A. M. STUYT

THE GENERAL PRINCIPLES OF LAW

AS APPLIED BY INTERNATIONAL TRIBUNALS TO DISPUTES ON ATTRIBUTION AND EXERCISE OF STATE JURISDICTION

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PROEFSCHRIFT TER VERKRIJGING VAN DEN GRAAD VAN DOCTOR IN DE RECHTSGELEERDHEID AAN DE RIJKSUNIVERSITEIT TE LEIDEN, OP GEZAG VAN DEN RECTOR MAGNIFICUS DR. B. G. ESCHER, HOOGLEERAAR IN DE FACULTEIT DER WIS- EN NATUURKUNDE, PUBLIEK TE VERDEDIGEN OP WOENSDAG 3 APRIL 1946, DES NAMIDDAGS TE 3 UUR

DOOR

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GEBOREN TE AMSTERDAM

Springer-Science+Business Media, B.V.
1946

PATRIS PIAE MEMORIAE ET MATRI

IN MEMORIAM PROFESSORIS BENJAMIN MARII TELDERS

ISBN 978-94-015-0375-4 ISBN 978-94-015-0955-8 (eBook)
DOI 10.1007/978-94-015-0955-8

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INTRODUCTION

When war is being waged, man is inclined to ask himself whether only force is governing the relations between States. War, it is argued, rests on a fact, not on law, and so the existence of international law, as a body of rules applicable to the relations between States or to the relations between States and international institutions, is called into question. Is international law—both the law of peace and of war—really based on general principles of law, such as domestic law, or is it but a conception of the spirit? The problem of the significance of general principles in international law has already been examined bij many authors, especially in relation to article 38 § 3 of the Statute of the Permanent Court of International Justice, which Court is to apply, apart from international conventions and custom, "the general principles of law recognized bij civilized nations." The purpose of this study was to construct a new method of inquiry into the general principles, upon which international law is based.

International law is unwritten law. Its positive rules must be sought in treaty texts, diplomatic correspondence, or decisions of international tribunals. The latter material will be especially used in this study, so as to avoid data of a rather political and subjective nature. Moreover, the international judge or arbitrator is mostly asked to apply general rules of international law.[1]) I shall have occasion, furthermore, to justify my contention in the Preface of my "Survey of international arbitrations, 1794-1938" that decisions of arbitral tribunals have "attained an increasing influence on the development of international law."

How should decisions of international tribunals be analysed in order to arrive at a synthesis of the general principles of international law? Some authors [2]) gather a number of precedents, such as "it is a principle of universal jurisprudence that . . .", "the general principle of civil law, according to which . . .", "according to general and universally recognized principles of justice . . .", etc., and they conclude then, that, bij way of analogy, principles of civil law, of natural law,

[1]) As to international arbitrations, cf. my "Survey of international arbitrations, 1794-1938", The Hague 1939, under 4b of each case.

[2]) Such as J. Spiropoulos: Die allgemeinen Rechtsgrundsätze im Völkerrecht, Kiel 1928; A. von Verdross: Les principes généraux du droit dans la jurisprudence internationale, Recueil des Cours 52 (1935) - 191, etc.

etc., could be transmitted into international law. It seems, however, to be a too simple method of gathering precedents without any logic connection: international law, as was observed by Professor J. H. W. Verzijl, acting as President of the French-Mexican Claims Commission of 1924, is something else than the simple result of an arithmetical addition and substraction of precedents.[3])

Since it is generally accepted that the elements of a State are: territory, population, and a political organization,[4]) it may be argued that each State is invested with a territorial, a personal, and a governing jurisdiction. It is clear that, in the relations between States as members of the international community, conflicts of state jurisdictions may arise. Such a conflict—apart from a conflict with a political character—may regard, in general, either the attribution of jurisdiction *(e.g.:* does territorial jurisdiction over island P belong to State A or to State B?), or the exercise of jurisdiction *(e.g.:* is State A, in the exercise of its territorial jurisdiction, obliged, by virtue of a general rule of international law, to admit vessels of State B into its ports?). It appears, as shall be seen hereafter, that general rules of international law originate, *inter alia,* in the conflict of state jurisdictions and that some general principles of law underlie the category of rules regarding the attribution of state jurisdictions, whereas other general principles of law underlie the category of rules with respect to the exercise of state jurisdictions. The following scheme has been drawn up: Chapter I deals with territorial jurisdiction; § 1 with the nature of this jurisdiction, § 2 with the attribution of territorial jurisdiction, § 3 with the exercise of that jurisdiction. Chapter II deals with personal jurisdiction; § 4 with the nature of personal jurisdiction, § 5 with the attribution of that jurisdiction, § 6 with the exercise of personal jurisdiction. Chapter III deals with governing jurisdiction; § 7 with the nature of governing jurisdiction, § 8 with the attribution of that jurisdiction, and § 9 with the exercise of governing jurisdiction.

This study is merely an essay in method, having for its object the analysis of general rules of international law [5]) in order to arrive at a synthesis of the underlying general principles. It is not the purpose

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[3]) "Heureusement, toutefois, le droit international est autre chose que le simple résultat d'une addition et soustraction arithmétiques de précédents.", Pinson case, ed. Paris 1933, p. 48, Survey No. 363.

[4]) "Or, un Etat n'existe qu'à la condition de posséder un territoire, une collectivité d'hommes habitant ce territoire, une puissance publique s'exerçant sur cette collectivité et ce territoire. Ces conditions sont reconnues indispensables et l'on ne peut concevoir un Etat sans elles.", Mixed Arbitral Tribunal Germany-Poland, decision of August 1, 1929, vol. 9 of the French Recueil, p. 344.

[5]) Rules concerning the law of treaties, of procedure, of damages, have been left aside.

of this study, however, to examine the nature of these general principles as well—that activity lying outside the domain of the positive science of law —, but the conclusions may, perhaps, have some interest as an introduction to the philosophy of law, while the three Chapters may have a more practical interest with regard to the juridical aspect of some state-activities in the international community.

I am greatly indebted to Mr. R. Borregaard, M.A., of London, for kindly reading the original text and making a number of valuable suggestions for correcting and improving the technical language used, a task which he conscientiously performed. [6])

[6]) I must apologize to my countrymen for not having published this dissertation in my own language, but this book joins my Survey, which has also been published in the English language since the Anglo-American arbitral decisions take the greatest part in it.

CHAPTER I

TERRITORIAL JURISDICTION

§ 1. NATURE OF TERRITORIAL JURISDICTION

Territory is something which has not only a political significance for the existence of a State, but also a juridical one: it entitles a State to territorial jurisdiction, whereby it may exercise its legislative, executive, and judicial power over all persons and things within that territory. The following arbitration decisions prove this statement. The Permanent Court of Arbitration at the Hague gave an award on September 10, 1910,[1]) concerning questions between Great Britain and the United States of America about fisheries on the North Atlantic Coast wherein it was held that

> the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty.[2])

Thus, within territorial limits, the territorial sovereign may rule as he likes,[3]) unless the contrary be provided. Whoever seeks to rely on a contrary rule, must prove the existence of such rule in international law. This principle applies not only to citizens or inhabitants of the country, but also to foreigners.[4])

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[1]) Survey No. 291.

[2]) A.J.I.L. 4 (1910) - 956.

[3]) "Is is certain that among the most widely recognized principles of international law are the principles that the jurisdiction of a State is territorial in character and that in respect of its nationals a State has preferential, if not sole jurisdiction.", France-Turkey, P.C.I.J., Judgment No. 9, diss. op. Altamira, Series A No. 10, p. 95.

[4]) "The principle of absolute and exclusive jurisdiction within the national territory applies to foreigners as well as to citizens or inhabitants of the country, and the foreigner can claim no exemption from the exercise of such jurisdiction, except so far as he may be able to show either: 1) that he is, by reason of some special immunity, not subject to the operation of the local law, or 2) that the local law is not in conformity with international law. No presumption of immunity arises from the fact that the person accused is a foreigner. ... It is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and,

The same Court, when asked to decide on a question raised between the Netherlands and the United States of America whether the island of Palmas (or Miangas) in its entirety formed a part of territory belonging to the United States of America or of Netherlands territory, discussed at length the territorial jurisdiction of States. The sole arbitrator, Prof. Max Huber, stated in his award given on April 4, 1928,[5]) that

> sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc. do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State. [6])

Two points are essential: territorial jurisdiction belongs, in general, to one State; this jurisdiction is exclusive in the sense that no jurisdiction belongs to other States on the same territory, unless the contrary be provided.

But while, in municipal law, abstract rights may exist apart from any material display of them, state jurisdictions, in international law, have not only a negative nature, eliminating the activities of other States, but also a positive one: such jurisdictions should be exercised by States in order to fulfil both their national and international obligations incumbent upon them as subjects of international law.

> Territorial sovereignty, said the same arbitrator, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all

except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.", France-Turkey, P.C.I.J., Judgment No. 9, diss. op. Moore, Series A. No. 10, p. 69, 92.

[5]) Survey No. 366.

[6]) A.J.I.L. 22 (1928) - 875.

> points the minimum of protection of which international law is the guardian. Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.[7])

Whereas a State may display its activities, with respect to national matters, according to its discretion—that exercise may be regulated by municipal law—, such an exercise can be limited, too, by international law as soon as international considerations arise. A State may be obliged, said Prof. Huber, "to protect within the territory the *rights* [8]) of other States". It would be more correct to hold that a State may be obliged by general or conventional rules of international law to protect within its territory the *exercise* [9]) of rights (jurisdictions) of other States. For, as has been observed, territorial jurisdiction belongs, in general, to one State only; if another State lays claim to some particular jurisdiction in or over that territory, the claim must be made good.[10]) In that case, one might speak of 'mixed' jurisdiction. As to the obligation referred to, Mr. A. Alvarez observed in his dissenting opinion before the Mixed Arbitral Tribunal Hungary-Czechoslovakia:

> un Etat ne peut, dans l'exercice de sa souveraineté intérieure, contrarier les principes du droit international ni éluder les obligations qu'il a contractées dans des traités. En d'autres termes, un Etat ne peut sous aucun prétexte se soustraire unilatéralement à ses obligations internationales. La réglementation qu'il établirait sur ces matières n'aurait aucune valeur en dehors de son territoire, même s'il l'appliquait aussi à ses propres nationaux. Ses lois internes, ainsi que les sentences de ses tribunaux, qui se fonderaient sur lesdites lois ne seraient que des faits sans aucune portée en dehors de l'Etat. S'il en était autrement, les conventions pourraient être impunément violées, le droit international n'existerait pas ou serait subordonné au droit national, ce qui est inadmissible.[11])

As to general international law, it was held by Mr. Palacio before the Mixed Claims Commission Mexico-U.S.A., under Convention of July 4, 1868, that the injuries in the case under consideration

> arose from the failure of the United States to perform obligations derived from:

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[7]) A.J.I.L. 22 (1928) - 876.

[8]) — [9]): My italics.

[10]) "From these principles it results that no nation can be called upon, of ought, to permit the operation of foreign laws within its territory when those laws are contrary to its interests or its moral sentiments.", Great Britain-U.S.A., arb., C. 8-2-1853, op. Hornby in the Enterprise case, Moore 4-4365, Survey No. 47.

[11]) 19-2-1934, R.G.P.C. 1934-2-18.

1. the law of nature in its application to international relations;
2. international law, as established by the consent of civilized nations and the opinions of writers;
3. the conventional law, as enacted by treaties;
4. the acknowledgment, express or implied, of the party whose obligation was alleged;
5. the legislation of the United States.

The law of nature enjoins the maxim "quod tibi non vis fieri, alteri ne facias". On this ground a nation must restrain incursions from its territory into the territory of another nation. The law of nations renders the territory of each nation inviolable. Hence, each nation must itself prevent and punish attempts within its territory against the territory of another nation.[12])

And the Central American Court of Justice stated that

> the function of sovereignty in a State is neither unrestricted nor unlimited. It extends as far as the sovereign rights of other States. ...To invoke the attributes of sovereignty in justification of acts that may result in injury or danger to another country is to ignore the principle of the independence of States which imposes upon them mutual respect and requires them to abstain from any act that might involve injury, even though merely potential, to the fundamental rights of the other international entities which, as in the case of individuals, possess the right to live and develop themselves without injury to each other.[13])

As to conventional law, the Permanent Court of Arbitration held in the case of the North Atlantic Coast Fisheries that

> the right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in article 1 of the Treaty of October 20, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain. The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said treaty.[14])

So far, two points have been established: first, a State is entitled to rule within its own territorial limits as it likes; secondly, the exercise of its jurisdictions may be limited by reference to the exercise of foreign state's jurisdictions. A State is not entitled to exercise jurisdiction on foreign territory,[15]) unless by virtue of a permissive rule

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[12]) Moore 3-2432/3, Survey No. 82.

[13]) Salvador-Nicaragua, 9-3-1917, A.J.I.L. 11 (1917) - 718/9, Survey Appendix No. III.

[14]) A.J I.L. 4 (1910) - 968.

[15]) "The criminal jurisdiction of a State therefore is based on and limited by the territorial area over which it exercises sovereignty. This is the principle, and it is an indisputable principle of international law.", France-Turkey, P.C.I.J., Judgment No. 9, diss. op. Weiss, Series A. p. 45; "Two principles will be found to exist: the principle of sovereignty and the territorial principle, according to which each nation has dominion over its territory and—on the other hand—has no authority to interfere in any way in matters taking place on the territories of other nations.", idem: diss. op. Nyholm, p. 59; "While no State can acquire jurisdiction over territory in another State by mere declarations on its own behalf.", Guatemala-Honduras, arb., 23-1-1933, ed. Washington 1933, p. 13/4, Survey No. 393.

derived from international custom or from a convention, as was duly observed by the Permanent Court of International Justice in the Lotus case:

> the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. ... All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty. [16])

If a State is entitled to exercise some jurisdictions outside its territorial limits, a distinction must be made according to whether such jurisdiction which, logically, cannot be the territorial, but must be either the personal or the governing jurisdiction of a State (see Chapters II and III), is exercised on the territory itself of a foreign State or on a place outside the sphere of state jurisdiction, such as on *terra nullius* or on the high seas. In the first case, that exercise will limit the exercise of jurisdictions of the foreign territorial sovereign or be exercised concurrently with the latter's jurisdictions.

It may be concluded that

1. state jurisdictions are either exclusive with regard to other States, or are mixed jurisdictions;
2. state jurisdictions either may be exercised according to discretion

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[16]) Judgment No. 9, Series A. No. 10, p. 18, 19. "The laws of a country are uniformly in force, beyond the limits of its territory, over its vessels on the high seas, and continue in force in various respects within foreign ports, as we shall hereafter show. ... There are many laws of a foreign country, in reference to its own citizens or their obligations, that another nation may enforce or not, where the citizens of such a country voluntarily come within its borders in order to place themselves under its jurisdiction. But there are cases where persons are forced by the disasters of the sea upon a foreign coast, where, as I contend, a nation has fundamental and essential rights within the ordinary local limits of another country, of which it can not be deprived, and that are operative and binding by a sanction that is wholly above and beyond the mere assent of any such State or community. Such rights are defined by jurists as the absolute international rights of States. I might also add, it is not now a question whether the doctrines of international law shall prevail either in England or America.", Great Britain-U.S.A., arb., C. 8-2-1853, Enterprise case, op. Upham, Moore 4-4351, Survey No. 47; "It is true that by what is termed the 'comity of nations' the laws of one country are in some cases, allowed by another to have operation; but in those cases the foreign law has its authority in the other country from the sanction, and to the extent only of the sanction, given to it there, and not from its original institution." idem: op. Hornby, Moore 4-4365; "It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied. ... The benefit of this principle equally enures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory.", Lotus case, diss. op. Moore, loc. cit. p. 68.

with regard to international law or their exercise is limited by that law.[17])

[17]) Reference, as to state jurisdictions: J. Basdevant: Règles générales du droit de la paix, Recueil des Cours 58 (1936) - 568, 591; V. Bruns: Völkerrecht als Rechtsordnung, Z. f. a. ö. R. u. V. 1 (1929) - 1 - 1; H. Kelsen: Théorie générale du droit international public, problèmes choisis, Recueil des Cours 42 (1932) - 182; R. Monaco: Natura della competenza dello Stato secondo il diritto internazionale, R.D.D.I. 24 (1932) - 36, 161; Ch. Rousseau: L'aménagement des compétences en droit international, R.G.D.I.P. 37 (1930) - 420.

As to state-territory: A. del Bon: Proprietà territoriale, Firenze 1867; L. Delbez: Du territoire dans ses rapports avec l'Etat, R.G.D.I.P. 39 (1932) - 705; D. Donati: Stato e territorio, Roma 1924 (idem in: R.D.D.I. 15 (1923) - 349 and 16 (1924) - 47); F. Giese: Staatsrecht und Staatsgebiet, Z. f. V. 11 (1920) - 461; W. Hamel: Das Wesen des Staatsgebiets, Berlin 1933; W. Henrich: Kritik der Gebietstheorien, Z.f.V. 13 (1926) - 28, 194, 325; P. Mayer: Die rechtliche Bedeutung des Staatsgebiets für den Staatsbegriff historisch und dogmatisch dargestellt, Greifswald 1915; W. Peiser: Begriff und Wesen der Gebietshoheit, Greifswald 1919; J. van de Poll: De territorio, Lugd. Bat. 1804; A. Prager: Eigentum und Staatsgebiet, Z. f. ö. R. 14 (1934) - 611; E. Radnitzky: Die rechtliche Natur des Staatsgebiets, Archiv für öffentliches Recht 20 (1905) - 313, 22 (1907) - 416, 28 (1912) - 454; W. Schade: Wesen und Umfang des Staatsgebiets, Berlin 1934; A. F. Schnitzer: Staat und Gebietshoheit, Zürich 1935; W. Schönborn: La nature juridique du territoire, Recueil des Cours 30 (1929) - 85; P. Schou: Le rôle du territoire dans le droit international, Acta Scandinavica iuris gentium, 10 (1939) - 17; S. Tachi: La souveraineté et le droit territorial de l'Etat, R.G.D.I.P. 38 (1931) - 406; A. von Verdross: Staatsgebiet, Staatengemeinschaftsgebiet und Staatengebiet, Niem. Zeit. 37 (1927) - 293.

§ 2. ATTRIBUTION OF TERRITORIAL JURISDICTION

Since there is a relationship between territory and jurisdiction, it is clear that a dispute between States with respect to territorial jurisdiction derives its origin either from conflicting claims concerning the acquisition of *„terra nullius"*, i.e. territory, over which no State has any jurisdiction, or from clashing boundary claims, i.e. territory, over which neighbouring States have jurisdiction.

A. Acquisition

In the following cases, disputes between States with regard to the attribution of territorial jurisdiction have been submitted to international tribunals and will be quoted as: the Aves case,[1]) the Bulama case,[2]) the Delagoa case,[3]) the Caroline case,[4]) the Guiana case,[5]) the Palmas case,[6]) the Clipperton case,[7]) and the Greenland case.[8]) [9])

King Victor Emmanuel III, arbitrator in the Guyana case, observed:

> that to acquire the sovereignty of regions which are not in the dominion of any State, it is indispensable that the occupation be effected in the name of State, which intends to acquire the sovereignty of those regions.[10])

This statement is very instructive and should be examined a little further.

"In the name of the State": in international law, jurisdiction can only belong to him, who is able to exercise that jurisdiction. States, the only subjects of international law, can alone exercise jurisdictions, so jurisdictions can only belong to States. Since territory gives a title

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[1]) Netherlands-Venezuela, arb., June 30, 1865, Lapradelle-P. 2-412, Survey No. 54.
[2]) Great Britain-Portugal. arb., April 21, 1870, Moore 2-1920, Survey No. 85.
[3]) Great Britain-Portugal, arb., July 24, 1875, Moore 5-4984, Survey No. 100.
[4]) Germany-Spain, mediation, October 22, 1885, Moore 5-5043, Survey No. 141.
[5]) Brazil-Great Britain, arb., June 6, 1904, de Martens N.R.G. 2-32-485, Survey No. 240.
[6]) Netherlands-U.S.A., arb., April 4, 1928, A.J.I.L. 22 (1928) - 867, Survey No. 366.
[7]) France-Mexico, arb., January 28, 1931, A.J.I.L. 26 (1932) - 390, Survey No. 293.
[8]) Denmark-Norway, P.C.I.J., Judgment April 5, 1933, Series A/B No. 53.
[9]) It goes almost without saying that such disputes can have been settled also by treaty or agreement.
[10]) De Martens N.R.G. 2-32-488.

to territorial jurisdiction, only States can acquire territory.[11]) While States can act only by and through their agents and representatives—as was held by the Permanent Court of International Justice [12])—, it seems to be an essential element that occupation by and through chartered companies [13]) or private individuals [14]) should be effected with the assent and sanction of the home-State, before such occupation will be recognized as valid by international law. In an arbitration between Great Britain and the United States of America concerning possessory rights and claims of the Hudson's Bay and Puget's Sound Agricultural Companies, the American Commissioner, Mr. A. S. Johnson, observed that

> the possessions of the Company in the territory, acquired with the assent and sanction of the Government, and over which they had first begun to extend the influences of civilization, could not have been taken from them, without a violation of natural justice. It is true that for the purposes of civil government, and the convenient devolution of property, the title to land is deemed to be derived from the sovereign, but its more natural foundation is upon the enterprise and labor of those who first subject it to cultivation and civilized use. So strong is the conviction of the justice of this view, in this country at least, that the rights of original settlers have, I think, never been disregarded, and the laws have, from time to time, been modified and moulded so as to protect this equitable right, even where it had its inception without the sanction of law.[15])

Mr. Bancroft Davis, in his Memorandum for the President of the United States of America, U. S. Grant, arbitrator in the Bulama case, said that

> navigators going on voyages of discovery, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nations, and this title has been usually respected, provided it was soon after followed by a real possession.[16])

Prof. Huber stated in the Palmas case that

> the acts of the East India Company (Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th till the 19th Century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the States

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[11]) "On ne peut acquérir que les droits qu'on est susceptible d'exercer; or les Etats seuls peuvent exercer des droits souverains; eux seuls peuvent donc les acquérir; ils doivent dès lors être aussi les seuls à pouvoir réaliser une occupation, puisque l'effet de l'occupation est l'acquisition de la souveraineté.", P. Fauchille: Le conflit de limites entre le Brésil et la Grande Bretagne..., Paris 1905, p. 33.

[12]) Advisory Opinion No. 6, 10-9-1923, Series B p. 22.

[13]) Cf. the Delagoa, Guyana, and Palmas cases.

[14]) Cf. the Aves, Bulama, and Guiana cases.

[15]) September 10, 1869, Moore 1-259, Survey No. 73.

[16]) Moore 2-1919.

> to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Münster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law; for the peace between Spain and the Netherlands extends to "tous Potentats, nations et peuples" with whom the said Companies, in the name of the States of the Netherlands, "entre lès limites de leurdits Octroys sont en Amitié et Alliance". The conclusion of conventions, even of a political nature, was, by Article XXXV of the Charter of 1602, within the powers of the Company. It is a question for decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.[17])

"Regions which are not in the dominion of any State": in order to be acquired by occupation, territory should not only belong to no other State, as was held by King Victor Emmanuel III in the Clipperton case:

> consequently, there is ground to admit that, when in November, 1858, France proclaimed her sovereignty over Clipperton, that island was in the legal situation of *territorium nullius*, and, therefore, susceptible of occupation.[18])

and by Prof. Anzilotti in his dissenting opinion in the Greenland case:

> a legal act is only non-existent if it lacks certain elements which are essential to its existence. Such would be the occupation of territory belonging to another State, because the status of a *terra nullius* is an essential factor to enable the occupation to serve as a means of acquiring territorial sovereignty.[19])

But there must be also absence of exercise of any state jurisdiction over such territory, as was held by the Mixed Claims Commission U.S.A.-Venezuela (Mr. Findlay) under the Convention of December 5, 1885:

> the act of the United States of the 18th of August 1856, providing for the acquisition of islands of this kind by its citizens, makes the fact of the non-exercise of jurisdiction by any other Power one of the conditions of acquisition.[20])

It will be noted that it makes some difference whether the territory to be occupied is inhabited or uninhabited. If it is inhabited by a people, the political organization of which does not correspond to the idea of "State" in the sense of member of the international community, and on the territory of which no state jurisdiction is exercised, the

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[17]) A.J.I.L. 22 (1928) - 897.
[18]) A.J.I.L. 26 (1932) - 393.
[19]) Series A/B No. 53 p. 95.
[20]) Moore 4-3359, Survey No. 142.

requirements of a valid occupation will be more stringent than in the case of occupation of an uninhabited territory.

