing the further extension of foreign power in the Western Pacific, advocating British annexation of non-Dutch New Guinea, endorsing the continued independence of the New Hebrides and proposing a federal council with legislative

Political and External Affairs (1958) ch23 and Alison Quentin-Baxter, "The Independence of Western Samoa" (1987) 17 VUWLR 345.

[2] *Attorney-General v Saipa'ia Olomalu* (1982) WSCA 1, (1984) 14 VUWLR 275.

[3] For a valuable account of the earlier period see Sylvia Masterman, *The Origins of International Rivalry in Samoa 1845-1884* (1934); see also 1884 AJHR A-4, pp133-158 for related correspondence between Wellington and London from 1871 to 1878. The Act would have authorised negotiations by New Zealand with islands in the Pacific with the prospect of confederation with or annexation by New Zealand with the approval of the authorities in London. See 1884 AJHR A1, p2. The sponsor of the Bill was former Governor Sir George Grey; New Zealand, he said, was ordained by Nature to be the future Queen of the Pacific.

[4] 1884 AJHR A3C p5.

[5] Ibid pp5-6.

[6] 1885 AJHR A-4B; see also 1885 AJHR A1, pp4-7, 9-10; 1884 AJHR A3.

authority over relations between the colonies and the Pacific colonies.[7] But the resolutions were not systematically followed up and, in the words of one scholar, the Conference did little to bring the colonies and Britain together on the topic. She quotes from "an amusing, rather bitter letter" written by Francis Dillon Bell, New Zealand's Agent General in London, to Harry Atkinson, the premier, about an essential failure of communication: the folk, standing expectant in London, supposed they were to be partners in a minuet addressing a new policy involved in an outline of imperial legislation affecting an infinity of lands and proclaiming the manifest destiny of Australasia. But "the other side skedaddles…. Result is that [Colonial Office] draws in its horns, and waits for the Kalends".[8]

I move from the imperial context to the international one and go back a few years to put the position of Samoa into that wider context. In 1878 the United States and Samoa had entered into a treaty of friendship and commerce – a treaty which, it might be thought and to introduce a recurring issue, proceeded on the basis that Samoa was an independent State.[9] A year later it was Germany's turn to conclude a more elaborate treaty of friendship.[10] This required that German traders be accorded national and most favoured nation treatment and provided that German authorities would resolve disputes between German citizens – a form of consular jurisdiction or capitulation common at that time in various parts of the world. Later that year, Great Britain signed a comparable treaty.[11] A short time later, as civil order was breaking down in Samoa, Britain entered into an agreement with Samoa for a council for the Government of Apia.[12] By the end of the year Germany negotiated a treaty relating to the cessation of the civil war including an agreement to the appointment of Malietoa Laupepa as King and Tamasese as Vice-King.[13]

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[7] 1884 AJHR A3.
[8] RM Dalziel, *The Origins of New Zealand Diplomacy : the Agent-General in London 1870-1905* (1975) 98-99; ch6 on Pacific Negotiations provides valuable background including an account of a "United Remonstrance against the present state of affairs in the Western Pacific" by Bell and three other agents-general delivered to the Colonial office in July 1883 (97) and 1884 AJHR A3 pp 128-135; for the Colonial Office reply see p 136 and text at n24 below.
[9] 152 CTS 313, 1879 AJHR A7.
[10] 154 CTS 455.
[11] 155 CTS 193, 205, 456.
[12] 155 CTS 205, Germany and the US acceded in 1880; the agreement was extended indefinitely in 1883, 162 CTS 445.
[13] 155 CTS 456.