"The State which intends to acquire the sovereignty": the intention *(animus)* to acquire territorial jurisdiction is also an essential factor. This intention, which cannot be presumed but must be manifested by external signs, will mostly be determined by the political climate of the occupying State: one will have in view commercial or military purposes, another the extension of missions,[21]) etc.

"The occupation be effected": intention alone to acquire territorial jurisdiction is not sufficient, the territory must be occupied effectively *(corpore)*. What is meant by "effectively"? Logically, (visual) discovery precedes occupation. Some centuries ago it was accepted that occupation of *terra nullius* was valid by priority of discovery, after ficticious or notional occupancy, or even on the ground of contiguity.[22])

Since the 19th century, however, it has been held in international cases [23]) concerning discovery:

> that the discovery of new channels of trade in regions not belonging to any State cannot by itself be held to confer an effective right to the acquisition of the sovereignty of the said regions by the State, whose subjects the persons, who in their private capacity make the discovery, may happen to be; [24])
>
> discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the island; [25])
>
> However, even admitting that the discovery had been made by Spanish subjects, it would be necessary, to establish the contention of Mexico, to prove that Spain not only had the right, as a State, to incorporate the island in her possessions, but also had effectively exercised the right. [26])

And concerning contiguity:

> the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law. [27])

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[21]) See the Caroline case.

[22]) See e.g.the Delagoa case, with the very extensive Portuguese Memoranda, the Caroline case, etc. "Such advances in good faith, followed by occupation and development, unquestionably creates equities which enterprises subsequently undertaken would be bound to consider. When it appears that the two Parties, seeking to extend their area of possession have come into conflict, the question of priority of occupation necessarily arises. Priority in settlement in good faith would appropriately establish priority of right.", Guatemala-Honduras, arb., 23-1-1933, ed. Washington 1933, p. 84, Survey No. 393. Cf. A. S. Keller, C. J. Lissitzyn and F. J. Mann: Creation of rights of sovereignty through symbolic acts, 1400-1800, New York 1938.

[23]) As to conventional law, cf. article 35 of the Congo Act, Berlin, February 26, 1885, de Martens N.R.G. 2-10-414 (R.D.I.L.C. 18 (1886) - 113 and Annuaire de l'Institut de Droit International 1888/9 p. 201).

[24]) Guiana case, de Martens N.R.G. 2-32-488.

[25]) Palmas case, A.J.I.L. 22 (1928) - 884.

[26]) Clipperton case, A.J.I.L. 26 (1932) - 393.

[27]) Palmas case, A.J.I.L. 22 (1928) - 910. See also the Bulama and Delagoa cases. Cf. Survey No. 17, sub 2.

The requirements of effective occupancy have been expressed as follows by international tribunals:

> considérant... que le gouvernement vénézuélien a été le premier à y tenir une force armée et à y faire des actes de souveraineté; [28])

> that long before the year 1792 a Portuguese settlement was made at Bissao on the river Jeba, which said settlement has ever since been maintained under Portuguese sovereignty; [29])

> attendu que, depuis la découverte, le Portugal a, en tout temps, revendiqué des droits de souveraineté. ... Attendu que si l'affaiblissement accidentel de l'autorité Portugaise dans ces parages a pu, en 1823, induire en erreur le Capitaine Owen; [30])

> the Spanish government to render her sovereignty effective engages to establish as quickly as possible in that archipelago a regular administration with sufficient force to guarantee order and the rights acquired; [31])

> that the occupation cannot be held to be carried out except by effective, uninterrupted, and permanent possession being taken in the name of the State, and that a simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice; ... That, however, the right of the British State as the successor to Holland, to whom the Colony belonged, is based on the exercise of rights of jurisdiction by the Dutch West India Company, which, furnished with sovereign powers by the Dutch Government, performed acts of sovereign authority over certain places in the zone under discussion, regulating the commerce carried on for a long time there by the Dutch, submitting it to discipline, subjecting it to the orders of the Governor of the Colony, and obtaining from the natives a partial recognition of the power of that official; That like acts of authority and jurisdiction over traders and native tribes were afterwards continued in the name of British sovereignty when Great Britain came into possession of the Colony belonging to the Dutch; That such effective assertion of rights of sovereign jurisdiction was gradually developed and not contradicted, and, by degrees, became accepted even by the independent native tribes who inhabited these regions, who could not be considered as included in the effective dominion of Portuguese, and later on of Brazilian, sovereignty; That in virtue of this successive development of jurisdiction and authority the acquisition of sovereignty on the part of Holland first, and Great Britain afterwards, was effected over a certain part of the territory in dispute; [32])

> It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as title. The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. [33])
>
> ... As regards the question wich of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation,

[28]) Aves case, Lapradelle-P. 2-415.
[29]) Bulama case, Moore 2-1921.
[30]) Delagoa case, Moore 5-4984, 4985.
[31]) Caroline case, Moore 5-5044.
[32]) Guiana case, de Martens N.R.G. 2-32-488/9.
[33]) Palmas case, A.J.I.L. 22 (1928) - 876.

shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relative few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. [34])

... If the claim to sovereignty is based on the continuous and peaceful display of state authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region; [35])

It is beyond doubt that by immemorial usage having the force of law, besides the animus occupandi, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying State reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when te State establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying State makes its appearance there, at the absolute and undisputed disposition of that State, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed. [36])

A claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. [37])

... Bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area. [38])

... To the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland in general, Denmark is entitled to rely upon them. These treaties may also be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland. [39])

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[34]) Idem p. 883.
[35]) Idem p. 896.
[36]) Clipperton case, A.J.I.L. 26 (1932) - 393/4.
[37]) Greenland case, Series A/B No. 53, p. 45/6.
[38]) Idem: p. 50/1.
[39]) Idem: p. 52.

It appears that, if the occupying State, acting by and through its agents and representatives, is capable of exercising its territorial jurisdiction, which it intends to acquire definitively, over *terra nullius* in an effective manner, it can reject any claim of other States to a same jurisdiction over that territory. That exercise will be the manifestation of the fact that its new jurisdiction is established to the exclusion of foreign jurisdictions.[40]) However, the display of state-activities may be interrupted temporarily, for, as was held in the Palmas case:

> although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory.[41])

Such interruption may be connected with the geographical situation of the occupied territory, or with the period,[42]) during which the occupation took place, of differ according as inhabited or uninhabited regions are involved. If the occupying State has exercised its territorial jurisdiction but a short time, its jurisdiction is 'inchoate'.[43])

Concluding, it seems difficult to give a definition of the positive rule of international law applicable in these disputes, a rule, which, with its four aspects, as analyzed above, will, moreover, vary according to every special case. This rule differs in one respect from the positive rule recognized by civilized nations in private law concerning acquisition of property rights by occupation, as well as agreeing with that law in another respect. In private law, a natural person may

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[40]) "Considérant que, s'il est bien établi que les habitants de Saint-Eustache, possession néerlandaise, vont pêcher des tortues et cueillir des oeufs à l'île d'Aves, ce fait ne peut pas servir d'appui au droit de souveraineté, car il implique seulement une occupation temporaire et précaire de l'île, étant donné qu'il n'est pas, en l'espèce, la manifestation d'un droit exclusif, mais la conséquence de l'abandon de la pêche par les habitants des contrées voisines ou par son maître légitime.", Aves case, Lapradelle-P. 2-414; "Attendu que, depuis la découverte, le Portugal a, en tout temps, revendiqué des droits de souveraineté sur la totalité de la baie et des territoires riverains, ainsi que le droit exclusif d'y faire le commerce.", Delagoa case, Moore 5-4984; "This taking of possession consists in the act, or series of acts, by which the occupying State ... takes steps to exercise exclusive authority there.", Clipperton case, A.J.I.L. 26 (1932) - 393.

[41]) A.J.I.L. 22 (1928) - 877. See also the Delagoa case. About abandonment, see the Palmas case, the Greenland case, and the Clipperton case, wherein it was said: "There is no reason to suppose that France has subsequently lost her right by derelictio, since she never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.", A.J.I.L. 26 (1932) - 394.

[42]) Also in connection with the development of technique (sailing vessels and steam-ships, railways, etc.).

[43]) "If on the other hand the view is adopted thas discovery does not create a definitive title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.", Palmas case, A.J.I.L. 22 (1928) - 884.

acquire proprietory rights by occupation; in international law, a State may acquire territorial jurisdiction after effective occupation. In private law, the moment, at which the proprietory right is acquired or protected, is not unknown; in international law, the exact moment, at which the contested jurisdiction does belong definitely to the occupying State, is unknown and yet this moment is important, because, from that moment, the State may reject any claim of other States. In private law, the manifestation of the exercise of the proprietory right is irrelevant for the acquisition of that right; in international law, such a manifestation is an essential element in its acquisition. The expression 'inchoate' title does not bear the same meaning in private law as in international law, but, apart from these points of difference, it may be argued that both rules are derived from one general principle of law: *"quod enim nullius est, id ratione naturali occupanti conceditur"*.[44]) This principle may be called a "general principle of law recognized by civilized nations",[45]) it is not merely a "principle of private law".[46]) It would be a mistake to confuse, on the one hand, a general principle of law with a rule derived from that principle within a special law system (domestic law system, international law system),[47]) or, on the other hand, a positive rule applicable only in domestic law with a positive rule applicable only in international law.[48]) [49])

[44]) Gaius D. 41.1.3.

[45]) Cf. article 38,3 of the Statute of the Permanent Court of International Justice.

[46]) Dealing with these matters, H. Lauterpacht, in his Private Law Sources and Analogies of International Law, London 1927, p. 102, speaks of a "principle of private law". His contention made on p. 103/4, that "even dogmatic positivists admit that the private law origin of a particular rule does not constitute an obstacle to its recognition as a part of international law, provided that its adoption has been sanctioned by custom and actual observance", is not clear.

[47]) Concrete rules, not abstract principles, are applied by international tribunals.

[48]) "Il y a là des comparaisons dangereuses, et je dénonce sur ce point la confusion entre les règles techniques et les règles fondamentales. Il s'agit, en droit privé, d'une acquistion de propriété ou d'un droit réel, aboutissant nécessairement à un déplacement de droit. Il y a une injustice tolérée pour des raisons d'utilité publique: l'impossibilité, au bout d'un certain temps, de faire la preuve du droit et la nécessité de maintenir des situations acquises. En droit international, la question débattue est une question non de propriété, mais de souveraineté. Les raisons qui expliquent l'acquisition da la propriété privée ne sont pas valables. Il peut y en avoir d'autres, mais elles sont alors tirées du droit des gens. Je ne crois pas que l'on puisse utilement transposer ici les principes sur l'acquisition de la propriété, principes qui ne sauraient d'ailleurs être séparés d'une technique juridique assez compliquée.", G. Ripert: Les règles du droit civil applicables aux rapports internationaux, Recueil des Cours 44 (1933) - 632/3.

[49]) Reference: R. Ago: Il requisito dell'effettività dell'occupazione in diritto internazionale, Roma 1934; Annuaire de l'Institut de Droit International, 1887/8-243, 1888/9-173, 1908-159; T. W. Balch: The arctic and antarctic regions and the law of nations, A.J.I L. 4 (1910) - 265; J. Basdevant: Etude comparée de l'occupation, Paris 1903; F. Bleiber: Die Entdeckung im Völkerrecht, Greifswald 1933; C. Boockesteyn: De iuris gentium dominii acquirendi modo per occupationem, Lugd. Bat. 1742; A. Decencière-Ferrandière: Essay historique et critique sur l'occupation

The question may be raised whether an 'inchoate' territorial jurisdiction of State A may be lost by lapse of time, whereby State B may validly acquire jurisdiction over the same territory, in other words, whether prescription by adverse possession is recognized by international law. The crucial question in the occupation conflict was: at the critical moment, did a given territory belong to State A or was it *terra nullius?* Here the question is: does a given territory belong to State A or to State B? Prescription runs always against legal persons, and so, in these matters, a State, as person in international law, can only invoke prescription, if another State has some (possibly 'inchoate') jurisdiction over the disputed territory.[50])

The Mixed Arbitral Tribunal Bulgaria-Greece observed in an award given on February 24, 1927:

> Le droit international positif n'a pas encore établi de règle précise généralement adoptée ni sur le principe, ni sur la durée de la prescription;

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comme mode d'acquérir les territoires en droit international, R.D.I.L.C. 64 (1937) - 362, 624; L. Deherpe: Essai sur le développement de l'occupation en droit international, Paris 1903; K. Fiege: Der Gebietserwerb durch völkerrechtliche Okkupation, Leipzig 1908; J. Fischer Williams: Sovereignty, seisin and the League, British Yearbook 1926, p. 24; O. C. Galtier: Des conditions de l'occupation des territoires dans le droit international contemporain, Toulouse 1901; R. Genet: Notes sur l'acquisition par occupation et le droit des gens traditionnel, R.D.I.L.C. 61 (1934) - 285, 416; H. Gillmann: Die völkerrechtliche Okkupation, Wien 1915; J. Goebel: The struggle for the Falkland Islands, New Haven 1927; K. Heimburger: Der Erwerb der Gebietshoheit, 1888; F. A. von der Heydte: Discovery, symbolic annexation and virtual effectiveness in international law, A.J.I.L. 29 (1935) - 448; G. Jèze: Etude théorique et pratique sur l'occupation, Paris 1896; A. S. Keller, O. J. Lissitzyn and F. J. Mann: Creation of rights of sovereignty through symbolic acts, 1400-1800, New York 1938; W. Lakhtine: Rights over the Arctic, A.J.I.L. 24 (1930) - 703; Lyndley: The acquisition and government of backward territory in international law, 1926; M. de Martitz: Occupation des territoires, R.D.I.L.C. 19 (1887) - 371; Occupation as a title to territory, The Law Times, April 22, 1933, vol. 175, No. 4699, p. 300; A. Ribère: Les occupations fictives dans les rapports internationaux, Bordeaux 1897; Ch. Salomon: L'occupation des territoires sans maître, Paris 1889; W. Schultz: Der Gebietserwerb durch völkerrechtliche Okkupation, Leipzig 1909; J. B. Scott: Arctic exploration and international law, A.J.I.L. 3 (1909) - 928; W. Siebert: Begriff und Arten der Okkupation im Völkerrecht, Greifswald 1920; G. Smedal: De l'acquisition de souveraineté sur les territoires polaires, 1932; E. Tartarin: Traité de l'occupation, Paris 1873; R. Waultrin: La question de la souveraineté des terres arctiques, R.G.D.I.P. 15 (1908) - 78, 185, 401; E. Wolgast: Das Grönlandurteil des St. Int. Ger. vom 5. April 1932, Z. ö. R. 13 (1933) - 545, 751.

[50]) "On the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American Courts of Equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless, at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity.", Great Britain-U.S.A., arb., C. 18-8-1910, Report Nielsen p. 330, Survey No. 303.

> les décisions de jurisprudence et les opinions des auteurs ne sont pas davantage arrivées à des solutions concordantes. La prescription apparaît cependant comme une règle de droit positif admise par toutes les législations; elle n'est que l'expression d'un grand principe de paix qui est à la base du droit commun et de tous les systèmes de jurisprudence civilisés. La sécurité et la stabilité des affaires humaines exigent la détermination d'un délai, au delà duquel les droits et obligations ne peuvent plus être mis en cause. La difficulté d'administrer la preuve après l'expiration d'un certain laps de temps rendrait souvent incertaine et même impossible la reconnaissance du droit. La prescription, partie intégrante et nécessaire de tout système de droit, mérite en droit international d'être admise. Quant à la durée de cette prescription, aucune précision ne se trouve formulée à ce sujet; certains traités, conclus pour des cas analogues à la présente affaire, ont admis une durée de vingt ans. Le Tribunal arbitral ou une Cour d'arbitrage, constitué spécialement pour connaître de l'affaire sans aucune restriction, devrait nécessairement prendre en considération ces principes de droit international sur la prescription et chercher la solution adéquate à l'espèce qui lui est soumise.[51])

J. H. Ralston, Umpire of the Mixed Claims Commission Italy-Venezuela under Convention of February 13, 1903,[52]) dealing, not with prescription by adverse possession but with prescription of claims in international law, quoted an award of the Permanent Court of Arbitration, given on October 14, 1902,[53]) concerning the Pious Fund of the Californias, wherein it was held that

> the rules of prescription, belonging exclusively to the domain of civil law, cannot be applied to the present dispute between the two States in litigation.[54])

Umpire Ralston noted that

> the declaration of the Court had reference not to the principle of prescription, but to the rules with which civil law had surrounded it. A "règle", as we are told in Bourguignon and Bergerol's Dictionnaire des Synonymes, "est essentiellement pratique et, de plus, obligatoire...; il est des règles de l'art comme des règles de gouvernement", while principle (principe), "exprime une vérité générale, d'après laquelle on dirige ses actions, qui sert de base théorique aux divers actes de la vie, et dont l'application à la réalité amène telle ou telle conséquence". The Permanent Court of Arbitration has never denied the principle of prescription, a principle well recognized in international law, and it is fair to believe it will never do so. Such denial would tend to upset all government, since power over fixed areas depends upon possession sanctified by prescription, although the circumstances of its origin and the time it must run may vary with every case. ... But it remains true that international law writers have referred almost invariably to that form of prescription involved in the taking and possession of property known at one time as usucaption...[55])

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[51]) M.A.T. vol. 7, p. 51.
[52]) Survey No. 257.
[53]) Survey No. 245.
[54]) A.J.I.L. 2 (1908) - 901.
[55]) Ralston-D. p. 725/6. As to prescription of claims, two other decisions may be quoted: "On careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of opinion that by their decided weight—we might say by very necessity—

Indeed, many international law writers have stated that prescription by adverse possession is recognized in international law. For instance, J. Spiropoulos, in his Traité théorique et pratique de droit international public, writes:

> la prescription acquisitive est un des principes de droit qui, appliqués par les nations civilisées dans leur vie interne, font ... partie intégrante du droit international. Pour l'application du principe, il y a lieu d'emprunter les règles du droit interne, en ne retenant, cependant, que celles qui cadrent avec la nature spéciale des rapports internationaux (possession interrompue, etc.).[56])

P. A. Verykios, in his dissertation on La prescription en droit international public, says that

> la prescription, étant un principe généralement reconnu dans les législations internes des pays civilisés, fait partie ainsi du droit international positif en vertu de l'article 38,3 du Statut de la Cour Permanente de Justice Internationale, non parce qu'elle est reçue dans le droit interne de tel ou tel pays, mais parce que, étant reconnue par tous les pays, elle constitue un principe général du droit.[57])

M. L. Lauterpacht holds that

> prescription appears in international law either as a mode of original acquisition of territorial rights or as a rule limiting the time in which both contractual claims and those arising out of an international tort may be put forward. With regard to the first-mentioned aspect of the question, it appears that prescription has become a well-recognized rule of international law. ... Stubborn opposition against this rule of private law could only come from writers who emphasize the fundamental difference between international and private law.[58])

It has thus been contended, in decisions of international tribunals as well as in doctrine, that prescription is a 'rule of international law', a 'general principle of law', a 'principle of international law'. The question whether these contentions have, in truth, a legal foundation in international law, merits examination.

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prescription has a place in the international system, and is to be regarded in these adjudications. True, but few of them make reference to individual claims or to debts by one State on account of transactions with citizens of another State. But the principles recognized are general. Founded in nature, their application is imperative and broad as human transactions. They reach to debts necessarily, as Domat shows.", U.S.A.-Venezuela, arb., C. 5-12-1885, op. Little, Moore 4-4194/5, Survey No. 142; "Limitation will run against the Italian State as it ordains that prescription should run against an individual, and I do not see why these principles, which have been considered just in the internal civil law, should not be so considered in the life of nations, and why a claim of a civil nature only, and therefore essentially liable to prescription, must become unextinguishable thereby because it is converted into an international claim.", Italy-Venezuela, arb., C. 13-2-1903, op. Zuloaga, Ralston-D. p. 723, Survey No. 257.

[56]) Paris 1933, p. 178.

[57]) Paris 1934, p. 55.

[58]) Private law sources and analogies of international law, London 1927, p. 116, 117

As has been observed, prescription by adverse possession can only run against a State entitled to 'inchoate' or perfected jurisdiction over a given territory. With regard to the positive side of such jurisdiction, namely, that it should be exercised, it is difficult to imagine how this jurisdiction can be exercised over a given territory, while, at the same time, the possession of that territory by another State is 'undisturbed, uninterrupted and unchallenged', as prescription would require. In a boundary dispute between Mexico and the United States of America it was held by an International Boundary Commission in its award given on June 15, 1911 that

> without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the Commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title. Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted and unchallenged from the date of the Treaty of Guadalupe Hidalgo in 1848 until the year 1895, when, in consequence of the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and federal governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents...
>
> Another characteristic of possession serving as a foundation for prescription is that it should be peaceable. [59])

No rule derived from international custom could be constructed by virtue of which an inchoate or perfected state jurisdiction could be lost without the consent [60]) of the State, to which that jurisdiction belongs. Moreover, the lapse of time,[61]) after which the foreign State would have acquired territory and jurisdiction, is not determined by international law. 'Quant à la durée de cette prescription, the Mixed Arbitral Tribunal Bulgaria-Greece observed, aucune précision ne se trouve formulée à ce sujet'.[62]) The United States Supreme Court, applying international law in interstate disputes, stated in 1841

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[59]) A.J.I.L. 5 (1911) - 806, 807, Survey No. 300. The arbitrator in the Palmas case, cited above, alluded to prescription, without basing, however, his award on that invoked title. See in other sense: W. E. Beckett in Recueil des Cours 50 (1934) - 230.

[60]) It is clear that a State may waive its jurisdictions by treaty or agreement. However, this waiving cannot be presumed. Cf. military occupation (§ 9), which does no more transfer jurisdictions of the occupied State to the occupying State, unless by the treaty of peace.

[61]) **Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti,** Modestinus D. 41.3.3.

[62]) Likewise in the case of prescription of claims: "As it is a general rule that the term of a period of prescription does not commence to run until the day when the payment falls due and action for its recovery may be had, it would be necessary to prove (and the proof would always be difficult and uncertain) when these

> that the time necessary to operate as a bar in equity is fixed at twenty years, by analogy to the statute of limitations;... But it would be impossible with any semblance of justice to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals; and the boundary in question was in a wild unsettled country and the error not likely to be discovered until the lands were granted by the respective colonies, and the settlements approached the disputed line; and the only tribunal that could relieve after the mistake was discovered was on the other side of the Atlantic, and was not bound to hear the case and proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations make it equally evident that a possession so obtained and held by Massachusetts, under such circumstances, cannot give a title by prescription.[63])

Since it seems impossible to admit that prescription by adverse possession is an incident of international law,[64]) it is irrelevant to

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conditions occurred in the case of claims against governments. As there is not in international law an exact and generally accepted provision which establishes when and within what limits a credit becomes null and void through prescription, there cannot be a presumptive negligence on the part of the dilatory creditor, and the plea of prescription must be absolutely rejected.", Italy-Venezuela, arb., C. 13-2-1903, op. Agnoli, Ralston-D. p. 722, Survey No. 257; "The Umpire, while disallowing the claim, expresses no opinion as to the number of years constituting sufficient prescription to defeat claims against governments in an international court. Each must be decided according to its especial conditions.", idem: Ralston, Ralston-D. p. 730: "A right unasserted for over forty-three years can hardly in justice be called a 'claim'.", U.S.A.-Venezuela, arb., C. 17-2-1903, Ralston-D. p. 162, Survey No. 258; "There is, of course, no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal. Domestic statutes of limitation take away at the end of prescribed periods the remedy which a litigant has to enforce rights before domestic courts. ...From a conclusion to this effect it does not follow that international tribunals must always disregard all statutes of limitation prescribing reasonable periods within which remedies may be enforced before domestic tribunals.", Mexico-U.S.A., arb., C. 8-9-1923, op. Nielsen, G.P.O. 1927 p. 319, Survey No. 354.

In conventional law, no more unanimity exists on that point, cf. Honduras-Salvador, arb., C. 19-1-1895, La Fontaine p. 505, Survey No. 184, and Great Britain-Venezuela, arb., C. 2-2-1897, de Martens N R.G. 2-28-328, Survey No. 207.

[63]) Rhode Island-Massachusetts, 1841, 15 Pet. 273.

[64]) As to doctrine, see: G. Achenwall: Ius naturae, Gottingae 1781, vol. 1, § 241; D. Anzilotti: Cours de droit international, Paris 1929, p. 336/7; G. Ch. Bastineller: De eo, quod iustum et aequum videtur in praescriptione immunitatis ab oneribus publicis, Witt. 1740; A. von Bulmerincq: Das Völkerrecht oder das internationale Recht, Freiburg 1887, § 47, p. 286; A. Cavaglieri: Règles générales du droit de la paix, Recueil des Cours 26 (1929) - 405/7; P. Du Puy: Si la prescription a lieu entre les Princes souverains, Rouen 1670 (idem in: Traitez touchant les droits du roy tres-chrestien sur plusieurs estats et seigneuries possédées par divers Princes voisins, Paris 1655, p. 353/65); G. de Garden: Traité complet de diplomatie, Paris 1833, vol. 1, p. 397; K. Gareis: Institutionen des Völkerrechts, Giessen 1901, p. 88; J. E. Gunnerus: Praescriptionem non esse Iuris Naturalis, Jenae 1749; A. W. Heffter: Das Europäische Völkerrecht der Gegenwart, Berlin 1888, § 12; K. Heimburger: Der Erwerb der Gebietshoheit, Karlsruhe 1888, p. 141; D. F. Hoheisel: De fundamentis in doctrina de praescriptione et derelictione gentium tacita distinctius ponendis, Halae 1723; J. L. Klüber: Europäisches Völkerrecht, Schaffhausen 1851, §§ 6 and 125; J. M. Lampredi: Iuris publici universalis sive iuris naturae et gentium Theoremata, Florence 1793, vol. 3, § VIII, p. 146; F. von Liszt: Das Völkerrecht systematisch dargestellt, Berlin 1925, p. 241; T. Mamiani: D'un nuovo diritto Europeo, Turino 1859, p. 30; G. F. de Martens: Precis du droit des gens moderne de l'Europe, Paris 1864, vol. 1, § 70/1; A. Mérignac: Traité de droit public inter-

examine the question whether any general principle of law underlies the institute of prescription, from which principle positive rules would have been deduced in private law of civilized nations.[65])

Possession from time immemorial should not be confused with adverse possession. The one has nothing to do with the other: it does not create a new jurisdiction, but it only gives rise to a presumption, in the absence of evidence to the contrary, that the former jurisdiction was valid. It was held by an arbitral tribunal in a dispute between Austria and Hungary that

> la possession immémoriale est celle qui dure depuis si longtemps qu'il est impossible de fournir la preuve d'une situation différente et qu'aucune personne ne se souvient d'en avoir entendu parler. En outre cette possession doit être ininterrompue et incontestée. Il va sans dire qu'une telle possession devrait aussi avoir duré jusqu'à l'époque où il y a eu contestation et conclusion d'un compromis.[66])

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national, Paris 1907, vol. 2, p. 415/8; P. J. Neyron: Principes du droit des gens européen conventionnel et coutumier, Bronswic, 1783, §§ 292/7; E. Nys: Le droit international, Brussels 1912, vol. 2, p. 38/44; J. N. Pomeroy: Lectures on international law, Boston 1886, §§ 107/14; G. de Rayneval: Institutions du droit de la nature et des gens, Paris 1853, p. 155/6; A. Rivier: Principes du droit des gens, Paris 1896, vol. 1, p. 182/3; K. Strupp: Theorie und Praxis des Völkerrechts, Berlin 1925, p. 45; idem: Wörterbuch des Völkerrechts und der Diplomatie, Berlin 1929, vol. 3, p. 29 ("Verjährung"); E. von Ullmann: Völkerrecht, Tübingen 1908, § 92, p. 309.

About the denial of prescription of claims, see, apart from the quoted decision of the Permanent Court of Arbitration of 1902, the following cases: "I observe that a tribunal of equity cannot invoke prescription in order to evade obligations established by authentic documents, ... I affirm that prescription is not admitted in the juridical reports based on the ius gentium.", Italy-Venezuela, arb., C. 13-2-1903, op. Agnoli, Ralston-D. p. 720, 721, Survey No. 257; "Attendu, en effet, que les dispositions des lois nationales touchant la prescription d'une action ne s'appliquent dans la jurisprudence internationale qu'en tant qu'elles sont en conformité avec les dispositions du droit international ou qu'elles y suppléent.", Hungary-Kingdom of Serbians, Kroatians and Slovenians, M.A.T., 15-5-1929, vol. 9, p. 197/8; As to doctrine, apart from general works, see e.g.: Annuaire de l'Institut de Droit International, 1925, p. 1/49, 466/501, 1931 part I, p. 435, 441; A. Cavaglieri: Il decorso del tempo ed i suoi effetti sui rapporti giuridici internazionali, R.D D.I. 18 (1926) - 169; B. E. King: Prescription of claims in international law, British Yearbook 1934, p. 282.

65) September 13, 1902, R.D.I.L.C. 38 (1906) - 207, Survey No. 205. "In Bouvier's rights of the latter which form the ultimate object of international as well as of municipal law. We cannot reason always from the individual to the nation. Should we apply exactly the same rules to the nation which we apply to the citizen, we should often destroy, instead of conserve, the latter's immunities and rights. International prescription would not prevent a single war or the shedding of a single drop of blood. It would generally be invoked in the interest of power against the weak, of oppression against the oppressed.", J. N. Pomeroy: Lectures on international law in time of peace, Boston 1886, p. 131.

66) September 13, 1902, R.D.I.L.C. 38 (1906) - 207, Survey No. 205. "In Bouvier's Law Dictionary (Rawle's edition), title Prescription, we read: 'The doctrine of Immemorial Prescription is indispensable in public law. The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. All nations are bound by this consent since all are parties to it. None can safely disregard it without impugning its own title to its possessions. The period of time can not be fixed in public law as it can in private law; it must depend upon varying and variable circumstances.' ", Italy-Venezuela, arb., C. 13-2-1903, Ralston, Ralston-D. p. 727, Survey No. 257;

Acquiescence in possession [67]) is connected with the question of delimitation of territories.[68])

"The teachings of publicists and of international practice agree in recognizing the necessity of immemorial usage consisting both of an uninterrupted recurrence of accomplished facts in the sphere of international relations and of ideas of justice common to the participating States and based upon the mutual conviction that the recurrence of these facts is the result of a compulsory rule. No international custom showing that Roumania had abandoned her right of jurisdiction over the Galatz-Braila sector in favour of the European Commission of the Danube has been able to develop; since neither a recurrence of facts from immemorial times nor ideas of justice held in common (French text: conscience juridique commune) can be shown to exist.", P.C.I.J., Adv. Op. 8-12-1927, diss. op. Negulesco, Series B. No. 14, p. 105.

[67]) Some decisions of the United States Supreme Court may be quoted whereby attention should be paid to the relation possession-exercise: "More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin.", Rhode Island-Massachusetts, 1846, 4 How. 638; "No human transactions are unaffected by time. ...For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.", idem: 4 How. 639; "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.", Indiana-Kentucky, 19-3-1890, 136 U.S. 479/519 (333); "The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighbourhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it.", idem (336); "Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary.", Virginia-Tennessee, 3-4-1893, 148 U.S. 522; "The effect to be given to such facts as long-continued possession 'gradually ripening into that condition which is in conformity with international order' depends upon the merit of individual cases as they arise.", Maryland-West Virginia, 21-2-1910, 217 U.S. 44 (659); "The rule, long settled and never doubted by this court, is that long acquiescence by one State in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority.", Michigan-Wisconsin, 1-3-1926, 270 U.S. 308; "Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary.", Massachusetts-New York, 12-4-1926, 271 U.S. 95; "The general principle of public law that as between States long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of the rightful authority—a principle by which prescription founded on length of time is regarded as establishing an incontestable right—,...", Oklahoma-Texas, 11-10-1926, 272 U.S. 47.

Cf. also the rule "uti possidetis" of 1810, especially applied in Latin America: Colombia-Venezuela, arb., 16-3-1891, Moore 5-4858, Survey No. 121; Honduras-Nicaragua, arb., 23-12-1906. Descamps-R. 1906-1028. Survey No. 180; Bolivia-Peru arb., 9-7-1909, A.J.I.L. 3 (1909) - 1029, Survey No. 249; Colombia-Venezuela, arb., 24-6-1918 and 24-3-1922, ed. P. Attinger, Neuchâtel 1918 en 1922, Survey No. 320;

B. Delimitation

Since territory entitles a State to territorial jurisdiction, it is important to know exactly how far territory extends: for so far does territorial jurisdiction extend.

A territory can be delimited in point of space by reference 1. to foreign territory, 2. to the high seas, and 3. to the air above the territory. Delimitation of territory by reference to foreign territory is determined by boundaries considered as (land-, river-, lake-, etc.) lines, and by reference to the high seas (and air?) by boundaries considered as zones.[69]) The importance of this distinction between boundary lines and boundary zones will be shown presently.

Boundaries are fixed in various ways. In ancient times, they often were fixed by unilateral acts of the territorial sovereign as zones of defence, separating different peoples, etc., whereas, in modern times, this is generally effected by bilateral or multilateral acts of the territorial sovereign and foreign (neighbouring) States as lines. This determination is, in general, a result of political and technical operations in which juridical considerations play an unimportant part or no part at all.

The boundary line may be determined either in the treaty itself [70]) or by reference to some third party decision.[71])

Guatemala-Honduras, arb., 8-1-1932 and 23-1-1933, ed. Washington 1932 and 1933, Survey No. 393; Bolivia-Paraguay, arb., 10-10-1938, A.J.I.L. 33 (1939) - 180, Survey No. 407. See also: H. Accioly: Le Brésil et la doctrine de l'uti possidetis, R.D.I. 1935-1-36/45; E. Ayala: Le principe de l'uti possidetis et le règlement des questions territoriales en Amérique, R.D.I. 1931-2-441/56; B. Checa Drouet: La doctrina Americana del uti possidetis de 1810, Lima 1936.

[68]) Reference, general: Prescription in international law, Harvard Law Review 17 (1903/4) - 346; J. C. Reigersman: Dissertatio iuridica inauguralis de praescriptione iuris gentium sive immemoriali, Lugd. Bat. 1749; M. Soerensen: La prescription en droit international, Acta Scandinavica Iuris Gentium 1932, p. 145; P. A. Verykios: La prescription en droit international public, Paris 1934.

[69]) Cf. the "zone contiguë" between the marginal sea and the high seas. See also § 6.

[70]) Treaty of peace, treaty of cession, treaty of separation, etc.

[71]) It is rare that a boundary line be determined by a third party, apart from an arbitral decision in a boundary dispute. One example may be quoted: the boundary between Iraq and Turkey was fixed by decision of the Council of the League of Nations. In article 3,2 of the Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State, of the one part, and Turkey, of the other part, signed at Lausanne on July 24, 1923, it was stipulated that: "The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months. In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.", A.J.I.L. Off. Doc. 1924, p. 6. No agreement being reached, the dispute was referred to the Council, which asked the Permanent Court of International Justice an advisory opinion on the question: "What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne—is it an arbitral award, a recommendation or

Thereupon, the procedure of demarcation of the line consists in the elaboration of maps, a report on marking out the boundary line, a report of verifications, and a final protocol.[72])

Boundaries have, thus, a great political significance for the independent existence of States in the international community, as they assure both peace and security.[73]) But they have also a juridical significance. This appears particularly when a dispute arises between two States regarding a common boundary. Such a conflict may differ according as a boundary is considered as line or as zone.

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a simple mediation?" In its Advisory Opinion No. 12, given on November 21, 1925, the Court held, **inter alia**: "The Court is of opinion that in signing Article 3, paragraph 2, of the Treaty of Lausanne, the intention of the Parties was, by means of recourse to the Council, to insure a definitive and binding solution of the dispute which might arise between them, namely, the final determination of the frontier." (p. 19). "If the word 'arbitration' is taken in a wide sense, characterized simply by the binding force of the pronouncement made by a third Party to whom the interested Parties have had recourse, it may well be said that the decision in question is an 'arbitral' award." (p. 26). "But the fact that the 'decision to be reached' by the Council under Article 3 of the Treaty of Lausanne cannot be described as a recommendation within the meaning of Article 15 of the Covenant, does not imply that the applicability of the latter article in the present case is excluded. For the various and more extensive powers conferred by the Parties in this case on the Council merely complete the functions which it normally possesses under Article 15." (p. 28). "For these reasons, The Court is of opinion: 1) that the 'decision to be taken' by the Council of the League of Nations in virtue of Article 3, paragraph 2, of the Treaty of Lausanne, will be binding on the Parties and will constitute a definitive determination of the frontier between Turkey and Iraq." (p. 33). The Council delivered a decision on December 16, 1925, fixing the boundary (L.N.O.J. 1926, p. 191/2). See also the Resolution of the Council of March 11, 1926 (L.N.O.J. 1926, p. 503), and the Treaty between the United Kingdom and Iraq and Turkey regarding the settlement of the frontier between Turkey and Iraq, signed at Angora, June 5, 1926 (L.N.T.S. vol. 64, p. 379). See about this question: P. E. J. Bomli: L'affaire de Mossoul, Amsterdam 1929; H. W. Briggs: L'avis consultatif no. 12 de la C.P.J.I. dans l'affaire de Mossoul, R.D.I.L.C. 54 (1927) - 626/55; Foreign Affairs, "The Iraq dispute", 3 (1924/5) - 687; L. Le Fur: L'affaire de Mossoul, R.G.D.I.P. 33 (1926) - 60/103, 209/45; J. H. W. Verzijl: La classification des différends internationaux et la nature du litige anglo-turc relatif au vilayet de Mossoul, R.D.I.L.C. 52 (1925) - 732/59; J. B. Whitton: L'avis consultatif de la C.P.J.I. du 21 novembre 1925, R.G.D.I.P. 32 (1925) - 403/22; Q. Wright: The Mosul dispute, A.J.I.L. 20 (1926) - 153/64.

[72]) See Paul de Lapradelle: La frontière, Paris 1928. The different phases of fixation, description, and demarcation of a boundary were not clearly taken into account by Prof. Huber when he said in the Palmas case that: "Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.", A.J.I.L. 22 (1928) - 875.

[73]) It may be remembered that when a State addressed a demand to the League of Nations in order to become a member of the League, the Assembly, deliberating on such an admittance, examined the following points: "1) La demande d'admission dans la Société des Nations est-elle régulière? 2) Le pays est-il reconnu de iure ou de facto et par quels Etats? 3) Possède-t-il un gouvernement stable et des frontières définies? 4) Se gouverne-t-il librement? 5) Quels ont été ses actes et ses déclarations en ce qui concerne: a) ses engagements internationaux; b) les prescriptions de la Société relative aux armements?", J. H. W. Verzijl· Volken-

I. Boundary line

Two points will be examined, first, the nature of the conflict which may arise between two States regarding a boundary line, and, secondly, the settlement of such a conflict by international tribunals, in considering which attention should be paid to the question whether rules of international law are applicable in such matters.

The function of a boundary considered as a line is to separate the territory of a given State from the territory of a neighbouring State.[74]) One can only speak of a boundary line, if it separates a given territory from another given territory, not if it separates a given territory from a *terra nullius*. In international law, the territorial jurisdiction of a given State ends on the boundary line where the territorial jurisdiction of the neighbouring State begins. So, a conflict regarding a boundary line can only arise with respect to the delimitation of a given territory by reference to a foreign neighbouring territory, not with regard to the high seas, since no State (the other Party in the conflict) can have any jurisdiction in parts of the high seas. This conflict, consequently, bears no relation to the question *whether* territorial jurisdiction is vested in State A or in State B, but *how far* territorial jurisdiction appertains to State A, and, thus, to State B.[75])

Although the demarcation of a boundary is a political question, the settlement of a boundary conflict by an international tribunal is a juridical question. The following statement made by the United States Supreme Court could be applied to all settlements of such conflicts by international tribunals:

> Now a question of boundary between States is in its nature a political question, to be settled by compact made by the political departments of the

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bondsverdrag, 1925, Zwolle, p. 8. The Mixed Arbitral Tribunal Germany-Poland observed in a decision given on August 1, 1929: "Pour qu'un Etat existe et puisse être reconnu comme tel avec un territoire sans lequel il ne pourrait ni exister, ni être reconnu, il suffit que ce territoire ait une consistance suffisamment certaine (alors même que les frontières n'en seraient pas encore exactement délimitées) et que, sur ce territoire, il exerce en réalité la puissance publique nationale de façon indépendante. Nombreux sont les exemples de cas dans lesquels des Etats ont existé sans contestation, ont été reconnus et se sont reconnus mutuellement à une époque où la frontière entre eux n'était pas encore exactement fixée.", M.A.T. vol. 9, p. 346.

74) "The very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length.", Great Britain-Turkey, P.C.I.J., Adv. Op. 21-11-1925, Series B no. 12, p. 20.

75) "The locality of that line is a matter of fact, and, when ascertained, separates the territory of one from the other, for neither State can have any right beyond its territorial boundary. It follows that when a place is within the boundary, it is a part of the territory of a State; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the State makes some cession.", Rhode Island-Massachusetts, U.S.S.C., 1838, 12 Pet. 733.

> government. ... But, under our government, a boundary between two States may become a judicial question, to be decided in this court. And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the States that are parties to the suit. [76])

Paul de Lapradelle, in his dissertation on La frontière, writes: "l'arbitrage (de limites) n'a pas pour objet l'attribution d'une masse, mais l'identification d'une ligne." [77]) He referred to an article of Profs. L. Renault, A. de Lapradelle and N. Politis, wherein these writers observed:

> Dans l'action en revendication du particulier, le juge est en présence d'une masse de biens, dont il peut adjuger au demandeur, soit toutes les parties, soit quelques-unes seulement; dans la réclamation territoriale d'un Etat, l'arbitre est en face de deux interprétations différentes d'une même frontière. Entre particuliers, la mission du juge est d'attribuer une superficie; entre Etats, la mission de l'arbitre est de vérifier une ligne. L'arbitre ne statue pas sur le partage d'une masse territoriale considerée comme superficie, mais sur l'identité d'une frontière considérée comme ligne. La sentence ne porte pas directement sur une quantité, mais, directement, sur une identité. La quantité est susceptible de plus ou de moins. L'identité n'est susceptible que d'être ou de ne pas être. Une ligne peut être autre, elle ne peut pas être moindre. Une masse est divisible: une frontière ne l'est pas; et cela est si vrai qu'à la différence du droit privé, où le juge peut adjuger tout ou partie du fond revendiqué, l'arbitre, en matière de contesté territorial, n'a jamais le droit d'adjuger tout ou partie du territoire en litige, mais seulement de choisir entre deux ou plusieurs lignes déterminées à l'avance. ... L'arbitrage territorial ne se comporte pas comme le procès relatif à un fonds de terre. Il n'a pas pour objet l'attribution d'une masse, mais l'identification d'une ligne. [78])

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[76]) Florida-Georgia, 6-3-1855, 58 U.S. 478 (190). "We consider, therefore, the established doctrine of this court to be, that is has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding.", Virginia-West Virginia, U.S.S.C., 6-3-1871, 78 U.S. 39 (71); "When a dispute arises about boundaries, this court must determine the line; and, in doing so, must be governed by rules explicitly or implicitly recognized (Rhode Island-Massachusetts, 12 Pet. 657). It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals. ... The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an idependent State. See 1 Oppenheim, International Law, 293, §§ 242, 243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long, ..., yet the fixing of a definite time usually belongs to the legislature rather than the courts.", Missouri-Illinois, U.S.S.C., 19-2-1906, 200 U.S. 519/20.

[77]) Paris 1928, p. 142.

[78]) De l'influence sur la procédure arbitrale de la cession de droits litigieux, R.G.D.I.P. 13 (1906) - 319, 320.

It may be doubted whether this statement, that the arbitrator has only 'to identify a line' is of such general application as it is contended. From a theoretical point of view it may be true, but, in practice, the task of the arbitrator depends on the special agreement (and its spirit) as established by the contesting parties, by virtue of which he may be invested with a greater power than that of identifying a line, as appears from different arbitrations. It is important to call attention to the terms in which the dispute to be disposed of is described [79]) and to the rules which the arbitrator should apply.[80])

Moreover, the task of the international arbitrator in a boundary dispute should not be compared with the task of the civil judge in an 'action en revendication du particulier'. In a boundary dispute, the contesting parties do not put in a 'claim' to territory, and the decision of the arbitrator has no constitutive, but mere declarative character.

Are, then, general rules of international law applicable in conflicts concerning the delimitation of territory by reference to foreign territory? It may be that the arbitrator has to interpret a treaty ("what

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[79]) See the boundary arbitrations collected in my Survey (index: Boundary) under No. 2.

[80]) Survey under No. 4. b. It is interesting to compare this "law to be applied". Some examples may be quoted: "Il est entendu qu'en traçant cette frontière et en se conformant, autant que possible, à la description de cette ligne dans le présent Protocole, ainsi qu'aux points marqués sur les cartes ci-annexées, les dits Commissaires tiendront dûment compte des localités et des nécessités et du bien-être des populations locales.", No. 140; "Whenever the royal acts and dispositions do not define the dominion of a territory in clear terms, the arbitrator shall decide the question according to equity, keeping as near as possible to the meaning of those documents and to the spirit which inspired them.", No. 249; "Les Gouvernements du Pérou et de la Colombie soumettent sans appel à la décision de Sa Majesté le Roi d'Espagne la question de frontières pendante entre eux, laquelle sera résolue en ayant égard, non seulement aux titres et arguments de droit qui ont été ou seront présentés, mais aussi aux convenances des Hautes Parties Contractantes et en les conciliant de manière que la ligne frontière soit établie en droit et en équité.", No. 271; "The arbitrators shall determine the dividing line in accordance with existing treaties and the modifications established by the present Convention; but they may, leaving to one side strict law, adopt an equitable line in accordance with the necessities and convenience of the two countries.", No. 285; "The Court of Arbitration shall have power to determine how far the boundary line shall be considered to be, either wholly or in part, determined by the Boundary Treaty of 1661, together with the charts appertaining to the same, and how such boundary line is to be drawn, and also, in so far as the boundary line can be considered as undetermined by the Treaty and chart in question, shall have power to determine the same, having regard to actual conditions and the principles of international law.", No. 288; "In arriving at their decision the Commission will take into account ethnographical and historical principles and the state-political interests of each party (military, strategical, economical and communicational) and the interests of the local population.", No. 331; "The arbitrators will pronounce, having heard the Parties and according to their loyal knowledge and understanding, taking into consideration the experience accumulated by the Peace Conference and the advice of the military advisers to that organization.", No. 407, etc.

river was truly intended under the name of the river St. Croix", Survey No. 1), or to identify a part of a boundary line or some points of it ("to ascertain and determine the points .... shall cause the boundary", Survey No. 12; "designate the boundary through the said river, lakes and water communications", No. 13; "to cause such parts of the said boundary", No. 14, etc.). It is clear that, in such conflicts, general rules of international law do not come into play, but only considerations of fact, geography, technique, etc., with rules of treaty-interpretation. Such decisions do not have general, but special interest, for each individual case. Water boundaries, especially river boundaries, have played a more important part before international tribunals than land boundaries.[81]) In private law, it may be taken to be the rule that the dividing line between two land properties, separated by a stream or river, either lies in the middle of the stream or river, or is the border line. In international law, it appears from decisions of international tribunals that the same rule is not applicable in the case of a river separating two State territories.[82]) The

[81]) A curious statement was made by an arbitral tribunal in a conflict between Austria and Hungary. In its award given on September 13, 1902, the tribunal held: "L'opinion de l'expert, partagée aussi par le tribunal, s'appuie sur les dispositions du droit des gens qui ne reconnaît pas aux fleuves la qualité de frontière, mais l'accorde plutôt aux crêtes de montagnes.", R.D.I.L.C. 38 (1906) - 210, Survey No. 206. In a note, the tribunal referred to A. Rivier: Principes du droit des gens, Paris 1896, vol. 1, p. 166. It would be misleading, however, to hold Rivier responsible for such a statement. On page 166 he does not speak of natural frontiers in the juridical, but in the political sense. He writes: "On emploie aussi l'expression de frontières naturelles dans un autre sens, non juridique, mais politique, pour marquer l'extension qu'au gré de certains partis ou de certaines personnes un pays devrait prendre aux dépens d'autres pays. On a représenté, par exemple, les Alpes comme la frontière naturelle de l'Italie, le Rhin comme celle de la France. Appliquée à des chaines de montagnes, cette acceptation se rattache à une idée juste, à l'idée de défense, la frontière naturelle étant d'ordinaire la frontière militaire ou stratégique. Appliquée à des cours d'eau, elle n'a guère de valeur; si les fleuves et les grandes rivières séparent quelquefois les populations des rives opposées, ce sont surtout, cependant, des voies de communication, et d'autre part leur instabilité, leurs changements continuels en font souvent des frontières plutôt mauvaises." So, the statement of the tribunal must be considered as erroneous: 'dispositions du droit des gens' and political considerations are different things. It is also curious that J. H. Ralston in his The law and procedure of international tribunals (Stanford University Press 1926), p. 319, No. 567, reproduces this statement without any comment.