In 1883, the question of the annexation of Samoa to New Zealand arose yet again as a result of the initiative of a New Zealand businessman visiting Samoa. The British High Commissioner of the Western Pacific, based in Suva, was not impressed: the course being proposed will inevitably cause a civil war and could not in any event be taken without the consent of Germany which has the greatest interest among foreign powers in Samoa and has provided protection to all white settlers by German vessels of war in Samoan waters.[14]

At the end of 1884, the issue of Samoa was being dealt with at the highest level in Berlin and London. On 22 October, the Premier, Robert Stout, asked the Agent-General to try to arrange that New Zealand have an option of annexing or confederating Samoa under the 1883 measure. On the same day Bell responded that he could present that proposal privately but an official request would inevitably be refused. On 19 November the Governor made a formal request to the Secretary of State for the Colonies and also in respect of Tonga. At the beginning of December Wellington was informed of exchanges between Count Otto van Bismarck, then the German Foreign Minister, and the British Ambassador in Berlin; those exchanges arose from reports the former had received about King Malietoa seeking that Samoa become a British Protectorate. The Ambassador only three days later was authorised to assure the German Government that the British Government would respect the independence of Samoa (and also that of Tonga), provided they received reciprocal assurances from the German Government. The Ambassador and the German Foreign Ministry exchanged the assurances, with the latter noting that they had recorded their respect for the independence of Samoa (and Tonga) in 1879 (and 1880). The New Zealand Ministers continued to pursue the matter over Christmas and the New Year, forwarding petitions and messages from Samoa, including from Malietoa, and claiming that the British position was supine, but all to no avail. The assurances to the German Government, "a great friendly Power" in the words of the Colonial Secretary in London, prevailed. Robert Stout on 12 January 1885, in a telegram to his Victorian counterpart, stated that as Samoa had been recognised as independent by England, Germany and America, surely it should be allowed to join any nation it liked.

That process was complicated not just by the fact of the petitions from Samoa but also from the belated disclosure of a treaty between Germany and Samoa which Malietoa insisted he had

[14] See Masterman pp 174-184; for a collection of documents outlining German interests in the South Seas, see 1885 AJHR A-09.

signed fearing that, if he did not, Germany would take their Islands against their will. He repeated this position in a petition to Queen Victoria in which he sought annexation. In a letter of 29 December to the German Emperor he similarly said that the means by which the agreement was obtained were unjust, they did not want it, they were unable to deliberate on it, and he was not given a copy of it. They signed because of their fear through being continually threatened.[15]

That treaty in its preamble declared that its purpose was to secure for German subjects residing in Samoa the advantages of a good government and it purported to be in conformity with the 1879 treaty of friendship. It gave the German consul a prominent role. He was to chair the German Samoan State Council with two Samoans and two Germans. It was to adopt laws. The King, in concert with the consul, was to appoint a German to be the Secretary of and Advisor to the King in all matters concerning Germany and also a judge in certain situations. The German Government had the power to abrogate the treaty on 6 months' notice; no such power was accorded to Samoa. It is hardly surprising that the treaty drew criticism from the British Foreign Secretary when it came to London's attention.[16]

In 1883 and into early 1884 closely related issues concerning Samoa arose in Wellington, but on this occasion before the New Zealand Supreme Court and Court of Appeal. Walter James Hunt sued Sir Arthur Hamilton Gordon, the British High Commissioner for the Western Pacific, for false imprisonment.[17] (It was Gordon who had signed the 1879 treaty for Queen Victoria promising perpetual peace and friendship.) The High Commissioner had the statutory power to prohibit any British subject whom he was satisfied to be dangerous to the peace and order of Western Pacific Islands not within the jurisdiction of a civilised power from being on those islands or part of them for up to two years. Such an order was made in relation to Samoa in respect of the plaintiff who on his return to Apia was convicted of a breach of the order and detained; he was then sent through Fiji to New Zealand. A principal issue or perhaps two was whether Samoa was recognised as independent and as a civilised power. Both Courts decided that it was neither. Johnston J early in his judgment in the Court of Appeal made the point, citing Phillimore, Vattel, Wheaton, Austin and the US Supreme Court, that "the word 'State' is, and has been, used among jurists and in treaties and public documents in more senses than

[15] The last two paragraphs summarise lengthy exchanges; see 1885 AJHR A-4D pp 1-45.
[16] 164 CTS 331, 1885 AJHR A-09 pp 26-27.
[17] (1883/4) 2 NZLR (CA) 160.