[82]) One arbitral award dealt with the question of a boundary as border line. It was held by General E. P. Alexander in the boundary dispute between Costa Rica and Nicaragua that: "En verdad, la palabra 'margen' con frecuencia se aplica en conversación vagamente al primer terreno seco que se levanta sobre el agua; pero la impropiedad de tal uso viene á ser aparente si nosotros consideramos los casos por donde los ríos inundan sus márgenes por muchas millas, ó donde sus lechos se secan totalmente. Tal uso indefinido de la palabra no es lícito en la interpretación de un Tratado que define una línea divisoria. El objeto de todo limite es asegurar la paz evitando los conflictos de jurisdicción. ... Claramente, pues, donde quiera que un Tratado designe, que la margen de un río será tomado como un límite, lo que es entendido no es la orilla temporal de tierra firme discubierta en estados extraordinarios de las aguas altas ó bajas, sino la margen en el

new *'formula'* of the so-called Thalweg was adopted in the following decisions:

> When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream", as applied to a navigable rivier, is the same as the middle of the channel of such stream. ... The middle of the channel of a navigable river between independent States is taken as the true boundary line from the obvious reason that the right of navigation is presumed to be common to both in the absence of a special convention between the neighbouring States, or long use of a different line equivalent to such a convention. ... The reason and necessity of the rule of international law as to the mid-channel being the true boundary line of a navigable river separating independent States may not be as cogent in this country, where neighbouring States are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law. [83])

> Conformément au sens précis de l'article 8 du traité d'Utrecht (April 11, 1713), la rivière Yapoc ou Vincent Pinson est l'Oyapoc qui se jette dans l'Océan immédiatement à l'ouest du Cap d'Orange et qui par son thalweg forme la ligne frontière. [84])

> If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep-water channel. The term "thalweg" is commonly used by writers on international law in definition of water boundaries between States, meaning, the middle, or deepest, or most navigable channel. And while often styled "fairway" or "midway" or "main channel", the word itself has been taken over into various languages. ... But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries, and other arms of the sea. As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep-water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. [85])

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estado ordinario de las aguas. Y cuando sea una vez definida per Convenio vendrá á ser permanente como la superficie del suelo en donde ella corre. Si la margen se retira, retrocede; si la margen aumenta hacia la corriente, avanza. Las llenas y vaciantes periódicas de las aguas no la afectan. Y esto es enteramente de acuerdo con el precepto de don Carlos Calvo ...: 'Las fronteras marcadas por corrientes de aguas están sujetas á variar cuando sus lechos reciben cambios.' 'En otras palabras es el lecho el que gobierna y no el nivel del agua en el, sobre él, ó bajo él.", award March 22, 1898, La Fontaine p. 534, Survey No. 197. Thus, such a boundary does not change by effect of inundation (cf. Inst. II.1.24: "Neque enim inundatio speciem fundi commutat et ob id, si recesserit aqua, palam est eum fundum eius manere, cuius et fuit."; see also Dutch Civil Code article 648), but well if the bed of the river itself changes.

[83]) Iowa-Illinois, U.S.S.C., 3-1-1893, 147 U.S. 7/8, 10.

[84]) Brazil-France, arb., 1-12-1900, La Fontaine p. 578, Survey No. 209.

[85]) Louisiana-Mississippi, U.S.S.C., 5-3-1906, 202 U.S. 49/50.

Whereas, the rule of drawing a median line midway between the inhabited lands does not find sufficient support in the law of nations in force in the seventeenth century; Whereas, it is the same way with the rule of the thalweg or the most important channel. [86])

The rule laid down in Iowa v. Illinois, 147 U.S. 1, was followed, and it was held that where the States of the Union are separated by boundary lines described as "a line drawn along the middle of the river", or as "the middle of the main channel of the river", the boundary must be fixed at the middle of the main navigable channel, and not along the line equidistant between the banks. We regard that decision as settling the law, and see no reason to depart from it in this instance. [87])

However, the general rule is that where a river, navigable or non-navigable, is the boundary between two States, and the navigable channel is not involved, in the absence of convention or controlling circumstances to the contrary, each takes tot the middle of the stream. [88])

It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Rio Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them (See Oppenheim, International Law, Vol. 1, pps. 314-322, 3rd. Ed. 1920; Fauchille, Droit International Public, Vol. 1, 2nd Part. pps. 453 et seq. 8th Ed. 1925; Moore, International Law Digest, Vol. 1, pps. 616 et seq; J. de Louter, Le Droit International Positif, Vol. 1, p. 445, Oxford Ed. 1920). [89])

When independence was achieved, the precepts to be obeyed in the division of the waters were those of international law. ... International law to-day divides the river boundaries between States by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks. Iowa v. Illinois, 147 U.S. 1, 7, 8, 9; Keokuk and Hamilton Bridge Co. v. Illinois, 175 U.S. 626, 631; Louisiana v. Mississippi, 202 U.S. 1, 49; Arkansas v. Tennessee, 246 U.S. 158, 169, 170; Arkansas v. Mississippi, 250 U.S. 39; Minnesota v. Wisconsin, 252 U.S. 273, 282. It applies the same doctrine, now known as the doctrine of the Thalweg, to estuaries and bays in which the dominant sailing channel can be followed to the sea. Louisiana v. Mississippi, supra; and compare 1 Halleck International Law, 4th ed., p. 182; Moore, Digest International Law Vol. 1, p. 617; Matter of Devoe Manufacturing Co., 108 U.S. 401; The Fame, 8 Fed. Cas. 984, Story J.; The Open Boat, 18 Fed. Cas. 751, Ware J. The Thalweg or downway, is the track taken by boats in their course down the stream, which is that of the strongest current. [90]) 1 Westlake, International Law, p. 144;

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[86]) Norway-Sweden, P.C.A., 23-10-1909, A.J.I.L. 4 (1910) - 232, Survey No. 288.
[87]) Arkansas-Mississippi, U.S.S.C., 19-5-1919, 250 U.S. 43.
[88]) Georgia-South Carolina, U.S.S.C., 30-1-1922, 257 U.S. 521.
[89]) Mexico-U.S.A., arb., C. 8-9-1923, G.P.O. 1929 p. 240, Survey No. 354.
[90]) In a boundary dispute between Great Britain and Portugal, the arbitrator, P. H. Vigliani, late Chief President of the Court of Cassation of Florence, observed in his award given on January 30, 1897: "But apart from the question whether the expression 'to follow a river upstream' be rigorously accurate from a philological point of view, it is certain that in the diplomatic and technical language of the delimitation convention, to follow a river, or stream, is made use of with the meaning to follow upstream as well as to follow downstream.", Moore 5-5014, Survey No. 183.

Orban, Etude de droit fluvial international, p. 343; Kaeckenbeeck, International Rivers, p. 176; Hyde, supra; Fiore, International Law Codified, § 1051; Calvo, Dictionnaire de Droit International. ...The underlying rationale of the doctrine of the Thalweg is one of equality and justice. "A river", in the words of Holmes, J. (New Jersey v. New York, 283 U.S. 336, 342), "is more than an amenity, it is a treasure". If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one State to the exclusion of the other. Considerations such as these have less importance for commonwealths or States united under a general government than for States wholly independent. Per Field, J. in Iowa v. Illinois, supra p. 10. None the less, the same test will be applied in the absence of usage or convention pointing to another. Iowa v. Illinois, supra. Indeed, in 1783, the equal opportunity for use that was derived from equal ownership may have had a practical importance for the newly liberated colonies, still loosely knit together, such as it would not have to-day. They were not taking any chances in affairs of vital moment. Bays and rivers are more than geometrical divisions. They are the arteries of trade and travel. The commentators tell us of times when the doctrine of the Thalweg was still unknown or undeveloped.

Anciently, we are informed, there was a principle of co-dominion by which boundary streams to their centre width were held in common ownership by the proprietors on either side. 1 Hyde, International Law, p. 243, § 137. Then, with Grotius and Vattel, came the notion of equality of division (Nys, Droit International, vol. 1, p. 425, 426; Hyde, supra, p. 244, citing Grotius, De Iure belli ac pacis, and Vattel, Law of Nations), though how this was to be attained was still indefinite and uncertain, as the citations from Grotius and Vattel show. Finally, about the end of the eighteenth century, the formula acquired precision, the middle of the "stream" becoming the middle of the "channel". There are statements by the commentators that the term Thalweg is to be traced to the Congress of Rastadt in 1797 (Engelhardt, Du Régime conventionnel des Fleuves Internationaux, p. 72; Koch, Histoire des Traités de Paix, vol. 5, p. 156), and the treaty of Lunéville in 1801. Hyde, supra, p. 245, 246, Kaeckenbeeck, International Rivers, p. 176; Adami, National frontiers, translated by Behrens, p. 17. If the term was then new, the notion of equality was not. There are treaties before the Peace of Lunéville in which the boundary is described as the middle of the channel, though, it seems, without thought that in this there was an innovation, or that the meaning would have been different if the boundary had been declared to follow the middle of the stream. Hyde, supra, p. 246. Thus, in the Treaty of October 27, 1795, between the United States and Spain (Article IV), it is "agreed that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the river Mississippi". Miller, Treaties and other international Acts of the United States of America, vol. 2, p. 321.

There are other treaties of the same period in which the boundary is described as the middle of the river without further definition, yet this court has held that the phrase was intended to be equivalent to the middle of the channel. Iowa v. Illinois, Arkansas v. Tennessee, Arkansas v. Mississippi, supra. See, e.g., the Treaty of 1763 between Great Britain, France and Spain, which calls for "a line drawn along the middle of the river Mississippi". The truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid. There was still a margin of uncertainty within which conflicting methods of division were contending for the mastery. Conceivably that is true to-day in unusual situations of avulsion or erosion. Hyde, supra, p. 246, 247. Even so, there has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. Unless prescription or convention has intrenched another rule (1 Westlake, Inter-

national Law, p. 146), we are to utilize the formula that will make equality prevail.

In 1783, when te Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. There was no possessory act nor other act of dominion to give to the boundary in bay and river below the circle a practical location, or to establish a prescriptive right. In these circumstances, the capacity of the land to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the Thalweg had only a germinal existence. The gap is not so great that adjudication may not fill it. Lauterpacht, The Function of Law in the International Community, pp. 52, 60, 70, 85, 100, 110, 111, 255, 404, 432. Treaties almost contemporaneous, which were to be followed by a host of others, were declaratory of a principle that was making its way into the legal order. Hall, International Law, 7th ed., p. 7. International law, or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the "imprimatur" of a court attests its jural quality. Lauterpacht, supra, pp. 110, 255; Hall, supra, pp. 7, 12, 15, 16; Jenks, The new Jurisprudence, pp. 11, 12. "The gradual consolidation of opinions and habits" (Vinogradoff, Custom and right, p. 21) has been doing its quiet work.

It is thus with the formula of the Thalweg in its application to the division between Delaware and New Jersey. ... The line of division is to be the centre of the main channel unless the physical conditions are of such a nature that a channel is unknown. ... but the inconvenience is a reason for following the Thalweg consistently through the river and the bay alike instead of abandoning it along a course where it can be followed without trouble. If the boundary be taken to be the geographical centre, the result will be a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. Minnesota v. Wisconsin, supra. If the boundary be taken to be the Thalweg, it will follow the course furrowed by the vessels of the world.[91])

By principles of international law, that apply also to boundaries between States constituting this country, it is well established that when a navigable stream is a boundary between States the middle of the main channel, as distinghuished from the geographical middle, limits the jurisdiction of each unless otherwise fixed by agreement or understanding between the parties. That rule rests upon equitable considerations and is intended to safeguard to each State equality of access and right of navigation in the stream. ... This court has held that, on occasion, the principle of the thalweg is also applicable to bays, estuaries and other arms of the sea. ... The doctrine of the thalweg is a modification of the more ancient principle which required equal division of territory and was adopted in order to preserve to each State equality of right in the beneficial uses of the boundary streams as a means of navigation.[92])

On behalf of Arkansas it is argued that the rule of the thalweg is of such dominating character that it meets and overthrows the defence of prescription and acquiescence. That position is untenable. The rule of the thalweg rests upon equitable considerations and is intended to safeguard to each State equality of access and right of navigation in the stream. Iowa v. Illinois, 147 U.S. 1, 7, 8; Minnesota v. Wisconsin, 252 U.S. 273, 281, 282; Wisconsin v. Michigan, 295 U.S. 455, 461; New Jersey v. Delaware, 291 U.S. 361, 380. The rule yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of prescription, the boundary no longer follows the thalweg but remains at the original line although now

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[91]) New Jersey-Delaware, U.S.S.C., 5-2-1934, 291 U.S. 378/85; A.J.I.L. 29 (1935) - 341/5.

[92]) Wisconsin-Michigan, U.S.S.C., 20-5-1935, 295 U.S. 461.

> on dry land because the old channel has filled up. Nebraska v. Iowa, 143 U.S. 359, 367; Missouri v. Nebraska, 196 U.S. 23, 36; Arkansas v. Tennessee, supra, pp. 173, 174. And, in turn, the doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. Here that fact has been established and the original rule of the thalweg no longer applies.[93])

In one quoted instance, the United States Supreme Court held (Iowa v. Illinois): "the reason and necessity of the *rule of international law* as to the mid-channel being the true boundary line of a navigable river separating independent States." It may be doubted, however, whether the *formula* of the Thalweg is, indeed, a 'rule of international law'. First, this *formula* was based on considerations of 'interest', 'equal right', 'right of navigation' (Iowa v. Illinois), 'free navigation' (Mexico v. U.S.A.), 'equality and justice', that another line would be 'inconvenient' (New Jersey v. Delaware), 'equitable considerations' (Wisconsin v. Michigan), etc. Secondly, in the last quoted case (Arkansas v. Tennessee), the Court held that the rule of the Thalweg yields to the doctrine that a boundary is unaltered by an avulsion,[94])

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[93]) Arkansas-Tennessee, U.S.S.C., 3-6-1940, A.J.I.L. 35 (1941) - 158.

[94]) "It is equally well-settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. ... These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel.", Nebraska-Iowa, U.S.S.C., 29-2-1892, 143 U.S. 359/70; in New Orleans v. United States the Court held: "The question is well-settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. ... This rule is no less just when applied to public than to private rights.", 10 Pet. 662. "The middle of the channel of the Missouri river, according to its course as it was prior to the avulsion of July 5th, 1867, is the true boundary line between Missouri and Nebraska.", Missouri-Nebraska, U.S.S.C., 19-12-1904, 196 U.S. 34/5, 37; "It is conceded, on both sides, that if this provision stood alone it would undoubtedly constitute a natural, or arcifinious, boundary between the two nations and that according to well-known principles of international law, this fluvial boundary would continue, notwithstanding modifications of the course of the river caused by gradual accretion on the one bank or degradation of the other bank; whereas, if the river deserted its original bed and forced for itself a new channel in another direction the boundary would remain in the middle of the deserted river bed.", Mexico-U S.A., arb., 15-6-1911, A.J.I.L. 5 (1911) - 793/4, Survey No. 300; "It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while, if the stream from any cause, natural or artificial, suddenly leaves

and that, in turn, this doctrine yields to the rule of acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. Prof. Huber observed in the Palmas case that "just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States." [95])

Thus, it may be argued that the *formula* of the Thalweg is not derived from a general principle of law. It seems to be adopted in international practice in order to facilitate the exercise of territorial jurisdiction in such a boundary zone rather than to fix a boundary line on which the territorial jurisdiction of the one State ends and at which the territorial jurisdiction of the other State begins.

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its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.", Arkansas-Tennessee, U.S.S.C., 4-3-1918, 246 U.S. 173 (A.J.I.L. 12 (1918) - 654).

[95]) A.J.I.L. 22 (1928) - 876, Survey No. 366. Cf. the following decisions: "Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary.", Virginia-Tennessee, U.S.S.C., 3-4-1893, 148 U.S. 522; "The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.", Louisiana-Mississippi, U.S.S.C., 5-3-1906, 202 U.S. 53/4; "It is well settled that governments as well as private persons, are bound by the practical line that has been recognized and adopted as their boundary. ... and that a boundary line between two governments which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by them for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the correct course; the line so established taking effect, in such case, as a definition of the true and ancient boundary.", Oklahoma-Texas, U.S.S.C., 11-10-1926, 272 U.S. 44; "For the concept of possession cannot be deemed to require a pedis possessio of every tract of land, and it is manifestly possible to have a recognition of a boundary, up to which it is assumed that administrative authority will be exercised as the opening up and development of territory within the boundary may require.", Guatemala-Honduras, arb., 23-1-1933, ed. Washington 1933 p. 37, Survey No. 393; "The truth indeed is that almost from the beginning of statehood Delaware and New Yersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain .. Acquiescence is not compatible with a century of conflict.", New Jersey-Delaware, U.S.S.C., 5-2-1934, 291 U.S. 376/7.

It may happen that the arbitrator is asked by the one Party to fix the disputed boundary as contended for by that Party, and by the other Party to fix the boundary as contended for by the latter. In a land boundary dispute between Italy and Switzerland concerning the definite fixing of the Italian-Swiss frontier at the place called: Alpe de Cravairola, the Umpire, George P. Marsh,—in the absence of an agreement between the two national Arbitrators—, followed a good method in his award given on September 23, 1874.[96])

> It is not clear, he said, whether the high contracting parties have intended to authorize the arbitrators to determine a frontier line with a view to mere convenience or whether it is expected that they should solve the question strictly according to the principles of right. It is therefore necessary to examine the considerations and arguments presented by them as well with regard to convenience as with respect to right. In the first place, therefore, considering simply convenience and leaving aside for the present the question of right...[97])

Having examined the arguments on both sides, he continued:

> If therefore it were clear that the arbitrators had the power to follow considerations of mere convenience, and if they or other arbitrators were authorized to fix a compensation for the present owners of the soil, the undersigned would not hesitate to say that the sovereignty and the ownership of the Alp ought to be ceded to Switzerland and a just equivalent granted to the actual residents for the transfer of the property. But the terms of the agreement do not in any way imply that such a power is conferred on the arbitrators; and the absence of any provision for the indemnity of the present owners of the soil induces the undersigned to believe that the high contracting parties did not intend to confer upon their arbitrators such authority. Furthermore, it is the opinion of the undersigned, that the extension of Swiss institutions, laws and administration to the territory while the owners of the same continued to be subjects of the Kingdom of Italy and to reside for the most part of the year in that country, would give rise to jealousies, dissensions and endless disputes, and would prove more hurtful to the peace and harmony of the two countries than the present unsatisfactory condition of the territory; and according to all probabilities would give rise to more international questions than any decision of this tribunal could settle within the limits of its competency. The question of convenience cannot therefore be considered as a fundamental basis for a decision, but can only serve as a subsidiary criterion in case of failure of the means to reach a well-grounded conclusion.[98])

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[96]) Moore 2-2028, Survey No. 107. The question submitted to the Arbitral Tribunal was formulated as follows: "Ought the frontier line above mentioned (which divides the Italian territory from the territory of the Swiss Confederation) to follow, according to the opinion of Switzerland, the summit of the principal chain by passing by the Crown of Groppo, Peak of the Croselli, Peak Pioda, Peak of the Furnace, Peak of the Monastery; or ought it, according to the opinion of Italy, to leave the principal chain at the specified summit of Sonnenhorn 2788 m in order to descend towards the stream of the valley of Campo by following the secondary ridge called Creta Tremolina (or Mosso del Lodano 2556 m on the Swiss map), to meet the principal chain at the Peak of the Frozen Lake?"

[97]) Moore 2-2030.

[98]) Moore 2-2033/4.

He then reached the question of mere right, considered the documents produced and the elements of fact, and held, *inter alia:*

> According to the principles of legal interpretation, the same word used more thans once by the same writer in the same document must be taken as having always the same meaning, unless the contrary appears from the context.[99])
>
> But these documents are not acts to which Val Maggia was an active party, and there is in them no positive proof of that kind, showing that the authorities of Val Maggia ever *exercised* or claimed jurisdiction over the Alp of Cravairola till 1641. It is a very probable supposition that in those rough times during which the law of the strongest generally prevailed, and few owners could show title-deeds to their lands or their jurisdiction, save the title of possession, the transferring of the soil to the inhabitants of Val Antigorio may have been considered as in itself implying also the sovereignty. And as far as we have the means of knowing it, Switzerland seems to have *acquiesced* in this point of view for more than a hundred years from the acquisition of Val Maggia.[100])

And he concluded that

> 1. the title of Italy over the said territory is established prima facie by the above considerations and therefore valid, unless it is refuted by proofs adduced by Switzerland.
> 2. Though reasons of convenience and of mutual interest advise the cession of the Alp Cravairola to Switzerland, nevertheless, for the reasons already expressed, the arbitrators would not be justified in assigning that territory to the Confederation merely on this basis alone.
> 3. The geographical principle of the political division of territories according to the watershed is not generally enough recognized in the practical international law of Europe to constitute an independent basis of decision in contested cases.[101])

He gave his desicion, using the expressions of the Agreement, in favor of Italy.[102])

In a dispute between Brazil and France concerning the boundaries between Brazil and French Guiana, the Arbitral Tribunal, *i.e.* the Swiss Federal Council, had a double task: first, it had to decide which was the river Yapoc or Vincent Pinson, secondly, it had to fix the interior limit of the territory.[103]) As to the first question, it was stipulated in the arbitral agreement that

> la République des Etats-Unis du Brésil prétend que, conformément au sens précis de l'article VIII du Traité d'Utrecht, la rivière Yapoc ou Vincent

[99]) Moore 2-2038.
[100]) Moore 2-2042.
[101]) Moore 2-2045.
[102]) Cf. Argentina-Brazil, arb., 5-2-1895, Moore 2-2020, Survey No. 157: "That the boundary line between the Argentine Republic and the United States of Brazil in that part submitted to me for arbitration and decision, is constituted and shall be established by and upon the rivers Pepiri (also called Pepiri-Guazu) and San Antonia, to wit, the rivers which Brazil has designated in the argument and documents submitted to me as constituting the boundary." (Moore 2-2022).
[103]) Survey No. 209.

> Pinson est l'Oyapoc qui débouche dans l'Océan à l'ouest du cap Orange et que la ligne de démarcation doit être tracée par le thalweg de cette rivière. La République française prétend que, conformément au sens précis de l'article VIII du Traité d'Utrecht, la rivière Yapoc ou Vincent Pinson est la rivière Araguary (Araouary) qui débouche dans l'Océan au sud du cap Nord et que la ligne de démarcation doit être tracée par le thalweg de cette rivière. L'arbitre résoudra définitivement les prétentions des deux parties en adoptant, dans sa sentence qui sera obligatoire et sans appel, une des deux rivières réclamées comme limite, ou, s'il le juge bon, quelqu'une des rivières comprises entre elles.

As to the second question:

> La République des Etats-Unis du Brésil prétend que la limite intérieure dont une partie a été reconnue provisoirement par le Convention de Paris du 28 août 1817, est le parallèle 2°24′ qui, partant de l'Oyapoc, va aboutir à la frontière de la Guyane hollandaise. La France prétend que la limite intérieure est la ligne qui, partant de la source principale du bras principal de l'Araguary, court à l'ouest parallèlement au fleuve des Amazones jusqu'à la rive gauche du Rio Branco et suit cette rive jusqu'à sa rencontre avec le point extrême de la montagne Acarary. L'arbitre décidera définitivement quelle est la limite intérieure en adoptant dans sa sentence, qui sera obligatoire et sans appel, une des lignes revendiquées par les deux parties ou en choisissant comme solution intermédiaire à partir de la source principale de la rivière adoptée comme étant le Yapoc ou Vincent Pinson jusqu'à la frontière de la Guyane hollandaise, la ligne de partage des eaux du bassin des Amazones, qui, dans cette région, est constituée en presque totalité par le faîte des monts Tumac-Humac. [104])

It should be noted that the arbitral tribunal had wide powers bestowed upon it: with respect to both questions, it was not obliged to decide upon an alternative, but it could, if desired, fix a third line. In its award, the arbitral tribunal held that the first question turned solely upon the interpretation of the terms 'Yapoc' or 'Vincent Pinson' of article 8 of the Treaty of Utrecht of April 11, 1713.[105]) As a result of this interpretation, the tribunal said that

> conformément au sens précis de l'article 8 du traité d'Utrecht, la rivière Yapoc ou Vincent Pinson est l'Oyapoc qui se jette dans l'Océan immédiatement à l'ouest du Cap d'Orange et qui par son thalweg forme la ligne frontière. [106])

Thus deciding in accordance with the Brazilian contention.