one". But, generally, he continued, a capacity for self-government and for enforcing its laws and the habitual obedience of its people to the laws was required.[18] Mr Hunt claimed that he had taken Samoan citizenship with the consequences that he had lost his status as a British subject and that he could not be subject to the prohibition order made against him. For that to happen there must, said the Judge, be a transfer of allegiance and therefore some sufficiently organised body politic capable of accepting the transfer. On the evidence Samoa was not such a body politic.[19] Williams J relied primarily on the proposition that the action taken by the British Government in 1877 under relevant legislation was a clear indication that it did not recognise that Samoa was at that time an independent sovereign state. He reached that conclusion notwithstanding the terms of the 1879 treaty and that the detention occurred in 1880.[20] Given his approach to the issues, the third Judge, Gillies J, did not need to address the issue. The judges, of course, did not have the advantage of the position to the contrary taken later in the year at the highest political level by the German Foreign Minister and the British Ambassador, a position which was based simply on the 1879 treaties.[21] Nor does it appear that they knew of a letter 31 August 1883 from the Colonial Office to the Agents-General of four Australian colonies, including New Zealand, in which London declared that Samoa was an independent State recognised as such by European diplomacy; under those circumstances the question might possibly arise whether its annexation by any Power would not be a violation of international law.[22]

In early 1886 newspaper reports said that Germany was annexing Samoa, but assurances were obtained from Berlin that that was not so.[23] The next treaty concerning Samoa was concluded in Berlin in 1889 and not in Apia and in Head of State form and not between the European consuls and the Samoan King but between Germany, represented by Bismarck, Great Britain, represented by Sir Edward Malet, its Ambassador in Berlin, who had dealt with Bismarck on

[18] At 198.
[19] At 199-204; see similarly Richmond J at first instance (184); the Law Officers in London had come to the same conclusion in 1882; recognising a native government in the Western Pacific by concluding treaties with it was not in itself enough; McNair *International Law Opinions* (1956) Vol I, 66.
[20] At 217-219.
[21] For another case from Samoa, this time in the Privy Council, around that time see *McArthur v Cornwall* [1892] AC 75; for some earlier related documents see 1884 AJHR A-4, pp 142-149.
[22] 1884 AJHR A3 p 136. This letter was a response to the Remonstrance of the Agents-General, n 8 above.
[23] 1886 AJHR A3.

this matter in 1884, and the United States; the conference was a resumption of one held in Washington two years earlier.[24] The treaty, entitled the Final Act of the Conference on the Affairs of Samoa, contained eight extensive provisions designed, according to the preamble, to provide for the security of the life, property and trade of the citizens and subjects of the three states residing or trading in the Islands of Samoa and to remove all occasions of dissention between their Governments and the Government and people of Samoa, while promoting so far as possible the peaceful and orderly civilisation of the people of the Islands. The first article was a declaration respecting the independence and neutrality of the Island, assuring to the citizens and subjects of the three States equality of rights in the Islands and providing for the immediate restoration of peace and order; none of the Powers were to exercise any separate control over the Islands or its Government; Malietoa Laupepa who was appointed King in 1881 and recognised by the three Powers was again so recognised unless the Powers otherwise declared.

The second article recognised that existing treaties between the three Powers respectively and the Samoan Government had to be modified to give effect to the General Act and that the Samoan Government had to assent. That assent was given by Malietoa in 1890 but whether he had had authority to do so was litigated, fully 120 years later in 2010.[25] The Samoan Court of Appeal ruled that he did have that authority. It made that ruling in a case relating to the validity of court decisions about land title given before and after 1900 when Western Samoa came under German sovereignty, with the United States acquiring sovereignty or assuming a protectorate over what became known as American Samoa.

Those major changes were achieved under the Convention of 1899 between the Three Powers – no role for the Samoan Government this time notwithstanding the importance of this treaty – which annulled the 1889 General Act and all previous treaties, conventions and agreements relating to Samoa.[26] Under the Convention the three powers were to continue to enjoy, in respect of their commerce and commercial vessels in all the Islands of the Samoan Group, privileges and conditions equal to those enjoyed by the Sovereign Powers in all ports which

[24] 172 CTS 133; for some background see Moore, *A Digest of International Law* (1906), Vol I, 541-549.
[25] *Ali'i and Faipule of Siumu District v Attorney-General of Samoa* [2010] WSCA5.
[26] 1 CTS 181.

may be open to the commerce of either of them – a provision which was to feature in a dispute in the 1920s and 1930s.