The second question, said the Tribunal, concerned only the examiniation of the validity of the contentions of each Party.[107]) It held that

> à teneur du traité d'arbitrage et en conformité des explications ci-dessus, la frontière extérieure ou maritime va jusqu'à la source principale de l'Oyapoc

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[104]) La Fontaine p. 564.
[105]) La Fontaine p. 571.
[106]) La Fontaine p. 578.
[107]) La Fontaine p. 571.

d'aujourd'hui, à moins que le Brésil ne puisse donner un fondement juridique à la prétention qu'il a articulée aux fins d'obtenir une frontière intérieure passant par le parallèle de 2°24'. Mais le Brésil n'a pas réussi à justifier sa prétention, par la raison que le seul argument qu'il invoque est tiré de la Convention de Paris du 28 août 1817; mais ce moyen, de l'aveu général, n'est pas définitif; il n'est que provisoire. Or comme il s'agit en l'espèce de la revendication d'une frontière définitive, la Convention de Paris doit être écartée du débat. Il y a lieu de remarquer en outre qu'une ligne frontière déterminée d'après un parallèle, constitue une limite artificielle, que l'arbitre ne saurait adopter si elle ne peut pas se fonder sur un titre. La limite intérieure que la France revendique dans le traité d'arbitrage, et qui devrait suivre une ligne parallèle au cours de l'Amazone jusqu'au Rio Branco, manque, elle aussi, de base juridique. Il est exact que la ligne parallèle qu'elle revendique aujourd'hui, la France l'a déjà en principe réclamée sous la forme de la "ligne de M. de Castries", mais pour que l'arbitre pût attribuer à la France cette ligne parallèle, il serait nécessaire qu'elle fût basée sur une Convention ou sur un autre acte incontestable. Ce titre fait défaut; car c'est à tort que la France estime que l'article 10 du traité d'Utrecht n'a cédé au Portugal qu'une bande de terres relativement étroite le long des bords, tandis que le vaste territoire qui se trouve derrière cette bande serait resté à la France. Le traité d'Utrecht se borne à édicter: „les deux bords de la rivière des Amazones, tant le méridional que le septentrional, appartiennent... à Sa Majesté Portugaise". Il ne parle pas d'une bande de terrain le long des bords, mais des bords même; il ne stipule pas davantage que le territoire que s'étend derrière la bande côtière appartient à la France, pas plus qu'il ne dit que les terres qui sont derrière les bords sont cédées au Portugal. Il dispose en termes identiques des deux bords; une interprétation restrictive du terme "bords" ne paraît admissible ni pour l'un ni pour l'autre côté du fleuve. L'allégation de la France qu'elle est fondée à revendiquer, en vertu d'une possession effective, les territoires qui sont limités par la frontière intérieure qu'elle propose, n'est pas confirmée par des faits. Par ces motifs, l'arbitre doit, en ce qui concerne la frontière intérieure, adopter la "solution intermédiaire" convenue par les parties dans l'article 2 du traité d'arbitrage.[108])

Accordingly, the Tribunal fixed a third line:

A partir de la source principale de cette rivière Oyapoc jusqu'à la frontière hollandaise, la ligne de partage des eaux du bassin des Amazones... forme la limite intérieure.[109])

Whereas, in the Cravairola case, the American Umpire held that the geographical principle of the political division of territories according to the 'watershed' ('ligne de partage des eaux') is not generally enough recognized in the practical international law of *Europe*, to constitute an independent basis of decision in contested cases, here, in the case of a boundary in *Brazil*, both parties stipulated that the arbitrator could choose the watershed, and the latter did so, accordingly. The same geographical 'principle' was applied in an award given on November 20, 1902 by King Edward VII of England concerning a boundary dispute between Argentina and Chile:

whereas, by an Agreement dated the 17th day of April, 1896, the Argentine Republic and the Republic of Chile, by their respective Representatives,

[108]) La Fontaine p. 578.
[109]) La Fontaine p. 578.

determined: That should differences arise between their experts as to the boundary-line to be traced between the two States in conformity with the Treaty of 1881 and the Protocol of 1893, and in case such differences could not be amicably settled by accord between the two Governments, they should be submitted to the decision of the Government of Her Britannic Majesty. And whereas such differences did arise, and were submitted to the Government of Her late Majesty Queen Victoria; And whereas the Tribunal appointed to examine and consider the differences which had so arisen, has—after the ground has been examined by a Commission designated for that purpose—now reported to Us, and submitted to Us, after mature deliberation, their opinions and recommendations for Our consideration;

Now, We, Edward, ... have arrived at the following decisions ...

art. 1. The boundary in the region of the San Francisco Pass shall be formed by the line of water-parting ...

art. 5. A more detailed definition of the line of frontier will be found in the Report. [110])

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[110]) Descamps-R. 1902 p. 372/3, Survey No. 198. The Report of the Tribunal to His Majesty held, inter alia: "The Argentine Government contended that the boundary comtemplated was to be essentially an orographical frontier determined by the highest summits of the Cordillera of the Andes; while the Chilean Government maintained that the definition found in the Treaty and Protocols could only be satisfied by a hydrographical line forming the water-parting between the Atlantic and Pacific Oceans, leaving the basins of all rivers discharging into the former within the coast-line of Argentina, to Argentina; and the basins of all rivers discharging into the Pacific within the Chilean coast-line, to Chile. We recognized at an early stage of our investigations that, in the abstract, a cardinal difference existed between these two contentions. An orographical boundary may be indeterminate if the individual summits along which it passes are not fully specified; whereas a hydrographical line, from the moment that the basins are indicated, admits of delimitation upon the ground." (Descamps-R. 1902 p. 377). "In short, the orographical and hydrographical lines are frequently irreconciliable; neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been made clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the Representatives of the two Republics. Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine—within the limits defined by the extreme claims on both sides—the precise boundary-line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration. We have abstained, therefore, from pronouncing judgment upon the respective contentions which have been laid before us with so much skill and earnestness, and we confine ourselves to the pronouncement of our opinions and recommendations on the delimitation of the boundary.", loc. cit. p. 378/9. These opinions and recommendations as to a third line were not in conformity with the arbitral agreement, which stipulated that: "should disagreements occur between the experts in fixing in the Cordillera of the Andes the dividing boundary-marks to the south of the 26° 52′ 45″, and should they be unable to settle the points in dispute by agreement between the two Governments they will be submitted for the adjudication of Her Britannic Majesty's Government, whom the Contracting Parties now appoint as Arbitrator to apply **strictly** in such cases the dispositions of the above Treaty and Protocol, after previous examination of the locality by a Commission to be named by the Arbitrator." Mr. A. Alvarez has criticized this award—which was accepted by both Parties—saying that 1) it was null and void owing to 'excès de pouvoir'; 2) it was not motivated, and 3) it accorded value, for the fixation of the boundary-line, to the territorial occupations by one of the contesting States during the dispute, R.G.D.I.P. 10 (1903) - 651/90.

It is obvious that this geographical principle is not a principle of law.

To conclude these examples of boundary arbitrations, in which the arbitrator was asked to pronounce on two alternative lines, a boundary dispute between Costa Rica and Panama should be mentioned, which the arbitrator, E. Douglass White, Chief Justice of the United States, settled by fixing, as to part, a third line.[111])

After examining those facts which were not in dispute, the arbitrator considered the propositions relied upon by the Parties. He said:

> It thus necessarily comes to pass that the fundamental question to be decided requires it to be determined whether the boundary line fixed by the previous arbitration (i.e. the Loubet award) was within the previous treaty or treaties. And if it was not, it must follow that its correction is within the scope of the authority conferred by this treaty; and if it was, no power here obtains to revise it. It is therefore true that the whole case comes down to the question stated: which is the scope and meaning of the prior arbitration treaty or treaties, and the solution of that inquiry will decide both of the propositions relied upon by Costa Rica, as well as all those insisted upon by Panama.[112])

Having considered the treaties of December 25, 1880, and of January 20, 1886, he established the following general conclusions:

> 1) That the controversy as to boundary between the parties which had existed for so many years was limited to a boundary line asserted by one party and to that asserted by the other, the territory in dispute between them, therefore, being that embraced between the lines of their respective asserted boundaries. 2) That the previous treaties of 1880 and 1886 by which the boundary dispute thus stated was submitted to arbitration, instead of going beyond the general principles of law which otherwise would have applied and conferring an extreme power to make an award wholly without reference to the dispute or the disputed territory, by their very terms confined the award to the matter in dispute and the diputed territory. 3) That as the line of boundary fixed by the previous award from Punta Mona to the Cordilleras was not within the matter in dispute or within the disputed territory, it results that such award was beyond the submission and that the arbitrator was without power to make it, and it must therefore be set aside and treated as non-existing.[113])

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[111]) September 12, 1914, A.J.I.L. 8 (1914) - 913, Survey No. 298. The arbitral Agreement stipulated: "The Republic of Costa Rica and the Republic of Panama, although they consider that the boundary between their respective territories designated by the arbitral award of His Excellency the President of the French Republic the 11th of September 1900 (award by E. Loubet, de Martens N.R.G. 2-32-411, Survey No. 118), is clear and indisputable in the region of the Pacific... have not been able to reach an agreement in respect to the interpretation which ought to be given to the arbitral award as to the rest of the boundary line; and for the purpose of settling their said disagreements agree to submit to the decision of the Honorable the Chief Justice of the United States, who will determine, in the capacity of arbitrator, the question: What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic made the 11th of September 1900?", A.J.I.L. Off. Doc. 1912 p. 1.

[112]) A.J.I.L. 8 (1914) - 932.

[113]) A.J.I.L. 8 (1914) - 935/6.

The only question thus was: what in other respects is the duty arising under the present arbitration from that situation? Stating that, as by the terms of the arbitral agreement the previous award was not set aside as a whole, and the power was only given to correct it in so far as it might be found to be without the authority conferred, the consequence was that all the results necessarily implied by the selection of the mountain line must be sustained although the mountain line itself was void for want of authority to make it, and that it was conceded by both parties that under the arbitral agreement there was the power and duty to substitute for the line set aside, a line within the scope of the authority granted under the previous treaty 'most in accordance with the correct interpretation and true intention' of the former award, the arbitrator considered, *inter alia:*

> No reason is afforded for departing from the river line thus shown to be the boundary line within the dispute between the parties by suggesting that some other river line would most comport with the interests of the two governments and best subserve the purpose of a boundary. To admit such considerations would in substance but be indulging in views of public policy and public interest which woud lead the mind away from the fundamental proposition which is here controlling, that is, the execution of the duty of arbitration which calls for judgment as to a dispute between the parties and affords no room for the application of discretion beyond the limit which that consideration necessarily imposes. Discretion or compromise or adjustment, however cogent might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate a matter in dispute according to the submission and to go no further. No more fatal blow could be struck at the possibility of arbitration for adjusting international disputes than to take from the submission of such disputes the element of security arising from the restrictions just indicated. Under these circumstances, since the duty here is not to elucidate and pass upon mere abstract questions of geography, nor to substitute mere expediency for judgment, but to determine what the river claimed as the boundary by Colombia, declared by her to be the boundary for so many years, tot which she asserted rights and which virtually was claimed to be the boundary upon which she relied prior to the entry into the previous treaty for arbitration and in the proceedings under that treaty, it is plain that the Sixaola-Yorquin is the line which should take the place of the line from Punta Mona along the counterfort of the Cordilleras to the point "beyond Cerro Pando", as declared in the previous award.[114])

From these conflicts concerning the delimitation of territory by reference to foreign territory established by boundaries considered as lines it follows:

1. that the settlement of such conflicts by an international tribunal

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[114]) A.J.I.L. 8 (1914) - 939/40. Panama refused to accept the award, which fixed as the boundary the dividing line between the disputed and undisputed territory, on the ground that the arbitrator has exceeded his jurisdiction in fixing a new line, which did not conform to their interpretation of the Loubet award. See Survey No. 298.

involves, for the greatest part, matters of a quite technical nature, which has no analogies in private law, but is the more of interest to the law which governs the relations between States;

2. that in cases in which the arbitrator has to interpret a boundary treaty only, no general rules of international law are applicable;

3. that in cases in which the arbitrator has to decide between two alternative lines, a threefold distinction should be made:

a. if he decides in favour of one of the two lines, in conformity with the arbitral agreement, his award will have but a relative value assessing the respective claims (valid or inchoate) of the Parties, so that his considerations in law cannot have a general character; [115])

b. if he decides upon a third line, in conformity with the arbitral agreement, the arbitrator cannot apply any general rule of international law in support of such a relatively speaking discretionary determination; [116])

c. if he decides upon a third line but not in conformity with the arbitral agreement, the award of the arbitrator, acting as 'amiable compositeur',[117]) has no juridical significance; [118])

4. that the *formulae* of the 'Thalweg' and 'watershed' are not rules of international law.

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[115]) Cf. the Cravairola case and the French Guiana case, first question.

[116]) Cf. the French Guiana case, second question, and the White award.

[117]) "The duty which Your Majesty has been pleased to undertake is one of pronouncing an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side. This is what we conceive to be the function of an 'amiable compositeur'.", Chile-U.S.A., arb., 5-7-1911, A.J.I.L. 5 (1911) - 1081, Survey No. 297.

[118]) Cf. the award of King Edward VII. See also some other cases, e.g.: Great Britain-U.S.A., arb., 10-1-1831, Moore 1-119, Survey No. 27. The arbitrator, King William I of the Netherlands, held: "Considérant que, d'après ce qui précède, les arguments allégués de part et d'autre, et les pièces exhibées à l'appui, ne peuvent être estimés assez prépondérants pour déterminer la préférence en faveur d'une des deux lignes, respectivement réclamées ... et que la nature du différend, et les stipulations vagues, et non suffisamment déterminées du traité de 1783 n'admettent pas d'adjuger l'une ou l'autre de ces lignes à l'une des dites parties, sans blesser les principes du droit, et de l'équité envers l'autre; considérant que la question se réduit, comme il a été exprimé ci-dessus, à un choix à faire du terrain ... et que, dès lors, les circonstances, dont dépend cette décision, ne sauraient être éclaircies davantage, au moyen de nouvelles recherches topographiques, ni par la production de pièces nouvelles; nous sommes d'avis qu'il conviendra d'adopter pour limite des deux Etats une ligne ..." (Moore 1-125). U.S.A. refused to accept the award. Honduras-Nicaragua, arb., 23-12-1906, Descamps-R. 1906 p. 1028, Survey No. 180. The arbitrator, King Alphons XIII of Spain, held inter alia: "Considérant que, de tout cet exposé, il résulte que le point qui répond le mieux au point de vue du droit historique, de l'équité et du caractère géographique pour servir de limite commune entre les deux Etats limitrophes sur la côte de l'Atlantique est le Cap de Gracias á Dios." (Descamps-R 1906-1035). Nicaragua refused to accept the award. King Victor Emmanuel III of Italy, arbitrator in the quoted British Guiana case, held: "That not even the limit of the zone of territory over which the right of sovereignty of one or of the other of the two Parties may be held to be established can be fixed with precision; That it cannot either be decided with certainty whether the right of Brazil or of Great

II. Boundary zone

A boundary is not only of importance in international law when it is considered as a line delimitating a territory by reference to foreign territory, but also when it is considered as a zone, and this for two reasons. First, in the present state of international law, a territory cannot be delimited, with regard to the high seas, by a well-fixed, definite, line; so it is more convenient to speak, in that respect, of a boundary zone. A boundary considered as such is irrelevant for an investigation into the conflict of state jurisdictions, which may arise with respect to such a boundary zone, since no State can have any jurisdiction over the high seas. Secondly, whereas a state-boundary is not necessarily, at the same time, a line determining proprietory interests, it may be said that a boundary zone exists between the territory of the one State and the territory of the neighbouring State: a third international zone within a double national zone. Jurisdictions over such a zone may be mixed, established by bilateral acts, giving rise to special boundary relations.[119]) In private law, on the contrary, relations between neighbours bear no contractual character. Conflicts of such jurisdictions will not be dealt with here owing to their conventional character. However, the exercise of state jurisdictions in boundary zones may give rise to conflicts, some of which will come under consideration in the next paragraph concerning the exercise of territorial jurisdiction over international rivers (whether or not they be also boundary rivers), and in paragraphs 6 and 9 concerning the exercise of personal and governing jurisdiction in the marginal sea.

It will become apparent from this paragraph, that rules of private law governing occupation, prescription by possession, boundaries as mid-channel, or border-lines, relations between neighbours, cannot be transmitted as such into international law; that, in an occupation dispute, the question of attribution of territorial jurisdiction to

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Britain is the stronger; In this condition of affairs, since it is our duty to fix the line of frontier between the dominions of the two Powers, We have come to the conclusion that, in the present state of the geographical knowledge of the region, it is not possible to divide the contested territory into two parts equal as regards extent and value, but that it is necessary that it should be divided in accordance with the lines traced by nature, and that the preference should be given to a frontier which, while clearly defined throughout its whole course, the better lends itself to a fair division of the disputed territory." (De Martens N.R.G. 2-32-489, Survey No. 240). The award, accepted by both Parties, was severely criticized. A good method was followed by Alexander III, Emperor of Russia, who, as arbitrator in a boundary dispute between France and the Netherlands, declined to arbitrate because the terms of the arbitral agreement were too narrow Then a new agreement was signed giving him larger powers, which, however, the Czaar dit not use. See Survey No. 153.

[119]) 'Régime des frontaliers', custom, police, etc. See Paul de Lapradelle, La Frontière, Paris 1928, Part II, 'Le voisinage'.

one of the contesting States is largely dependent on the other question, whether that jurisdiction has been effectively exercised; that the same rule of international law may be upheld in a boundary dispute, as Prof. Huber observed in the Palmas case: "If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as *e.g.*, in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territoral sovereignty";[120]) that decisions and doctrine on prescription learns, that territorial jurisdiction cannot vanish without the consent of the territorial sovereign, for, existing conditions should be maintained, as was held by the Permanent Court of Arbitration in the Grisbadarna case: "It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.",[121]) and by the United States Supreme Court: "There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life".[122]) Each State should have an maintain its own territory, and, thus, have and exercise its territorial jurisdiction. To what extend international law regulates that exercise will be examined in the next paragraph.

Reference: V. Adami: National frontiers in relation to international law, London 1927; J. Ancel: L'évolution de la notion de frontière, Bulletin of the International Committee of Historical Sciences, 5 (1933) - 538; A. Cavaglieri: Frontiere, Milano 1905; J. W. Garner: The doctrine of the Thalweg as a rule of international law, A.J.I.L. 29 (1935) - 309/10; Th. H. Holdich: Political frontiers and boundary making, London 1916; C. C. Hyde: Notes on rivers as boundaries, A.J.I.L. 6 (1912) - 901/9; idem: Maps as evidence in international boundary disputes, A.J.I.L. 27 (1933) - 311; P. de Lapradelle: La frontière, Paris 1928; C. A. Menius: Dissertatio inauguralis de finibus territorii, Lipsiae 1740; E. Nys: Rivières et fleuves frontières. La ligne médiane et le thalweg. Un aperçu historique, R.D.I.L.C. 33 (1901) - 75/88; G. de Portugal de Faria: Considérations sur les limites des Etats, Paris 1890; M. Sibert: La question des frontières en droit international, Académie diplomatique internationale, Séances et travaux, 1928 p. 50; F. Turner: The significance of the frontier in American history, Annual report of the American Historical Association, Washington 1893; H. Wittmaack: Die nordamerikanische Rechtsprechung über den

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[120]) A.J.I.L. 22 (1928) - 877. It may be remembered that, in this case, the agent for the Netherlands was Prof. C. van Vollenhoven, of Leiden University, and for the U.S.A. Mr. F. K. Nielsen. Cf. the Cravairola case and the decisions of the United States Supreme Court.

[121]) Norway-Sweden, 23-10-1909, A.J.I.L. 4 (1910) - 233, Survey No. 288.

[122]) Virginia-Tennessee, 3-4-1893, 148 U.S. 524.

Talweg als Grenzlinie, wenn ein schiffbares Gewässer die Grenze zwischen zwei Staaten bildet, Archiv für öffenltiches Recht, 22 (1907) - 176.

As to the Netherlands: W. A. F. Bannier: De landgrenzen van Nederland (tot aan den Rijn), Leiden 1900; H. Emmer Jr.: De grenzen van Nederland (van de Wielingen tot aan den Rijn), Haarlem 1937; E. M. Klingenburg: Die Entstehung der deutsch-niederländischen Grenze, 1813-1915, Leipzig 1940; A. M. Stuyt: Grensproblemen, Rechtsgeleerd Magazijn-Themis 1943 p. 189/222.

§ 3. EXERCISE OF TERRITORIAL JURISDICTION

International law, as has been observed, contains rules concerning the attribution of territorial jurisdiction. If, according to such rules, territorial jurisdiction belongs to a given State, the manner of exercise of that jurisdiction—just as the exercise of every state jurisdiction —is, in the first place, not a matter of international law but of domestic law. However, in the exercise of territorial jurisdiction a conflict may arise with the exercise of jurisdiction by another foreign State. In such a case, the question arises whether a general rule of international law limits the exercise of one jurisdiction in favour of the other, or whether territorial jurisdiction, in the absence of a general or conventional rule, may be exercised in a discretionary manner. In this paragraph, two aspects of the exercise of a State's territorial jurisdiction will be examined, namely, *A* the question of international rivers, and *B* that of state succession.

A. International rivers

If jurisdiction belongs to a State over its territory, that State also enjoys jurisdiction over rivers flowing within that territory. It follows that it may lawfully exercise its territorial jurisdiction over such rivers.[1]) As to the latter, a distinction should be made:
1. if a river flows wholly within a state territory, the territorial sovereign may exercise jurisdiction over such a national river in a discretionary manner: no conflict can arise between that State's

[1]) "Chaque Etat riverain conserve ses droits souverains sur les parties des fleuves internationaux soumises à sa souveraineté, dans les limites établies par les stipulations de ce règlement et les traités ou conventions.", article 28 of the Projet de règlement international de navigation fluviale, adopted by the Institut de Droit international in its session at Heidelberg, September 1887, Annuaire de l'Institut 1887/8 p. 186. It goes almost without saying that such conventions of navigation (and commerce) have but a declarative character when they enunciate this principle: "For the convenient use of navigable rivers by nations bordering upon them, treaties have been usually made, specifying rules and regulations in reference to their use; but it is well settled that such treaties recognize and sustain the right of use, and do not originate it.", Great Britain-U.S.A., arb., C. 8-2-1853, Op. N. G. Upham (Enterprise case), Moore 4-4358, Survey No. 47. Cf. the United States Supreme Court in U.S.A. v. Utah: "As the court said, in Packer v. Bird (137 U.S. 661, 667): 'It is, indeed, the susceptibility, to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or soils under them'.", 13-4-1931, 283 U.S. 82/3.

territorial jurisdiction and the jurisdiction of a foreign State.[2]) In confederate States, two jurisdictions should be taken into account: the general jurisdiction of the federal Government and the special jurisdiction of the riparian State; [3])

2. if a river separates territory A from territory B, State A may exercise its territorial jurisdiction as far as the line at which the boundary has been fixed (see § 2, B., I), and State B likewise;

3. if a river traverses a given territory, the territorial sovereign may exercise territorial jurisdiction over that portion of the river, which flows within the territory.

In cases 2 and 3, a conflict may arise between the jurisdiction of the territorial sovereign and of a) the neigbouring State or other riparian States, b) non-riparian States, c) an international river Commission empowered with special river powers.[4]) Only conflicts under a) and b) will be considered here.