1900-1920 : the German protectorate and New Zealand occupation

Aspects of the law applicable during the period of the German protectorate from 1900 until 1919, when Germany in the Treaty of Versailles renounced all its entitlements over its overseas territories, followed in 1920 by New Zealand assuming the role of mandatory under the League of Nations, were before the New Zealand Supreme Court as late as December 1961 on a case stated from the High Court in Apia. The case was heard and decided by that Court which had appellate jurisdiction in the two week period immediately before Western Samoa became independent on 1 January 1962. The question was whether a marriage performed in accordance with Samoan custom in 1870, before any civilised government was established there, between an American citizen and a Samoan was a valid marriage and whether their children were legitimate.[27] Joseph Collins had died in 1920 shortly before New Zealand legislation repealed the former laws of Samoa. That repeal provided for the saving of all rights, obligations and liabilities arising under those earlier laws. The Court accordingly went back to 1870, considered the extraterritorial law made by Germany in 1879 in terms of the agreements all three powers had made by then, referred to the Malietoa law of 1890, adopted before he acceded to the Act of Berlin, and decided that the German Civil Code of 1896 became part of the law of Samoa in 1900. In terms of that law and applying principles of conflict of laws to be found there and in English law the Court held the marriage to be valid and the children to be legitimate. The two judgments give a real sense of the principle that vested private rights are to be maintained whatever major changes may have occurred at the political level, in large part because of the competing interests of the outside powers, their increasing involvement in the government of Samoa, the taking of sovereignty by Germany and the US, the war between the parties to the 1899 treaty, the Treaty of Versailles, the introduction of the mandate system over Western Samoa and its replacement by trusteeship, the last of which does not even get a mention.[28]

[27] *Samoan Public Trustee v Annie Collins and others* [1961] WS Law Rps 2, [1960-1969] WSLR 52.
[28] For a later New Zealand decision reflecting the same broad principle, see *Ngati Apa v Attorney-General* [2003] 3 NZLR 643, especially paras 15-48 and 133-150.

Following the outbreak of the Great War, a New Zealand force arrived in Apia on 30 August 1914 (Eastern time) and occupied German Samoa. A major purpose of the occupation was to take over the radio station in Apia. The Australian Rear Admiral commanding the ships and vessels of the Allied Fleets had called on the German Governor to surrender immediately. If no answer came within half an hour he would open fire. The Acting Governor did not surrender; in the absence of the Governor, he would not take that responsibility, but no opposition would be offered to the landing of the allied forces and the wireless-telegraph station would be packed up. In response to the Rear Admiral, he respectfully protested against the proposed bombardment; according to the principles of the rights of nations, especially the agreements of the Second Hague Peace Conference of 1907, such bombardment is forbidden as is the threat to do so.[29]

Colonel Robert Logan, as Administrator of Samoa, received the Governor of Samoa and "informed him that I regretted I must place him under arrest". He was then transported to Suva and was to be "treated as an honoured guest and accorded every consideration". The Administrator at once issued a Proclamation as commander of the occupying force requiring, among other things, the delivery of all public property of the German Government to the occupying force and the protection of private property unless the force required it, in which event reasonable payment would be made at the end of the war. Anyone resisting of attempting to interfere with or to overthrow the military government or breaching any of the rules would be punished according to the laws of war.[30]

A few days later, the Administrator issued a memorandum on the attitude adopted towards officials formerly employed by the German Government in Samoa. It began with these paragraphs which should be quoted in full:

> Article 43 of the Hague Regulations [annexed to the Geneva Constitutions II and IV of 1899 and 1907] requires that the occupying Force shall secure public order and safety in the occupied territory, and it is obvious from this requirement the necessity arises of appointing officials to carry on the administration of the territory and to preside in the Courts.

[29] 1915 AJHR H 19c pp5, 11-12.
[30] Ibid, pp 5, 8.

It is, of course, quite open to the occupying Force to appoint a completely new set of officials for this purpose. Article 43 of the Hague Regulations was, however, framed with a view to preventing the occupied territory from falling into a condition of chaos, and in order to carry out the intention of Article 43 it has been the custom in past wars for the occupying Force to invite most of the existing officials in the occupied territory to remain in office under the new regime. If the officials agree to remain in office they become, of course, servants of the occupying Force. This would at first sight seem to involve a certain amount of disloyalty on the part of the officials, in that they serve the enemy of their own State, but since Article 43 was framed not for the benefit of the occupying Force, but for the benefit of the occupied territory, it has been long considered to be not only no wrong, but even a duty on the part of the officials to assist the occupying Force in carrying out the intentions of Article 43.
The fact that the officials may be employed for this purpose does not, however, imply that the government of the occupied territory is being carried on in the name of, or on behalf of, the State against which it is occupied. The occupying Force is the Government of the occupied territory is being carried on in the name of, or on behalf of, the State against which it is occupied. The occupying Force is the Government of the occupied territory during the period of the occupation, and it is inconceivable that any occupying Force would depart from the principle laid down by the Prussians in 1870 – namely, that in occupied territory no official documents are to be issued which purport to be under the authority of the State against which the territory is occupied.[31]

The Proclamations made by the Administrator, in particular one made on 12 September 1914, were very soon in issue (along with regulations made under the New Zealand War Regulations Act 1914) in judicial proceedings. Frederick Gaudin, who ordinarily lived in Auckland and was in fact a member of the Auckland City Council, visited Samoa in October 1914. In breach of provisions in the Proclamation, he brought correspondence and coins back to Auckland. He was arrested and returned to Apia where he was convicted by a Military Court set up by the Administrator and sentenced to five years hard labour, later reduced to six months. He sought habeas corpus. A full Supreme Court headed by the one-time premier, who appeared in this account 30 years earlier, now Chief Justice Sir Robert Stout, rejected the motion. The civil courts in New Zealand, they held, had no jurisdiction to interfere with or review the acts of the

[31] Ibid, p 10. Compare the 1917 opinion of Solicitor-General Salmond that Samoa was under "the despotic government" of the Officer Commanding the Occupying Forces quoted in Alex Frame, *Salmond: Southern Jurist* (1995) 189.

Military Court.[32] The Court does not appear to have been referred to the Hague Regulations. Mr Gaudin petitioned the House of Representatives seeking an inquiry "into charges of war treason of which he was convicted". The committee concluded that his offences could not be overlooked but that the original sentence was out of all proportion; there was no reason to suppose that Mr Gaudin was animated by any traitorous or disloyal purpose.[33]

The Treaty of Versailles and the League of Nations Mandate

The Peace Conference at Versailles had to deal with President Woodrow Wilson's demand for self-determination – one of his Fourteen Points – and the determination of the Australian Prime Minister, Billy Hughes, and his New Zealand counterpart, Bill Massey, that the German Pacific territories should be annexed to them. The difference was resolved by their being placed under the mandate system which was set up under the Covenant of the League of Nations for colonies and territories no longer under the sovereignty of the States which formerly governed there – they having renounced all rights, titles and privileges in the particular peace treaty – and inhabited by peoples not yet able to stand by themselves; the principle that their wellbeing and development formed a sacred trust of civilisation and securities for the performance of this trust should be embodied in the Covenant. The mandatory powers would exercise this tutelage on behalf of the League. Western Samoa, along with New Guinea and Nauru, was within the C category – territories that were best administered under the laws of the mandatory as integral parts of their territory subject to the safeguards mentioned in the interests of the indigenous populations. The Australian, South Africans and New Zealand executives, legislatures and courts gave different answers to the source of the exercise of their authority under the mandate agreements. Was it the agreement, their own constitutions or an order in Council made by the British authorities under the Foreign Jurisdiction Act 1890 (Imperial)?