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[2]) "And whereas the right to open and close, as a sovereign on its own territory, certain harbors, ports, and rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan Government, much less this right can be denied when used in defence not only of some fiscal rights, but in defence of the very existence of the Government; and whereas the temporary closing of the Orinoco River (the so-called 'blockade') in reality was only a prohibition to navigate that river in order to prevent communication with the revolutionists in Ciudad Bolívar and on the shores of the river, this lawful act by itself could never give a right to claims for damages to the ships that used to navigate the river.", U.S.A.-Venezuela, arb., C. 17-2-1903, Barge, Ralston-D. p. 95/6, Survey No. 258; "... an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State.", P.C.I.J., Judg. no. 1, p. 22.

[3]) As to the German Empire, Mr. Schulze observed at the quoted Heidelberg session of the Institut de Droit international, with respect to the river Weser (see about that river: P. Morgan Ogilvie: International waterways, New York 1920, p. 256/7): "Ici, il faut distinguer: c'est un fleuve commun vis-à-vis de l'empire et des autres Etats étrangers, parce que, selon la constitution allemande, la législation et l'inspection suprêmes sont de la compétence de l'empire. Un Etat particulier ne peut conclure une convention par rapport à un tel fleuve. Pour des Etats confédérés, il faut donc toujours tenir compte des deux souverainetés, et non seulement de celle de l'Etat particulier.", Annuaire 1887/8 p. 168. As to Switzerland, cf. Max Huber: Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen, Z. f. V. 1 (1907) - 29/55, 159/217. As to the U.S.A., cf. Kansas v. Colorado, 206 U.S. 86; U.S.A. v. Utah, 283 U.S. 75; U.S.A. v. Oregon, 295 U.S. 14.

[4]) "Roumania exercises power as territorial sovereign over the maritime Danube in all respects not incompatible with the powers possessed by the European Commission under the Definitive Statute. When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them. As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.", P.C.I.J., Adv. Op. No. 14, 8-12-1927, concerning the jurisdiction of the European Commission of the Danube between Galatz and Braila, Series B, p. 63/4. See also Judgment No. 16 (Series A No. 23, 10-9-1929) of the same Court in the case relating to the territorial jurisdiction of the international Commission of the river Oder.

I. Riparian States

A river separating or traversing more than one state territory is the subject matter of the exercise of the riparian States' territorial jurisdictions. A conflict between the exercise of these jurisdictions may concern, in the first place, the navigation of the river. "The conception of navigation, said the Permanent Court of International Justice, includes, primarily and essentially, the conception of the movement of vessels with a view to the accomplishment of voyages. .... The second idea which the conception of navigation comprises is that of contact with the economic organization and with the means of communication of the country reached by navigation. Ports are precisely the means of establishing such contact. In this connection a distinction must be drawn between, on the one hand, everything connected with 1) vessels situated in ports, such as the conditions under which they must take or shift their moorings, their position alongside quays, their admission to inner docks, or the manoeuvres necessary for this purpose, and 2), on the other hand, the loading or unloading of ships, the warehousing of goods, access to railways, etc." [5]) The question arises whether one riparian State, in the exercise of its territorial jurisdiction, is obliged, in the absence of conventional rules, to grant freedom of navigation to other riparian States by virtue of a general rule of international law.

"Freedom of navigation, said the Permanent Court of International Justice in its advisory Opinion No. 14, regarding navigation as the movement of vessels, must be assured by the European Commission on the whole river, including the portions of the river in the neighbourhood of ports or which actually constitute a port. .... The freedom of navigation which is the duty of the European Commission to assure therefore covers not only shipping passing through a sector of the river corresponding to a port, but also shipping arriving in or leaving a port. This point of view.... is the only one in conformity

[5]) Advisory Opinion No. 14, Series B p. 64, 65. About navigability, the United States Supreme Court held: "In the Daniel Ball, 10 Wall. 557, 563, the court said: 'Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' (And in another case) '... and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.' ", U.S.A.-Utah, 13-4-1931, 283 U.S. 76; "It is true that whether a stream is navigable in law depends upon whether it is navigable in fact. ...But a court may take judicial notice that a river within its jurisdiction is navigable.", Arizona-California, 18-5-1931, 283 U.S. 452. Cf. Germany-Venezuela, arb., C. 13-2-1903, Op. Zuloaga, Ralston-D. p. 611, Survey No. 256.

with the principle of freedom of navigation as understood in the instruments relating to the maritime Danube. .... Freedom of navigation is incomplete unless shipping can actually reach the ports under the same conditions. The Commission's powers therefore extend to navigation into and out of the port, as well as through the port." [6]) In the Oscar Chinn case between Belgium and Great Britain, the same Court held: "According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers. From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also. But it does not follow that in all other respects freedom of navigation entails and presupposes freedom of commerce." [7])

It may be that this 'freedom of navigation' [8]) is regarded as a right to navigation for the one State and as an obligation to grant this navigation for the other State, it seems, nevertheless, that this delicate question is more complex. If it is true that a riparian State should be obliged, even in the absence of a conventional rule, to grant navigation in that portion of the river, which flows through its territory, that State may undoubtedly exercise its police powers with regard to foreign navigation, as was confirmed by the General Claims Commission Mexico-U.S.A., under Convention of September 8, 1923, in the James H. McMahan case:

[6]) P. 65.

[7]) 12-12-1934, Series A/B No. 63, p. 83.

[8]) "In conformity with the provisions of the first Peace of Paris of May 30th, 1814, the Final Act of the Congress of Vienna of June 9th, 1815, provided that the Powers whose territories were separated or traversed by the same navigable river should regulate all that regarded its navigation by common consent, and should for this purpose name commissioners who should adopt as the basis of their proceedings certain principles laid down in the Act itself. The first of these was the principle that the navigation of such rivers along their whole course, from the point where each of them became navigable to its mouth, should be entirely free, and should not, in respect of commerce, be prohibited to any one, subject to uniform regulations of police. The rest of the principles mainly related to uniformity of navigation dues, and the establishment of a special service for the collection of such dues, the exclusion of national customs houses from interfering in the matter of navigation dues or from throwing obstacles in the way of navigation, the maintenance of navigable channels, and the keeping of towing paths in good repair, and the establishment of regulations of police alike for all, and as favourable as possible to the commerce of all nations. The arrangements, once settled, were not to be subject to change, except with the consent of all riparian States.", P.C.I.J., Adv. Op. No. 14, p. 38, This freedom of navigation has been expressed in many treaties and conventions (see the very extensive report of Mr. James Valloton on the Régime de la navigation fluviale en droit international, Annuaire de l'Institut de Droit international, 1929-1-228/383), and in draft conventions (see the same Annuaire 1887/8 p. 182, article 3, 1934 p. 714, article 2, A.J.I.L., Off. Doc., Spec. Number, 1926 p. 339, article 2).

It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Rio Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them. (See Oppenheim, International Law, Vol. I, pps. 314-322, 3rd. Ed. 1920; Fauchille, Droit International Public, Vol. 1, 2nd Part. pps. 453 et seq., 8th Ed. 1925; Moore, International Law Digest, Vol. 1, pps. 616 et seq.; L. de Louter, Le Droit International Positif, Vol. 1 p. 445, Oxford Ed. 1920.) The Congress of Vienna of 1815 fixed the free navigation of certain rivers, subject to police regulations. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, article 26; Treaty of June 15, 1845, article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation of international rivers, applicable to rivers separating two States as fell as those traversing several States, in which the right of the riparians to exercise police power over the streams is recognized.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, some police powers, at least, over the course of the Rio Grande, and is does not appear excessive or contrary to the right of free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defence, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts. [9])

The extension of this right of exercise of the police power when confronted with the principle of free navigation being 'a matter as yet not defined by theory or precedent',[10]) it may, perhaps, be argued that, between riparian States, reciprocal rights and duties exist, namely, for the one State, a right to exercise police powers [11]) and a duty to grant navigation, and, for the other State, a duty to submit to police regulations and a right to navigation. The existence of these reciprocal rights and duties may be based on the community of interest of riparian States in a navigable river. The Permanent

[9]) G P.O. 1929 p. 240/1, Survey No. 354.

[10]) "Il est impossible, en présence des faits cités, de prétendre qu'à présent les principes de droit international sur cette matière (i. e.: navigation fluviale) soient reconnus et pratiqués uniformément sur tous les fleuves internationaux. Au contraire, il faut reconnaître qu'il existe jusqu'à ce jour une divergence assez essentielle parmi les hommes d'Etat et les jurisconsultes les plus compétents, sur la portée de ces principes et le mode de leur application. Il y a des fleuves à l'égard desquels ils n'ont reçu aucune application; il y a d'autres qui, étant juridiquement dans les mêmes conditions, sont néanmoins soumis à des régimes essentiellement différents", Mr. de Martens in Annuaire de l'Institut, 1885/6 p. 279.

[11]) "River police... essentially comprises... the regulation of navigation as far as the movement of ships on the river is concerned.", P.C.I.J., Adv. Op. No. 14, p. 49.

Court of International Justice observed in its quoted Judgment No. 16:

> It may well be admitted, as the Polish Government contend, that the desire to provide the upstream States with the possibility of free access to the sea played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers. But when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others. [12])

And Prof. D. Anzilotti stated in the Annuaire de l'Institut de Droit international, Oslo session:

> Si les Etats riverains d'un soi-disant fleuve international n'ont aucun devoir de l'ouvrir à la navigation des Etats tiers, sauf dans les cas sus-indiqués (*i.e.:* navigation maritime empruntant une voie fluviale, stipulations dans une convention), ils ont par contre le devoir réciproque de permettre la navigation des autres Etats riverains dans la partie du fleuve qui est soumise à la souveraineté de chacun d'entre eux. C'est dans ce sens, à savoir qu'un Etat riverain ne peut empêcher le passage inoffensif, dans la portion du fleuve qui lui appartient, des navires, bateaux, radeaux, etc., relevant d'un autre Etat riverain, que la liberté de navigation sur les fleuves, revendiquée depuis longtemps, peut être considérée comme faisant partie du droit international commun. Et je ne doute pas qu'un Etat d'aval qui prétendrait interdire aux bateaux d'un Etat situé en amont le passage sur le fleuve pour se rendre dans les ports d'un autre Etat riverain, ou qui prétendrait interdire aux bateaux d'un Etat situé en aval le passage pour se rendre dans un port d'un Etat d'amont, agirait à l'encontre de ses devoirs internationaux, même en l'absence d'un traité spécial. Ce n'est pas nécessaire d'exposer longuement les raisons pour lesquelles la liberté de navigation ainsi comprise doit être considérée comme un principe reconnu et sanctionné par le droit international en vigueur. ... La base naturelle de cette conviction n'a guère besoin d'être rappelée; elle a trouvé depuis longtemps son expression dans l'idée de la communauté fluviale, idée qui, pour discutable qu'elle soit au point de vue juridique, n'exprime pas moins une réalité de fait indéniable et dont le droit a dû tenir compte. [13])

These reciprocal rights and duties extend to the whole navigable course of the river,[14]) as a common highway.[15])

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[12]) Series A No. 23, p. 26/7. "It is apparent that the standard which clearly determines the legitimate needs of the riverain countries...", Allied Powers-Central Powers, arb., 2-8-1921, Ed. Paris 1921 p. 40, Survey No. 324.

[13]) Annuaire 1932 p. 108/10.

[14]) "If the common legal right is based on the existence of a navigable waterway separating or traversing several States, it is evident that this common right extends to the whole navigable course of the river and does not stop short at the last frontier.", P.C.I.J., Judgment 16, Series A No. 23 p. 27/8; "The principle that freedom of navigation upon a river must include navigation as far as (jusque dans) the zone to be reached, was made clear by the Act of the Rhine (1831) which lays down that freedom of navigation jusqu'à la mer (as far as the sea), as enunciated by the Treaty of Peace of Paris of May 30th, 1814, and the articles concerning the navigation of the Rhine annexed to the Final Act of the Congress

A conflict in the exercise of territorial jurisdictions over international rivers may concern, on the second place, technical river works. Such works "consist of the carrying out and maintenance of works in the river and on the banks with a view to facilitating and ensuring navigation over the navigable channel".[16])

Mr. Grover Cleveland, President of the United States of America, arbitrator in a boundary dispute between Costa Rica and Nicaragua, held:

> The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, provided such works of improvement do not result in the occupation of flooding or damage of Costa Rica territory, or in the destruction of serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement. ... The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. ... These (natural) rights (alluded to in the Treaty of limits, April 15, 1858) are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded; where there is an encroachment upon either of the said harbors injurious to Costa Rica; or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same.[17])

The same idea of reciprocal rights and duties has been enunciated in the following judicial decisions, from which quotations are cited in H. A. Smith's: The economic uses of international rivers,[18]) namely: Aargau v. Zürich, Schweizerisches Bundesgericht 1878 (Entsch. des Schw. B., IV, 34); Missouri v. Illinois, U.S.S.C., 1901 and 1906 (180 U.S. 208 and 202 U.S. 598); Kansas v. Colorado, U.S.S.C., 1902 and

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of Vienna (1815), means jusque dans la pleine mer (as far as the sea and into the high sea) et vice versa.", the same Court, Adv. Op. No. 14 p. 57.

[15]) Judge Story said in the Apollon case: "St. Mary's River formed, at this period, the boundary between the United States and the Spanish territory. ... The only access from the ocean to the Spanish waters running into the St. Mary's, as well as to the adjacent Spanish territories, was through this river. So that, upon the general principles of the law of nations, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway, necessary for the advantageous use of its own territorial rights and possessions.", Instance Court, 1824, 9 Wheaton 369.

[16]) P.C.I.J., Adv. Op. No. 14, p. 48.

[17]) 22-3-1888, Moore 2-1965/6, Survey No. 147. It seems that this is the only arbitration dealing with these matters.

[18]) London 1931, p. 104 et seq. Prof. Smith omitted, however, the Cleveland award.

1907 (185 U.S. 125 and 206 U.S. 46); Wyoming v. Colorado, U.S.S.C., 1922 (259 U.S. 419); North Dakota v. Minnesota, U.S.S.C., 1923 (263 U.S. 365); Würtemberg and Prussia v. Baden, Deutsches Staatsgerichtshof, 1927 (Entsch. R.G.Z. Sachen, 116 Suppl. p. 18); Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York v. Illinois, Missouri, Kentucky, Tennessee, Louisiana, Mississippi and Arkansas, U.S.S.C., 1929 (278 U.S. 399). See also U.S. v. Utah, 1931 (283 U.S. 64); Arizona v. California, 1931 (283 U.S. 423); U.S. v. Oregon, 1935 (295 U.S. 1), etc.[19])

These decisions were confirmed in a Resolution of the Institut de Droit international, Madrid 1911 session. According to the 'exposé des motifs',[20]) this Resolution ascertained the rules of law in these matters, and, therefore, did not have the character of a draft convention.[21]) It was held:

> I. Lorsqu'un cours d'eau forme la frontière de deux Etats, aucun de ces Etats ne peut, sans l'assentiment de l'autre, et en l'absence d'un titre juridique spécial et valable, y apporter ou y laisser apporter par des particuliers, des sociétés, etc., des changements préjudiciables à la rive de l'autre Etat. D'autre part, aucun des deux Etats ne peut, sur son territoire, exploiter ou laisser exploiter l'eau d'une manière qui porte une atteinte grave à son exploitation par l'autre Etat ou par les particuliers, sociétés, etc., de l'autre. Les dispositions qui précèdent sont également applicables lorsqu'un lac s'étend entre les territoires de plus de deux Etats.
> II. Lorsqu'un cours d'eau traverse successivement les territoires de deux ou de plusieurs Etats:
> 1. Le point où ce cours d'eau traverse les frontières des deux Etats, soit naturellement, soit depuis un temps immémorial, ne peut pas être changé par les établissements de l'un des Etats sans l'assentiment de l'autre;
> 2. Toute altération nuisible de l'eau, tout déversement de matières nuisibles (provenant de fabriques, etc.), est interdit.
> 3. Il ne peut être prélevé par les établissements (spécialement les usines pour l'exploitation des forces hydrauliques) une quantité d'eau telle que la constitution, autrement dit le caractère utilisable ou le caractère essentiel

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[19]) Cf. also the case of the diversion of water from the Meuse, P.C.I.J., Judgment June 28, 1937, Series A/B No. 70.

[20]) "Les Etats riverains d'un même cours d'eau sont, les uns vis-à-vis des autres, dans une dépendance physique permanente qui exclut l'idée d'une entière autonomie de chacun d'eux sur la section de la voie naturelle relevant de sa souveraineté. Le droit international s'étant déjà occupé du droit de navigation quant aux fleuves internationaux, l'exploitation de l'eau à l'usage de l'industrie, de l'agriculture, etc., est restée en dehors des prévisions de ce droit. Il paraît donc opportun de combler cette lacune *en constatant les regles de droit* (my italics) qui découlent de l'interdépendance incontestablement existant entre Etats riverains du même cours d'eau et entre Etats dont les territoires sont traversés par le même cours d'eau. Le droit de navigation, en tant qu'il est réglé déjà, ou sera réglé en Droit international, restant réservé: L'Institut de Droit international est d'avis que les règles suivantes doivent être observées au point de vue de l'exploitation (quelconque) des cours d'eau internationaux.", Annuaire 1911 p. 365.

[21]) Prof. Smith wrote, not wholly correctly, that he offered certain comments "upon these *suggested* (my italics) rules." (op. cit. p. 155). Those rules were not suggested by the Institute but only ascertained as deduced from the interdependence of riparian States.

du cours d'eau à son arrivée sur le territoire d'aval, s'en trouve gravement modifié;
4. Le droit de navigation en vertu d'un titre reconnu en Droit international ne peut pas être violé par un usage quelconque;
5. Un Etat en aval ne peut pas faire ou laisser faire dans son territoire de constructions ou établissements qui pour l'autre Etat, produisent le danger d'inondation;
6. Les règles précédentes sont applicables de même, au cas où, d'un lac situé dans un territoire, des cours d'eau s'écoulent dans le territoire d'un autre Etat ou les territoires d'autres Etats;
7. Il est recommandé d'instituer des Commissions communes et permanentes des Etats intéressés qui prendront des décisions, ou tout au moins donneront leur avis, lorsqu' il se fera de nouveaux établissements ou des modifications aux établissements existants et qu'il pourrait en résulter quelque conséquence importante pour la partie du cours d'eau située sur le territoire de l'autre Etat. [22])

Prof. H. A. Smith observed that "the subject is clearly one which is not ripe for codification at the present day." [23]) In a Convention relating to the development of hydraulic power affecting more than one State, concluded at Geneva, December 9, 1923, it was stipulated in Article 1:

> The present Convention in no way affects the right belonging to each State, within the limits of international law, to carry out on its own territory any operations for the development of hydraulic power which it may consider desirable. [24])

And in Article 8:

> So far as regards international waterways which, under the terms of the general Convention on the Regime of Navigable Waterways of International Concern, are contemplated as subject to the provisions of that Convention, all rights and obligations which may be derived from agreements concluded in conformity with the present Convention shall be construed subject to all rights and obligations resulting from the general Convention and the special instruments which have been or may be concluded, governing such navigable waterways.[25])

This Convention does no more enunciate *what* limits are imposed by international law. In this connection it should be noted that not only matters of navigation and of technical works, but also questions such as navigation dues, pilotage, lighter services and superintendence of ballast, towage, fisheries,[26]) etc., are generally regulated by con-

[22]) Annuaire 1911 p. 365/7. See also the quoted articles of Prof. Max Huber in Z. f. V. (p. 46, note 3).
[23]) Op. cit. p. 158: "Questions of law will be closely involved with questions of history, geography, strategy, economics, and politics. In most cases the statesman will also be compelled to rely very largely upon the guidance of engeneers and other technical experts." (ibidem).
[24]) L.N.T.S. 36-81.
[25]) L.N.T.S. 36-83.
[26]) Cf. Moore 1-426/94, 703/53.

vention or agreement between the riparian States, or even by local usage varying with the very nature of each river in question, rather than by general rules of international law.[27])

It may be concluded from this conflict of territorial jurisdictions that riparian States may not exercise their territorial jurisdiction over an international river in a discretionary manner. If, in the present state of international law, no general rule, deduced from these decisions and doctrine, can be defined, about which rule should be applicable to each international river with respect to navigation, technical works, fisheries, etc., it may nevertheless be argued that a general principle of law underlies this rule, namely, that one (State), in the exercise of its right (state jurisdiction), may not violate the rights (state jurisdictions) of others (riparian States). "Si une rivière, navigable ou non", said Mr. B. Winiarski,[28]) "traverse ou sépare deux ou plusieurs Etats, chacun des Etats riverains exerce la souveraineté sur la portion de la rivière qui se trouve en son territoire; mais dans l'utilisation de cette portion, il doit respecter les droits de ses voisins: c'est un des principes généraux du droit, élaborés par les juristes romains pour les *praedia vicina* et dont la réception par le droit international était également toute naturelle." [29]) Meanwhile, it would not be correct to apply such rules of Roman and civil law in international relations.[30]) The United States Supreme Court held that

> For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. Kansas v. Colorado, 185 U.S. 125, 146. And, while the

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[27]) "Ces intérêts de la communauté internationale exigent qu'une législation et une police fluviale uniformes dominent sur les fleuves internationaux et garantissent l'application des mêmes principes aux navires et marchandises. Ils imposent aux Etats riverains l'obligation d'entreprendre des travaux nécessaires pour la navigation et d'établir un régime fluvial qui soit conforme au principe de la liberté de la navigation proclamé par la conscience juridique des nations modernes. Pour atteindre ce but, il est tout naturel que les Etats riverains se concertent, afin que le même régime s'établisse sur un fleuve et que toutes les mesures nécessaires pour la navigation soient prises d'un commun accord.", Mr. de Martens in Annuaire de l'Institut de Droit international, 1885/6 p. 288.

[28]) Principes généraux du droit fluvial international, Recueil des Cours 45 (1933) - 81.

[29]) About Roman law, see Winiarski p. 107 et seq.; A. Ossig: Römisches Wasserrecht, Leipzig 1898; J. Spiropoulos: Die allgemeinen Rechtsgrundsätze im Völkerrecht, Kiel 1928, p. 53, note 24; etc. Mr. N. G. Upham said in the Enterprise case: "It is holden also in civil law that the use of the shores of navigable rivers and of the ocean is incident to the use of the water (Inst. 2.1.1/5).", Great Britain-U.S.A., arb., C. 8-2-1853, Moore 4-4358, Survey No. 47.

[30]) See § 2, p. 14.

municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. [31])

This is important when an international arbitrator is asked to decide whether, in a given case, the international responsibility of a riparian State is brought into play when the latter has exercised its territorial jurisdiction over an international river to the detriment of the other riparian States.[32])

II. Non-riparian States

The question arises whether, also, a general rule of international law limits the exercise of a riparian State's territorial jurisdiction over an international river in favour of non-riparian States.[33])

Whereas a conflict between two territorial jurisdictions of riparian States has been examined above, now a conflict concerning the exercise of a riparian State's territorial jurisdiction over an international river and the exercise of a non-riparian State's personal jurisdiction over its private vessels [34]) on such rivers comes under consideration: [35]) especialy the question of navigation.

It has been contended in doctrine and in diplomatic correspondence that a riparian State is obliged, in international law, to grant freedom of navigation in an international river, separating or traversing its territory, to vessels of non-riparian States. Prof. W. J. M. van Eysinga, in a lecture held at the Académie de Droit international, The Hague,[36]) based freedom of navigation on international rivers

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[31]) Connecticut-Massachusetts, 24-2-1931, 282 U.S. 670, A.J.I.L. 26 (1932) - 169.

[32]) Cf. the Cleveland award: "The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.", Moore 2-1966.

[33]) "Dans toutes les questions de navigation fluviale se trouvent engagés deux intérêts: ceux des Etats riverains et ceux de toutes les autres nations non riveraines, c'est-à-dire la communauté internationale.", Mr. de Martens in Annuaire de l'Institut de Droit international 1885/6 p. 283.

[34]) See Chapter II, p. 122.

[35]) As to the governing jurisdiction over public vessels (see Chapter III) on international rivers, it was held in the Cleveland award: "The Republic of Costa Rica under said Treaty (April 15, 1858) and the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment.", Moore 2-1965. Cf. also the Wimbledon case, P.C.I.J., Judgment No. 1, and article 17 of the Statute on the Régime of navigable waterways of international concern, Barcelona April 20, 1921, A.J.I.L. Off. Doc. 1924 p. 163.