The New Zealand executive and legislature, acting on the advice of the Solicitor-General, Sir John Salmond KC, took the last, conservative course. The South African (in respect of South West Africa) and Australian executives thought that the last course was not needed, a position upheld by their courts. The New Zealand Courts can be seen as using all three sources. Given that Mary Boyd, Alex Frame and I have discussed those decisions, this is not an occasion to

[32] *In re Gaudin* (1915) 34 NZLR 401.
[33] 1915 AJHR I-1A.

add further to those accounts.[34] Nor, with one exception, will I attempt to address some very serious issues arising during the Mandate period, matters well covered by the historians.[35] The exception relates to exchanges between the United States and the United Kingdom (in the end New Zealand) about alleged breaches of the 1899 Treaty. In 1924 the United States contended through its Ambassador in London that discriminating tariffs imposed by New Zealand on its imports into Western Samoa were in breach of the obligations in the Treaty that its goods be granted complete equality of treatment with British goods.

New Zealand responded by calling for a specific assurance by the US that the same provision of the 1899 Treaty ensures British commerce and commercial vessels national treatment in that part of Samoa under US administration. The New Zealand position was also presented more broadly, raising issues about the rights of British ships to be able to carry goods and passengers from American Samoa to the US under the same conditions as US ships. The formal New Zealand position deferred to the view that the obligations of the Treaty were still imposed on Western Samoa notwithstanding its transition from German sovereignty to mandatory authority. But, in its view, the Treaty was equally binding on the US: If the Government of the United States definitely concede that New Zealand ships and all British ships are entitled to carry goods and passengers between American ports and ports of American Samoa, and that British shipping will receive exactly the same treatment in all other respects in such trade as American ships, both in American Samoa and the United States ports, then the New Zealand Government will reciprocally legislate to place American imports in the same position as the British imports in Western Samoa.[36]

There followed legal opinions from the Solicitor to the State Department and the Attorney-General concerning the relationship in US law between the Treaty provisions and a later statute, with the former interpreting the legislation in conformity with the Treaty and the latter concluding that the legislation overrode the Treaty provision as a matter of US Law.[37] The Secretary of State in writing to the Secretary of the Navy said this about the opinion of the

[34] See Boyd, "The record .. to 1945", n1 above, 125-127, Alex Frame, op. cit. 191-195, KJ Keith in JF Northey (ed), *The AG Davis Essays in Law* (1965) 144-145.
[35] See especially Boyd and Wood n1 above. I might also mention the status of forces agreement concluded with the United States in 1942 relating to the stationing of US forces in Western Samoa : see United States Forces Emergency Regulations 1943 (NZ).
[36] Foreign Relations of the United States 1924, Vol II, pp 241-245, 245.
[37] Foreign Relations of the United States 1927, Vol II, pp760-775.

Attorney-General: I need not emphasize here the seriousness of the situation from the point of view of international relations where a country enacts a statute in conflict with the provisions of a treaty to which it is a party; nor need I mention the evident fact that the enactment of such a statute does not relieve the country enacting it from that country's obligation under the treaty.[38]

I interrupt the account of the exchanges between the parties and within the Washington bureaucracy to record that the Secretary of State at the beginning of this story was Charles Evans Hughes who was to become a Judge of the Permanent Court of International Justice and later Chief Justice of the United States; his Ambassador in London was Frank B Kellogg, later Secretary of State (and author of the passage just quoted) and a Judge in The Hague as successor to Hughes, and the Solicitor to the State Department was Green H Hackworth one of the 15 original members of the International Court of Justice.

As best as I can discover, there were no further exchanges at the international level until 1934 when the US Ambassador was instructed to take the matter up again. Ever since the 1924 exchange, he was informed, it had been the policy and earnest effort of the State Department to amend the US shipping legislation to which New Zealand objected. That had now been achieved. The instructions recalled the New Zealand offer of 1924 as set out above: "It is hoped that this situation [resulting from the change in the US legislation] may be brought to the attention of the appropriate New Zealand authorities so that the regime of the Open Door, contemplated by the convention of 1899, may be restored in Western Samoa".[39]