[36]) "Les fleuves et canaux internationaux", Bibliotheca Visseriana, vol. II, p. 123/57.

for all nations, recognized as 'un principe de droit commun', not only upon international treaties and conventions, but also on an arbitral award. He said:

> Et lorsque la sentence arbitrale dans le grand conflit anglo-vénézuélien fixe en 1899 les frontières entre la Guyane britannique et le Vénézuéla, de telle sorte que les rivières Amakuru et Barima deviennent internationales, le tribunal d'arbitrage considère qu'il va de soi que la navigation sur les deux rivières sera ouverte aux navires marchands de toutes les nations.[37])

Examining this arbitration, one might entertain some doubts about considering the award as an argument for freedom of navigation. In a Treaty concluded between both Parties, Great Britain and Venezuela, and signed at Washington on February 2, 1897, it was stipulated that 'an arbitral Tribunal shall be immediately appointed to determine the boundary line between the Colony of British Guiana and the United States of Venezuela' (article 1), and: 'the Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana' (article 3).[38]) The arbitral Tribunal give an award on October 3, 1899, holding that:

> In fixing the above delimitation de Arbitrators consider and decide that in times of peace the Rivers Amakuru and Barima shall be open to navigation by the merchantships of all nations, subject to all just regulations and to the payment of light or other like dues. Provided that the dues charged by the Republic of Venezuela and the Government of the Colony of British Guiana in respect of the passage of vessels along the portions of such rivers respectively owned by them shall be charged at the same rates upon the vessels of Venezuela and Great Britain, such rates being no higher than those charged to any other nation. Provided also that no customs duties shall be chargeable either by the Republic of Venezuela or by the Colony of British Guiana in respect of goods carried on board ships, vessels, or boats along the said rivers, but customs duties shall only be chargeable in respect of goods landed in the territory of Venezuela or Great Britain respectively.[39])

First, the Tribunal did not declare absolute freedom of navigation to merchantships of all nations, but freedom 'subject to all just regulations and to the payment of light or other like dues'.[40]) Secondly,

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[37]) Loc. cit. p. 144. The same statement with reference to that award was made by G. Kaeckenbeeck: International rivers, London 1918, p. 24.

[38]) De Martens N.R.G. 2-28-328, Survey No. 207. See the rules of procedure, Survey under 4.b.

[39]) De Martens N.R.G. 2-29-587.

[40]) Cf. article 109 of the Final Act of the Congress of Vienna, June 9, 1815: "The navigation of the rivers referred to in the preceding article, along their whole course, from the point where each of them becomes navigable, to its mouth, shall be entirely free, and shall not, as far as commerce is concerned, be prohibited to anyone; due regard, however, being had to the regulations to be established with respect to its police, which regulations shall be alike for all and as favourable as possible to the commerce of all nations.", Hertslet, Map of Europe, 1-208.

the award is not a reasoned one: so it does not appear whether freedom of navigation and equality of treatment is based 'on any principles of international law which the Arbitrators may deem to be applicable to the case' [41]) or rather on 'equity, reason or justice'.[42]) Thirdly, according to the arbitral agreement, the Tribunal was to 'determine a boundary line'. However, it also created a régime of navigation, which had not been asked for by the Parties. Thus it may be said that this award has but little authority by reason of its being *ultra vires*.

In his Le Droit international codifié, Mr. Bluntschli stated in his comment on paragraph 314 concerning freedom of navigation on international waterways [43]) that

> la libre navigation fluviale n'a pas pour base le fait que les rives du fleuve sont possédées par des Etats différents; elle repose sur ce que le fleuve ne fait qu'un avec la mer; or, la mer est ouverte au commerce de toutes les nations; la liberté des mers entraîne donc nécessairement la liberté de la navigation fluviale.

This statement, which has been upheld also by other authors, such as Pradier-Fodéré,[44]) Calvo,[45]) etc., is erroneous: the conception of freedom of navigation on the high seas is not the same as of freedom of navigation in international rivers. As to the former, in the absence of any territorial jurisdiction over the high seas, no conflict can arise concerning the attribution of jurisdictions, whereas, as to the latter, a conflict concerning the exercise of territorial jurisdiction can arise.[46])

In diplomatic correspondence, freedom of navigation has often been upheld as a postulate of natural law.[47]) Without defining the conception of 'natural law', such considerations have generally been advanced in order to sustain political claims.[48])

Finally, the enunciation of freedom of navigation in conventions and draft conventions [49]) does not necessarily create a general rule of

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[41]) Rules of procedure, Survey sub 4.b. (b).

[42]) Rules of procedure, Survey sub 4.b. (c.).

[43]) § 314: "Les fleuves et rivières navigables qui sont en communication avec une mer libre, sont ouverts en temps de paix aux navires de toutes les nations. Le droit de libre navigation ne peut être ni abrogé ni restreint au détriment de certaines nations."

[44]) Traité de droit international public européen et américain, vol. II, No. 730, p. 278, Paris 1885.

[45]) Manuel de droit international public et privé, 3rd ed., Paris 1892, § 101, p. 135.

[46]) Other theories, such as of inchoate or imperfect right, innocent passage, servitute, etc., are found in diverse handbooks on international law.

[47]) Cf. J. Kosters: Les fondements du droit des gens, Leiden 1925, passim.

[48]) See Winiarski, loc. cit. p. 138 et seq.

[49]) Cf. article 3 of the Projet de règlement international de navigation fluviale, Annuaire de l'Institut de Droit international 1887/8 p. 182; article 2 of the Règlement pour la navigation des fleuves internationaux, same Annuaire 1934 p. 713.

international law: "on doit prendre garde de ne pas confondre l'identité des régles particulières avec l'établissement d'une régle générale".[50])

On the following grounds it seems impossible to establish that a general rule of international law obliges a riparian State to grant freedom of navigation in an international river to non-riparian States.

a. Decisions of international tribunals

In the Faber case between Germany and Venezuela relating to a claim for damages of the Government of the German Empire against the Government of Venezuela,[51]) which established, by decrees, a commercial blockade on the Zulia and Catatumbo [52]) rivers, in consequence of which blockade subjects of the German Empire were said to have suffered damage, the German Commissioner Goetsch contended in favour of freedom of navigation for all vessels, whereas the Venezuelan Commissioner Zuloaga denied unrestricted freedom.[53]) The Umpire, Mr. Duffield, said that the concrete question was whether, under the given physical and political conditions, Venezuela had the right to suspend the traffic on the said rivers by the closing of these ports. He examined the question as follows:

> As has been shown above, there is no substantial contradiction of authorities as to the rights of a State to regulate, and, if necessary to the peace, safety, and convenience of her own citizens, to prohibit temporarily navigation on rivers which flow to the sea. What is necessary to peace, safety, and convenience of her own citizens she must judge, and it seems to the umpire quite clear that in any case calling for an exercise of that judgment her decision is final. That a case for the exercise of this discretion did exist at the dates of the various decrees complained of is obvious, and in the opinion of the umpire the decision of Venezuela in the premises can not be reviewed by this Commission or any other tribunal. Being of the opinion that the closing of the ports of the Catatumbo and Zulia rivers under the circumstances which existed at the time was a lawful exercise of sovereignty by the Republic of Venezuela, the claim is disallowed.
>
> A complete examination of the question leads back to the differing theories of the true source of natural law. It would extend this opinion to too great a length to dicuss them, but a brief statement of them is pertinent.
>
> Some philosophers, while admitting that human ideas of right spring solely from revelation, do not agree that natural law is but the consequence of revelation of divine or moral law (Stahl: Rechtsphilosophie, V, 1).
>
> Others derive their idea of natural law from the most abstract theories of reason, without taking into account the continual changes of social relations, which, being the practical basis of that law, necessarily exert an influence on the idea itself (Grotius, Kant).
>
> While others, still, putting aside both the abstract and objective idea of a Supreme Being, discuss the source of natural law in the supreme and

[50]) J. Basdevant: Règles générales du droit de la paix, Recueil des Cours 58 (1936) - 493.

[51]) C. 13-2-1903, Ralston-D. p. 600 et seq., Survey No. 256.

[52]) "The Catatumbo River rises in Colombia a short distance from the Venezuelan boundary", loc. cit. p. 623.

[53]) Loc. cit. p. 603/20.

absolute faculty of the abstraction they call esprit du monde (Hegel). They construct the moral and material world by the dialectic process of an abstract idea, and define the State as the realization of God in the world. The consequence is the complete absorption of the citizen in the State and the individual in the "pantheistic chaos of universal reason", which, on the other hand, has no conscience of its own. Still another school recognizes natural law as the science which exhibits the first principles of right founded in the nature of man and conceived by reason (Ahrens).

But when the crucial question comes, from what authority natural law is derived, each publicist seeks to solve it in his own way.

The theory of Grotius was that on the establishment of separate property, which he conceived grew by agreement out of an original community of goods, there were reserved for the public benefit certain of the pre-existing natural rights, and that one of these was the passage over territory, whether by land or by water, and whether in the form of navigation of rivers for commercial purposes, or of an army over neutral ground, which he held to be an innocent use, the concession of which it was not competent to a nation to refuse.

It is on this doctrine that some writers on international law uphold the principle of the freedom of river navigation.

Gronovius and Barbeyrac, in their notes to Grotius, consider the right of levying dues for permission to navigate rivers. This would seem to imply the right to prohibit navigation. It has been decided by the Supreme Court of the United States in the lottery cases that the right to regulate commerce includes the right to prohibit.

Bluntschli (par. 314) broadly states that water courses which flow into the sea, and navigable rivers which are in communication with an independent sea, are open to the commerce of all nations, but he restricts the right to the time of peace.

Calvo holds that where a river traverses more than one territory the right of navigation and of commerce on it is common to all who inhabit its banks, but when it is wholly within the territory of a single State it is considered as within the exclusive sovereignty of that State. He limits the exercise of that sovereignty to fiscal regulations, but seems to subordinate the right of property to that of navigation.

Fiore (758-768) agrees in the main with Calvo, that in the case of a river flowing through one State only, that State may close the river if it chooses.

It is difficult to sustain the distinction of a navigable river running into the sea.

Heffter, paragraph 77, says that each of the proprietors of a river flowing through several States, the same as the sole proprietor of a river, can, stricti iure, regulate the proper use of the waters, and restrict in to the inhabitants of the country and exclude others. But, on the other hand, he agrees with Grotius, Puffendorf, and Vattel, at least in principle, that the privilege of innocent use should not be refused absolutely to any nation and its subjects in the interest of universal commerce.

Wheaton (Elements of International Law, pt. 2, ch. 4, par. 11, Lawrence's ed.) declares that the right of navigation, for commercial purposes, of a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks. But this right of innocent passage being what the text writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectively secured by mutual convention regulating the mode of its exercise, citing Grotius, Vattel, and Puffendorf.

Halleck says (vol. 1, p. 147, chap. 6, sec. 23) that the right of navigation for commercial purpose is common to all the nations inhabiting the banks of a navigable river, subject to such provisions as are necessary to secure the safety and convenience of the several States affected.

De Martens, Précis, paragraph 84, recognizes, as a general rule, that the exclusive right of each nation to its territory authorizes a country to close its entry to strangers, but that it is wrong to refuse them innocent passage. It is for the State to judge what passage is innocent. But he seems to think

that the geographical position of another State may give it a right to demand, and in case of need to force, a passage for its commerce.

Woolsey, paragraph 62, says:

> When a river rises within the bounds of one State and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation.

Phillimore, in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says (pt. 1, par. CLXX):

> It seems difficult to deny that Great Britain may have grounded her refusal on strict law; but it is at least equally difficult to deny that by so doing she put in force an extreme and hard law,

not consistent with her conduct with respect to the Mississippi.

Klüber, paragraph 76, considers that the independence of the States is to be particularly noted in the free and exclusive usage of the right over water courses — at least in the territory of the State in which the water course flows into the sea, navigable rivers, channels, and lakes are situated.

And that

> a State can not be accused of injustice if it forbids all passage of foreign vessels on its water courses, flowing to the sea, rivers, channels or lakes in its territory.

Twiss, Volume I, section 145, page 233, second edition, declares that

> a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream whilst it is passing through its territory.

It is to be observed that distinctions are drawn by some of the above text writers, some declaring that the right of innocent use is confined to time of peace; others that only the inhabitants of those countries through which the river passes have the right of innocent use, while still others sustain the right without any limitation, save the right of the State to make necessary and proper regulations in respect to the use of the stream within its boundaries.

The theory of Grotius, mentioned above, has been said to be the "root of such legal authority as is now possessed by the principle of the freedom of river navigation" (Hall's Treatise on International Law, p. 137). It does not appear to have been adopted by the best annotators on international law. Hall says: "It can no longer be accepted as an argumentative starting point" (Hall's Treatise on International Law, p. 139).

Phillimore speaks of it as a "fiction which this great man believed", and says:

> But as the basis of this opinion clearly was, and is now universally acknowledged to be a fiction, this reason, built upon the supposition of its being a truth, can be of no avail (Phillimore's Com. on International Law, p. 190, Sec. CLVII).

The other theory, also of Grotius, was because the use of rivers belonged to the class of things "utilitatis innoxiae", the value of streams being in no way whatever diminished to the proprietors by this innocent use of them by others, inasmuch as the use of them is inexhaustible (Vattel, Bk. I, chap. 23).

This right of mere passage by one nation over the domain of another, whether it be an arm of the sea, or lake or river, or even the land, is considered by him as one of strict law, and not of comity. It is said on the other hand that it is not founded on any sound or satisfactory reason, and is at variance with that of almost all other jurists (Phillimore, ubi sup.).

> The same view was taken by Grotius, but the great weight of authority since Vattel is that the State through which a river flows is to be the sole judge of the right of foreigners to the use of such river (Wheaton's International Law, Vol. I, p. 229, cited from Wharton, Vol. I, sec. 30, p. 97).

Still another ground is asserted as a basis for this free use of rivers, viz, that conceding the proprietary rights of the State over that portion of the river within its boundaries, nevertheless these should be subordinated to the general interests of mankind, as the proprietary rights of individuals in organized communities are governed by the requirements of the general good. It is pertinently remarked by an eminent jurist that this

> involved the broad assertion that the opening of all waterways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends to which the rights of the individual are sacrificed by civil communities, are to the latter (Hall, p. 139).

Most of the advocates of the innocent use of rivers base their claim upon the grounds that the inhabitants of lands traversed by another portion of the stream have a special right of use of the other portions because such use is highly advantageous to them. If the proprietary right of the State to the portion of the river within its boundaries be conceded, as it must be generally, there can be no logical defense of this position. It certainly is a novel proposition that because one may be so situated that the use of the property of another will be of special advantage to him he may on that ground demand such use as a right. The rights of an individual are not created or determined by his wants or even his necessities. The starving man who takes the bread of another without right is none the less a thief, legally, although the immorality of the act is so slight as to justify it. Wants or necessities of individuals can not create legal rights for them, or infringe the existing rights of others (Hall, p. 149).

It seems difficult upon principle to support the right to the free use of rivers as a right stricti juris. While this is not expressly admitted, it is tacitly conceded by nearly all the advocates. They define this right of use as an "imperfect right". The term is an anomaly. The fallacy is thus aptly stated by a learned authority on international law:

> A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the State whose property is affected, and for sufficient cause it may be denied altogether (Hall, p. 140).

Woolsey terms it "only a moral or imperfect right to navigation". However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists, spoken generally, seem to agree in holding that the right can only be what is called (however improperly) by Vattel and other writers imperfect, and that the State through whose domain the passage is to be made "must be the sole judge as to whether it is innocent or injurious in its character" (Phillimore, CLVII, citing Puffendorf, Wheaton's Elements of International Law, Hesty's Law of Nations, Wolff's Institutes, Vattel).

From this review of the authorities it seems that even in respect of rivers capable of navigation by sea-going vessels carrying oceanic commerce the weight of authority sustains the right of Venezuela to make the decrees complained of. But in the opinion of the umpire there are other considerations which control the decision in this case.

If the case before the umpire turned upon this general question of international law, the umpire is inclined to the opinion that he would be compelled to sustain the right of Venezuela to the complete control of navigation of the Catatumbo and Zulia rivers. In his opinion it is not necessary to decide the case on this ground. As has been shown above, there is no contradiction of authority as to the right of Venezuela to regulate, and, if necessary to the peace, safety, or convenience or her own citizens, to prohibit altogether navigation on these rivers. It is also equally without doubt that her judgment in the premises can not be reviewed by this Commission or any other tribunal. That a case for the exercise of discretion did exist is obvious.[54])

[54]) Loc. cit. p. 626/30.

In the Oscar Chinn case between Belgium and Great Britain and decided by the Permanent Court of International Justice in its judgment of December 12, 1934,[55]) a claim was made by the Government of the United Kingdom in respect of loss and damage alleged to have been sustained by Mr. Oscar Chinn, a British subject, as the result of certain measures taken and applied in the month of June 1931 and subsequently thereto by the Belgian Government in connection with the limited liability Company 'Union nationale des Transports fluviaux' (commonly known as 'Unatra') in relation to fluvial transport in the waterways of the Belgian Congo. In the special agreement concluded between both parties it was asked at the Court:

1) Having regard to all circumstances of the case, were the above-mentioned measures [56]) complained of by the Government of the United Kingdom in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom?

2) If the answer to question 1 above is in the affirmative, and if Mr. Oscar Chinn has suffered damage on account of the non-observance by the Belgian Government of the above-mentioned obligations, what is the reparation to be paid by the Belgian Government to the Government of the United Kingdom?

After having stated that the fundamental issue in the suit was the lawfulness or otherwise under international law of the measures taken in 1931, and having considered questions of fact, the Court examined the three arguments of the Government of the United Kingdom.

a) The main argument was the alleged inconsistency between the measures taken by the Belgian Government and the principles of equality and freedom of trade and freedom of navigation.

The Court held:

> According to the conception universally accepted, the freedom of navigation referred to by the Convention [57]) comprises freedom of movement

[55]) Series A/B No. 63.

[56]) Decision of the Minister of the Colonies, June 20, 1931; refusal of the Belgian Government, which ensued and which was maintained until October 3, 1932, to extend the benefit of the measures to fluvial transport enterprises other than Unatra; payments made by the Exchequer of the Colony to that Company.

[57]) Between U.S.A., Belgium, British Empire, France, Italy, Japan, and Portugal, revising the General Act of Berlin, February 26, 1885 (see A.J.I L. Off. Doc. 1909 p. 7), and the General Act and Declaration of Brussels, July 2, 1890 (ibidem p. 29), signed at Saint-Germain-en-Laye, September 10, 1919, A.J.I.L. Off. Doc. 1921, p. 314. "The Signatory Powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the present Convention a complete commercial equality in the territories under their authority within the area defined by Article 1 of the General Act of Berlin of February 26th, 1885, set out in the Annex hereto, but subject to the reservation specified in the final paragraph of that Article." (Article 1); "Subject to the pro-

for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers. From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also. But it does not follow that in alle other respects freedom of navigation entails and presupposes freedom of commerce.[58])

What the Government of the United Kingdom is concerned with in this case is the principle of freedom of navigation regarded from the special aspect of the commercial operations inherent in the conduct of the transport business; for that Government has never contended that the impugned measures constituted an obstacle to the movement of vessels.[59])

Freedom of trade, as established by the Convention, consists in the right —in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries. Freedom of trade does not mean the abolition of commercial competition; it presupposes the existence of such competition. Every undertaking freely carrying on its commercial activities may find itself confronted with obstacles placed in its way by rival concerns which are perhaps its superiors in capital or organization. It may also find itself in competition with concerns in which States participate, and which have occupied a special position ever since their formation, as in the case of Unatra.[60])

The Government of the United Kingdom maintained that the reduction in transport rates together with the Belgian Government's promise temporarily to make good losses enabled Unatra to exercise a de facto monopoly inconsistent with freedom of trade:

A concentration of business of this kind will only infringe freedom of commerce if commerce is prohibited by the concession of a right precluding the exercise of the same right by others; in other words, if a 'monopoly' is established which others are bound to respect. ... In what the Government of the United Kingdom describes in this case as a 'de facto monopoly', the Court, however, sees only a natural consequence of the situation of the services under State supervision as compared with private concerns.

The Court also sees therein, in some respects, a possible effect of commercial competition; but it can not be argued from this that the freedom of trade and the freedom of navigation, provided for by the Convention of Saint-Germain, imply an obligation incumbent on the Belgian Government to guarantee the success of each individual concern. If the term 'de facto monopoly' should be understood, in so far as concerns trade, navigation or the transport business, as covering all measures likely to render it difficult or impossible for others to carry on their business at the same

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visions of the present Chapter, the navigation of the Niger, of its branches and outlets, and of all the rivers, and of their branches and outlets, within the territories specified in Article 1, as well as of the lakes situated within those territories, shall be entirely free for merchant vessels and for the transport of goods and passengers. Craft of every kind belonging to the nationals of the Signatory Powers and of States, Members of the League of Nations, which may adhere to the present Convention, shall be treated in all respects on a footing of perfect equality." (Article 5).

[58]) Loc. cit. p. 83.

[59]) Loc. cit. p. 83.

[60]) Loc. cit. p. 84.

prices and under the same commercial conditions, it would follow that all measures affording to customers facilities, reductions in prices, abatements or other advantageous conditions which other concerns are unwilling or unable to offer and which, after all, are calculated to promote commerce, would be incompatible with freedom of trade Such a contention would be inconsistent with the very notion of trade; for there is nothing to prevent a merchant, a ship-owner, a manufacturer or a carrier from operating temporarily at a loss if he believes that by so doing he will be able to keep his business going.[61])

To sum up, having regard to the exceptional circumstances in which the measures of June 20th, 1931, were adopted and to the nature of those measures, that is to say, their temporary character and the fact that they applied to companies entrusted by the State with the conduct of public services, these measures cannot be condemned as having contravened the undertaking given by the Belgian Government in the Convention of Saint-Germain to respect freedom of trade in the Congo.[62])

b) Then the Court examined the alternative contention of the Government of the United Kingdom, alleging discrimination inconsistent with the equality of treatment provided for in the Convention of Saint-Germain.

The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups. It should be recalled in this connection that the treatment accorded to Unatra was based on the special position of that Company, as a Company under the supervision of the Belgian Government. The special advantages and conditions resulting from the measures of June 20th, 1931, were bound up with the position of Unatra as a Company under State supervision and not with its character as a Belgian Company. These measures, as decreed, would have been inapplicable to concerns not under government supervision, whether of Belgian or foreign nationality. The inequality of treatment could only have amounted to a discrimination forbidden by the Convention if it had applied to concerns in the same position as Unatra, and this was not the case. ... The position of the British national Mr. Chinn was not, as such, either better or worse than that of the other concerns not under State supervision; these included, according to the evidence produced, Belgian concerns and a French concern. The Court therefore is equally unable to accept the alternative plea as to an alleged discrimination.[63])

c) Finally, the Court considered the last alternative plea of the Government of the United Kingdom to the effect that the measure of June 20th, 1931, by indirectly depriving Mr. Chinn of any prospect of carrying on his business profitably, constituted a breach of the general principles of international law, and in particular of respect for vested rights. The Court was unable to see in the original position

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[61]) Loc. cit. p. 85.

[62]) Loc. cit. p. 86. Regarding the conception of the Belgian Government with respect to 'the management of national shipping', the Court observed: "However legitimate and unfettered governmental action in connection with the management and subsidizing of national shipping may be, it is clear that this does not authorize a State to evade on this account its international obligations.", loc. cit. p. 86.

of Mr. Chinn—which position was characterized by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right.

> It is true that in 1932 the Belgian Government decided to grant Belgian or foreign ship-owners, whose business was endangered, advances similar to those allowed to the Unatra Company; the taking of this measure cannot, however, be regarded in itself as an admission by the Belgian Government of a legal obligation to indemnify the transporters for an encroachment on their vested rights; it is rather to be ascribed to the desire of every Government to show consideration for different business interests, and to offer them some compensation, when possible. The action of the Government appears to have been rather in the nature of an act of grace.[64])

For these reasons, the Court, by six [65]) votes to five,[66]) decided that the measures were not in conflict with the international obligations of the Belgian Government of the United Kingdom.

Attention should be paid to the dissenting opinion of the English Judge, Sir Cecil Hurst, who stated:

> the general conclusion is therefore that the reduction of Unatra's transport rate by the Belgian decision of June 20th, 1931, was not inconsistent with the liberty of commerce, the liberty of navigation, or the commercial equality which Belgium was obliged to maintain in the Congo, even though the effect of the reduction was bound to be that exporters would give their cargoes to Unatra and not to a private transporter like Chinn.[67])

Examining the alternative contention that the Belgian measures amounted to discrimination in favour of Unatra and against Chinn, he stated that the question was "whether the Government's refusal to extend the arrangements for the repayment of losses to Chinn as a private transporter was a violation of Article 1 of the Convention".