The reply from Wellington took some time to be prepared and was delivered by way of London in a note of 3 June 1936 by Anthony Eden who had recently become British Foreign Secretary. He made it clear that the note stated the position of the New Zealand Government. (Earlier in 1934, Prime Minister Forbes had indicated to the US Vice Consul that he was inclined to act on the view of the authorities in London. The Labour Government, elected in 1935, took a much more independent line in foreign policy than its immediate predecessors.) The courses of action taken in 1920 by the US in restricting coastal shipping and by New Zealand instituting

[38] Foreign Relations of the United States 1928, Vol II, pp982-984, 984. In this section I draw on a paper of mine published in (2012) 18 NZACL Yearbook 133.
[39] FRUS 1934 General The British Commonwealth Vol I, 1003-1006; see also the report of the Vice Consul in Wellington and related correspondence 1006-1010.

a preferential rate of duty favouring British goods amounted, in the view of the New Zealand Government, as a tacit abrogation of Article III of the Convention. In spite of this mutual disregard of the Article the Government in 1924 was willing to provide national treatment to US commerce if the US gave an express assurance in respect of British commerce and vessels, as was communicated to the US Ambassador in 1924. But 10 years had gone by without any reply or further communications. That 1924 offer cannot be regarded as remaining open indefinitely and the New Zealand Government must regard it as having lapsed. "An offer made in 1924 to renew the operation of a provision which was being disregarded by both parties, was not accepted and has lapsed; … neither party can now claim from the other compliance with the provisions in question."[40]

I have discovered no further action on this matter. One striking feature of the exchanges is that they proceeded on the basis that the 1899 treaty remained in force and applicable to and binding on New Zealand notwithstanding the fact that war had broken out between the three states parties to it in 1914 and 1917, that Germany no longer had rights in respect of Western Samoa and that New Zealand had the rights of a mandatory, not full sovereignty. As already indicated, in 1924 the New Zealand Government accepted that that question was one to be determined by the Law Officers of the Crown in England and in deference to their advice it had not contended that it was free from the obligations under the Treaty.[41] But that was of no consequence if the view of the New Zealand Government that mutual breach had abrogated the treaty obligation prevailed.[42] There is no evidence that the United States rejected that view.

Conclusion

Given the character of this paper I do no more than offer a few reflections on the above account which, in someone's hands, has still another 70 years to go and calls for further elaboration. One is the danger of scholars taking too narrow a view – the matters discussed involve history,

[40] FRUS 1936, British Commonwealth, Vol I, Document 674, pp852-854; see also UN Secretariat Study on treaty succession, Yearbook of the International Law Commission Vol II (2) pp111, 174-175, para 127 (A/CN.4/243/Add1).
[41] See articles 6(a) and 7 and Annex para (e) of the draft articles prepared by the International Law Commission, on the effects of armed conflicts on treaties (2011) and paras 26-46 of the commentary to the Annex.
[42] That position of abrogation by practice is supported by a draft article (38) of the ILC text on the law of treaties – the only ILC provision rejected by the conference which drew up the Vienna Convention.

geography, international relations, the development of independent status, and the interaction of international law, constitutional law and private law (particularly the durability of private rights). The relevant sources of policy, principle and law may also be various – consider those invoked by the New Zealand courts in 1883-84 and 1961 and by the German Deputy Governor and the New Zealand Administrator in August/September 1914. The movement of actions between different categories of capitals and actors is another feature – the Samoan leaders in Apia, the consuls and other representatives of the three powers there, the Australasian colonial leaders and the Imperial authorities in London and the Western Pacific and the Ministers and Ambassadors in London, Berlin and Washington. Next there is the interaction of executive, legislative and judicial functions. A further matter is the changing of hats as individuals moved through their official lives, notably among the Americans in the 1920s with Secretary of State Kellogg insisting that a national law does not relieve the State of its treaty obligations.[43] And above all the reconciling of continuity and change, heritage and heresy.[44]

[43] See also the roles of Robert Stout as premier and Chief Justice. In between he had a major hand in the founding of Victoria College, if I may complete one Powles' circle.
[44] Paul Freund *On Law – Justice* (1968) p 23.