> Chinn's nationality was British, and Unatra's was Belgian. Is this discrimination between an individual British subject and the group of Belgian companies to whom the decision of June 20th was adressed, sufficient to fulfil the requirements of article 1? Or must the discrimination be shown to be based on nationality? The judgment adopts the latter interpretation. I am not able to share this view. In my opinion it is not necessary to show that the discrimination was based on nationality, in the sense that the differentiation was made because the persons possessed a particular nationality. Such a requirement would materially reduce the scope of the application of article 1.[68])

Following him, the wording of the articles supported the larger interpretation [69]) and he concluded:

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[64]) Loc. cit. p. 88.

[65]) Judges Guerrero, Rolin-Jaecquemyns, Rostworowski, Fromageot, Urrutia and Negulesco.

[66]) Judges Hurst, Altamira, Anzilotti, Schücking, van Eysinga.

[67]) Loc. cit. p. 126.

[68]) Loc. cit. p. 128.

[69]) "Article 3 provides that nationals of the territorial Power and of other Powers shall enjoy without distinction equal treatment and the same rights as regards protection of persons and effects and as regards property and professions. Clearly this is an article which guarantees individual equality.", loc. cit. p. 128.

> These reasons justify the view that what article 1 of the Convention of Saint-Germain ensures is an individual commercial equality. As above said, the refusal to extend the repayment of losses to private transporters was inconsistent with such individual commercial equality. Therefore, so far as the Belgian measure embodied in the decision of July 28th, 1931, applied to Chinn, it was inconsistent with the international obligations of Belgium to the United Kingdom.[70])

These two important decisions [71]) have some points of difference and some agreement. In the Faber case, a conflict existed between the territorial jurisdiction of Venezuela over the Catatumbo and Zulia rivers and the personal jurisdiction of the German Empire (as non-riparian State) over its subjects carrying on commercial traffic on those rivers, whereas, in the Chinn case, a conflict existed between the governing jurisdiction of Belgium over Unatra concerning navigation on the waterways of the Belgian Congo and the personal jurisdiction of Great Britain (as non-riparian State) over its citizen Chinn. In the Faber case, the territorial jurisdiction prevailed over the personal jurisdiction of the non-riparian State, and, in the Chinn case, the governing jurisdiction prevailed also over the personal jurisdiction of the non-riparian State. Freedom of navigation, in the sense of movement of vessels, had been prohibited in the Faber case as a consequence of the exercise of Venezuela's territorial jurisdiction, whereas, in the Chinn case, such movement had not been prohibited.[72]) Neither in the Faber case nor in the Chinn case the personal jurisdiction of the non-riparian State prevailed over the territorial or governing jurisdiction of the riparian State. Neither in the Faber case nor in the Chinn case, did any general rule of international law limit the exercise of Venezuela's territorial jurisdiction or of Belgium's governing jurisdiction in favour of the non-riparian State. In the Faber case, the Umpire held that "a case for the exercise of discretion did exist". From that award, the conclusion is not justified, however, that Venezuela might exercise its territorial jurisdiction on a discretionary manner also over riparian States, such as Colombia. The Umpire said that there was no contradiction of authority as to the right of Venezuela to regulate navigation on the rivers in question.

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[70]) Loc. cit. p. 129.

[71]) No comment on the Faber case seems to be available, whereas on the Chinn case only some annotations have been published: H. L.: The Chinn case, British Yearbook 1935 p. 162/6; Prof. B. M. Telders: De vrijheid der scheepvaart op internationale rivieren, Economisch-Statistische Berichten 20 (1935) - 44/5; Prof. J. H. W. Verzijl: Het nieuwe Congo Recht, Weekblad van het Recht 1935 Nos. 12849 (p. 2/4) and 12850 (p. 1/2); Nederlandsch Juristenblad 1935 p. 33/9; R.G.P.C. 2 (1935) - 15/27; Z. f. ö. R. 15 (1935) - 296/9.

[72]) As it was said in the Judgment, the Government of the United Kingdom "has never contended that the impugned measures constituted an obstacle to the movement of vessels" (p. 83).

As has been observed, a riparian State may exercise police powers over riparian and non-riparian States. But he added that Venezuela had also the right to prohibit navigation: "If necessary to the peace, safety or convenience of her own citizens". A ground for such an exercise may exist regarding non-riparian States; it seems difficult, however, to hold that it may exist regarding riparian States: such a prohibition, necessary to the peace, safety and convenience of citizens of the one riparian State, seems inconsistent with the 'community of interest' of riparian States in general, and with convenience towards citizens of the other riparian State in particular. In the Chinn case, the Court held that the exercise of Belgium's governing jurisdiction did not constitute "a breach of the general principles of international law". It follows from that case that according to the majority of the Court, including the Belgian judge, as well as to the English judge, the crucial question was rather one of interpretation of treaty: [73]) both the majority and the English judge held that the exercise of Belgium's governing jurisdiction [74]) was not inconsistent with the principles of equality and freedom of trade and freedom of navigation,[75]) but the majority based discrimination, according to their interpretation of the Convention of Saint-Germain, on nationality, whereas the English judge based discrimination, according to his interpretation, on individual commercial equality.

b. Doctrine

The Umpire in the Faber case quoted many authors on this sub-

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[73]) The validity of the Convention of Saint-Germain has been contested, moreover, by the dissenting judges and in the annotations quoted.

[74]) As to this governing jurisdiction, judge Altamira was of opinion that Unatra could only be regarded "in the light of its commercial character and of its Belgian nationality, and not in its capacity as a controlled or an uncontrolled Company—a point which is immaterial for the legal issue in the present case" (p. 100). Judge Anzilotti said: "The position of Unatra, as a Company which has been under governmental control from the time of its foundation in 1925, and which is responsible for certain public services, has no bearing on the issue: that position in no way precluded competition by other enterprises." (p. 113). On the same page, he made a mistake by saying that: "necessity may excuse the non-observance of international obligations". (!)

[75]) Judges Anzilotti and van Eysinga laid stress on 'effective' freedom of navigation: "The freedom of navigation which article 5 seeks to protect is not an abstract and academic freedom, but a tangible and effective freedom: the freedom to engage in a business in order to reap its profits." (Anzilotti p. 112); "In fact, it is not sufficient that the riparian States of an international river should abstain from acts which impede the free movement of shipping to such an extent that the shipping firm has to abandon its fluvial transport business. The impediment comes under the prohibition at an earlier stage, namely as soon as freedom of navigation ceases to be effective. It is purely a question of fact whether, in a given case, the effective freedom of navigation has, or has not, been annihilated." (van Eysinga p. 141/2).

ject.[76]) It may be added that the same view is upheld by Hyde,[77]) Winiarsky,[78]) Anzilotti,[79]) Dupuis,[80]) etc.

c. Drafts of general Conventions

Article 3 of the Statute on the regime of navigable waterways of international concern, Barcelona, April 20, 1921, stipulated that:

> Subject to the provisions contained in articles 5 and 17, each of the contracting States shall accord free exercise of navigation to the vessels flying the flag of any one of the other contracting States on those parts of navigable waterways specified above which may be situated under its sovereignty or authority.[81])

If a general rule of international law, by virtue of which riparian States were obliged to grant freedom of navigation to all vessels on international rivers, were recognized by civilized nations, the Convention and Statute of Barcelona would not have limited that obligation to the contracting States only. The same may be said as regards article 2 of the Draft No. 19 elaborated by the American Institute of International Law, 1925, which article runs as follows: "International rivers shall be open in time of peace to the merchant vessels of the contracting republics." [82])

It may be concluded from the above that a riparian State is not obliged, by virtue of a general rule of international law, to grant freedom of navigation on international rivers to vessels flying the flag of non-riparian States.[83]) Consequently, in these matters, the international responsibility of the riparian State is not engaged towards non-riparian States.

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[76]) Especially W. E. Hall: A treatise on international law, Oxford 1924 (8th ed.), § 39, p. 172/3.

[77]) Notes on rivers and navigation in international law, A.J.I.L. 4 (1910) - 151, and the same in his International Law, Boston 1922, vol. I, § 165, p. 290 ("No treaty has declared it to be a principle of international law that international navigable rivers are generally open to navigation by vessels of foreign riparian or non-riparian States").

[78]) Loc. cit. p. 153 ("D'après les règles de droit international en vigueur, la base du droit de naviguer en territoire étranger est constitutée par le consentement de l'Etat territorialement intéressé, qu'il s'agisse des fleuves communs, dits internationaux, ou qu'il s'agisse des fleuves nationaux; en d'autres termes, par la volonté expresse ou tacite du maître du territoire").

[79]) "... tandis que l'ouverture du fleuve aux Etats tiers est toujours considérée comme une concession que l'on fait volontairement ou comme une imposition que l'on subit, la possibilité pour tous les riverains de profiter du fleuve en tant que voie navigable est considérée comme une exigence à laquelle aucun Etat ne saurait se soustraire ", Annuaire de l'Institut de Droit international, 1932, p. 109.

[80]) Annuaire de l'Institut de Droit international 1929-1-417.

[81]) A.J.I.L. Off. Doc. 1924 p. 157.

[82]) A.J.I.L. Off. Doc. Special Number 1926 p. 339.

[83]) "... though it would be as wrong in a moral sense as it would generally be foolish to use these powers needlessly or in an arbitrary manner ...", Hall, op. cit. p. 173.

Reference: Annuaire de l'Institut de Droit international 1885/6-272/89, 1887/8-153/88, 1911-156/99 and 347/67, 1929-1-229/458, 1931-2-141/77, 1932-67/158, 1934-167/81 and 572/622 and 713/9; L. von Bar: L'exploitation industrielle des cours d'eau internationaux au point de vue du droit international, R.G.D.I.P. 17 (1910) - 281/8; I. L. C. van den Bergh: Disputatio historica iuris gentium continens historiam novarum legum de fluminum communium navigatione, Leiden 1835; E. Carathéodory: Le droit international concernant les grands cours d'eau, Leipzig 1861; E. Engelhardt: Du régime conventionnel des fleuves internationaux, Paris 1879; W. J. M. van Eysinga: Evolution du droit fluvial international du Congrès de Vienne au traité de Versailles, Leiden 1919; idem: Les fleuves et canaux internationaux, Bibliotheca Visseriana, vol. II, p. 123/57; A. Giannini: Le Convenzioni internazionali di diritto fluviale, Roma 1933; J. Hostie: Notes sur le statut relatif au régime des voies navigables d'intérêt international, R.D.I.L.C. 48 (1921) - 532/67; M. Huber: Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen, Z. f. V. 1 (1907) - 29/55 and 159/217; Ch. Ch. Hyde: Notes on rivers and navigation in international law, A.J.I.L. 4 (1910) - 145/55; G. Kaeckenbeeck: International rivers, London 1918; E. Nys: Les fleuves internationaux traversant plusieurs territoires, R.D.I.L.C. 35 (1903) - 517/37; P. Morgan Ogilvy: International waterways, New York 1920; P. Orban: Etude de droit fluvial international, Paris 1895; A. W. Quint: Internationaal rivierenrecht betreffende gebruik tot andere doeleinden dan de scheepvaart, Amsterdam 1930; idem: Nouvelles tendances dans le droit fluvial international, R.D.I.L.C. 58 (1931) - 325/40; K. Schulthess: Das internationale Wasserrecht, Zürich 1915; H. A. Smith: The economic uses of international rivers, London 1931; J. Vallotton: Du régime juridique des cours d'eau internationaux de l'Europe Centrale, R.D.I.L.C. 45 (1913) - 271/306; B. Winiarski: Principes généraux du droit fluvial international, Recueil des Cours 45 (1933) - 75/217.

B. State succession

State succession may be said to occur when a part of an existing State becomes a new State,[84]) or when a part of an existing State is acquired by another State, or when the whole of the territory of an existing State is absorbed by another given State. In international law, such a succession may be the result of a bilateral or multilateral legal act (treaty or convention).[85]) The effect of such an act is that the successor State acquires territory, and thus territorial jurisdiction, from the predecessor State. No conflict arises between the two States as to the attribution of territorial jurisdiction—that question being the very object of the legal act—, but the exercise of the newly acquired territorial jurisdiction by the successor State may give rise to complicated conflicts of state jurisdictions.[86]) That exercise may

[84]) Cf. Chapter III, p. 179.

[85]) State succession occurring by means of an unilateral act is considered, in international law, as a mere fact, since no State can be deprived from its jurisdictions without its own will; hence, it shall not be dealt with here. It should be observed, moreover, that a contested territory can be awarded to one of the contesting Parties in pursuance of an arbitral award.

[86]) "Den auch bei den Annexionen und Gebietszessionen handelt es sich, wie bei dem internat. Privatrecht, um eine Zuständigkeitsordnung; nicht um eine Rechtsnachfolge, sondern um die Frage der örtlichen Kompetenz zur Betätigung irgendwelcher rechtlich geordneter Macht in Bezug auf ein bestimmtes Objekt, eine bestimmte Sphäre (Schönborn S. 9). Auch bei unserem Problem kollidieren zwei Rechtsordnungen: die des alten Staats und die des Nachfolgers deshalb, weil ein Rechtsverhältnis seine Wurzeln unter der einen Rechtsordnung geschlagen hat und seine Aeste und Früchte unter einer anderen Rechtsordnung auswirken soll",

be affected by the legal act itself, by the circumstance whether the predecessor State still exists or is extinguished, and by the exercise of jurisdictions of the predecessor State and third States regarding the new acquired territory. The matter of State succession has rightly been called a very complicated and delicate one.[87])

One has to enquire what general rules of international law[88]) limit the exercise of the successor State's territorial jurisdiction in favour of the exercise of jurisdictions of the predecessor State or

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J. Hatschek: Völkerrecht als System rechtlich bedeutsamer Staatsakte, Leipzig 1923 p. 173. W. Schönborn: Staatensukzessionen (Stuttgart 1913), to whom Hatschek referred, wrote: "Immerhin lassen sich auch die Ausdrücke "Sukzession", "Rechtsnachfolge" rechtfertigen, wenn man sich nur gegenwärtig hält, dasz es nicht das materielle Recht, sondern blosz die Kompetenz zur Betätigung irgendwie rechtlich geordneter Macht in Bezug auf ein bestimmtes Objekt oder innerhalb einer bestimmten Sphäre ist, die hier wirklich auf den Nachfolger übergeht. ... Erkennt man nun aber, dasz das Territorium nicht Objekt, sondern nur seitens der anderen Staaten anerkannte räumliche Sphäre, örtliche Kompetenzsphäre der staatlichen Herrschaft (über Menschen) ist, so kann von einer Rechtsnachfolge nur mehr in beschränktem Sinne die Rede sein. Was hier wirklich übertragen werden kann und übertragen wird, ist nur der Anspruch gegen dritte Staaten auf Anerkennung der Zugehörigkeit eines bestimmten Gebietes zur eigenen Kompetenzsphäre. ... Nach dieser Auffassung wird also durch eine Zession lediglich die örtliche Kompetenzsphäre des Zessionars erweitert, ohne dasz ihm irgendwie innerhalb des neuen Gebietes in spezifisches materielles Recht neu zuwüchse, das er nicht erst durch seine eigene Gesetzgebung sich beilegen müszte. Mit Recht wird darum bei Gebietszessionen juristisch zwischen der völkerrechtlichen Abtretung und der staatsrechtlichen Einverleibung unterschieden. Das abgetretene Gebiet selbst, das räumliche Substrat der Staatsgewalt ist freilich vor und nach dem Sukzessionsfall identisch, nicht aber das innerhalb des Gebietes ausgeübte Imperium. ... Die auch rechtliche Möglichkeit der Uebertragung der örtlichen Kompetenz von einem Staat auf den anderen ist dagegen ... auch von der heutigen völkerrechtlichen Praxis noch anerkannt. ... Die eigentlich interessierende Frage wird dann aber: Verpflichtet oder berechtigt der Uebergang der örtlichen Zuständigkeit von einem Staat auf den anderen als solcher den letzteren nach Völkerrecht zur Uebernahme von Ansprüchen oder Leistungen, die dem Vorgänger-Staat zustanden bezw. oblagen?", p. 9/11. See also A. von Verdross: Völkerrecht, Berlin 1937, § 69/74, p. 238/48.

[87]) In § 83 of his book: The diplomatic protection of citizens abroad, New York 1915, dealing with succession of States and apportionment of debts, Prof. E. M. Borchard observes in a note: "The details of this exceedingly interesting subject, which may become of renewed importance at the conclusion of the present European War, can hardly be discussed here. It is a very complicated subject, and precedents depend so largely upon the special facts and circumstances of each case, that conclusions of principle are not easily deducible." (p. 202. note 2).

[88]) Questions of domestic law arising from state succession shall not be considered here. The Central American Court of Justice observed, in a case between Salvador and Nicaragua, decided on March 9, 1917: "... it is unquestionable that under the principles of public law there is an alteration of constitutional order —in perhaps its most serious and transcendental form—when a State supplants, in all or part of the national territory, its own sovereignty by that of a foreign country and thereby, from that moment, overthrows its own laws in order that those of the concessionary State may govern therein. In the sphere of principles the exercise of the public auctoritas, of imperium or of jurisdictio, on the part of the foreign sovereignty fundamentally alters the normal life of the nation, because national territory and its exclusive possession are indispensable elements of sovereignty.", A.J.I.L. 11 (1917) - 726, Survey Appendix No. III.

third States, in the absence of conventional rules applicable to that exercise.

I. Conflict with jurisdictions of the predecessor State

A conflict may arise, first, as to the public domain. On the general aspect of this problem, the Permanent Court of International Justice made two incidental observations. In the case of the Peter Pázmány University v. the State of Czechoslovakia, the Court held that "the first paragraph of this Article (viz. 191 of the Treaty of Trianon between the Allied and Associated Powers and Hungary, June 4, 1920, A. J. I. L. Off. Doc. 1921 p. 1) says: 'States to which territory of the former Austro-Hungarian Monarchy is transferred and States arising from the dismemberment of that Monarchy shall acquire all property and possessions situated within their territories belonging to the former or existing Hungarian Government.' The article applies the principle of the generally accepted law of State succession....".[89]) And in the case concerning certain German interests in Polish Upper Silesia the same Court said that ".... the article in question, which relates to the transfer of public property as a result of cessions of territory, must, in accordance with the principles governing State succession—principles maintained in the Treaty of Versailles and based on considerations of stability of legal rights—be construed in the light of the law in force at the time when the transfer of sovereignty took place." [90])

Only one arbitral decision, which deals with the special aspect of the problem, seems to be available, namely a decision dated October 12, 1833, to which Prof. J. Basdevant, from Paris University, has directed the author's attention. This arbitration concerned the consequences of the division of the Swiss Canton of Basel into two Cantons: Basel-Landschaft and Basel-Stadttheil.[91]) This decision, which, like the other decisions of the Tribunal, is somewhat little known, concerned the question "nach welchem Maszstab die jedem Theile zukommende Quote an demjenigen Stück des baselschen Staatsgutes, welches den Nahmen Staatskasse trägt, anzumitteln sei". The Umpire held:

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[89]) Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, Judgment Series A/B No. 61, December 15, 1933, p. 237.

[90]) Judgment Series A No. 7, May 25, 1926, p. 41.

[91]) Survey No. 30. Cf. P. Pradier-Fodéré: Traité de droit international public européen et américain, Paris 1885, vol. I, § 147, p. 251.

Dasz das Staatsgut an und für sich, und abgesehen von dem Falle einer Theilung irgend welcher Art, als Eigenthum der Corporation oder ideellen Person des Staates, des Volkes, des Inbegriffs oder der Gesamtheit der Staatsbürger erscheint, so dasz dasselbe mit Beziehung auf das Eigenthum auszer aller direkten Beziehung zu dem einzelnen Staatsbürger steht, und sich dadurch namentlich vom Gesellschaftsgut und andern ähnlichen Gemeinschaften wesentlich unterscheidet;
dasz sonach die einzelnen Bürger rücksichtlich des Eigenthums an dem Staatsgute nicht als Antheilhaben betrachtet, insbesondere ihnen auf keine Weise weder bestimmte noch unbestimmte Antheile, gleiche oder ungleiche Quoten zugeschrieben werden, sonach auch die Begriffe von Rechtsgleichheit und Rechtsungleichheit, da den einzelnen eben gar keine Rechte zustehen, nicht zur Sprache kommen können;
dasz dieses Rechtsverhältnisz auch von der Art der Entstehung eines vorhandenen Staatsgutes völlig unabhängig ist, insbesondere also durch das gröszere oder geringere Masz, in welchem der Einzelne oder eine Mehrheit einzelner Individuen zu desen Bildung beigetragen haben möchte, auf keine Weise geändert wird;
dasz aber die eintretende Theilung des Basel'schen Staatsgutes jene sonst nicht vorhandene rechtliche Beziehung desselben auf die einzelnen Bürger nicht hervorruft, weil der ehemalige Kanton Basel sich keineswegs, selbst nicht übergangsweise, in die Individuen seiner Bürger aufgelöst, sondern in zwei Theile, welche wieder Staaten sind, getrennt hat, sonach auch die Theilung nur auf diese, nicht auf jene sich bezieht, und daher keinerlei Rechte der Einzelnen sich darstellen, aus welchen sie selbst, oder der Kantonstheil, dem sie angehören, irgend welche Rechte für sich ableiten könnte;
dasz folglich auch beider Regulierung der Theilung der vorliegenden Vermögensmasze, deren Eigenschaft als Staatsgut beständig festgehalten und auf die innere Natur und Bestimmung des Staatsguts im Allgemeinen zurückgegangen werden musz; dasz nun in dieser Hinsicht das Staatsgut als der Kapitalstock für Bestreitung der Staatsbedürfnisse zu betrachten ist, mithin bei der Theilung desselben unter die zwei neuentstandenen Gemeinwesen das Verhältnisz der beidseitigen Staatsbedürfnisse als das richtige Theilungsprinzip erscheint; dasz für Ausmittlung dieses Verhältnisses als der einzige allgemeine Maszstab die Gesamtbevölkerung, nicht aber die bürgerliche Bevölkerung, als auf welche die Staatsbedürfnisse sich nicht beschranken, anerkannt werden kann;
dasz zwar dieser Maszstab in seiner concreten Anwendung durch verschiedene spezielle Umstände und Eigenthümlichkeiten, wie zum Beispiel die örtliche Lage und Ausdehnung, die Gestaltung der geselligen Verhältnisse und des Verkehrs, den Grad, die Richtung der Cultur, u.s.w., einer Verrichtigung fähig und bedürftig werden kann.[92])

This interesting decision advances the idea that the public domain, *in casu* the public treasury, must be divided, not according to the number of citizens, but according to the whole population, which benefits by the public services of the State.[93]) Thus, the governing jurisdiction seems to prevail over the territorial jurisdiction.

As to the private domain, it was held in a decision dated November 19, 1833:

Dasz unter den Gegenständen, über welche dem Staate das Recht der Verfügung und des Gebrauchs zukommt, ein wesentlicher Unterschied besteht zwischen solchen, welche als einfaches fiscalisches Eigenthum er-

[92]) Gesetze, Verordnungen und Beschlüsse für den Kanton Basel Landschaft, Liestal 1838, Erster Band p. 357/8.
[93]) Cf. in other sense: P. Pradier-Fodéré, op. cit., vol. I, p. 278/9.

scheinen, und in dieser Eigenschaft gleich jedem Privateigenthum dem bürgerlichen Verkehr unterliegen, oder desselben wenigstens fähig sind —, und solchen, welche nach Wesen und Individualität in Rücksicht auf Verfügung, Veräuszerung, Nutzung, kurz in jeder Beziehung dem bürgerlichen Verkehr entzogen und desselben unfähig sind, und nur durch Aufhebung ihres Wesens und ihrer Individualität zum Gegenstande desselben werden können;
dasz in die erstere Klasse z. B. das dem Staate gehörende baare Geld und alle andern gewöhnlichen Vermögenstücke, in die zweite dagegen anerkannter Maszen und nach allgemeiner Ansicht z. B. die öffentlichen Gewässer, Straszen, Brücken u. dgl. gehören;
dasz nun nach dem eigentlichen Eigenthum oder Vermögen des Staates blos die Gegenstände der erstern Art beigezählt werden können, bei denjenigen der letztern hingegen sich das Recht des Staates vielmehr zu einem reinen Hoheitsrechte gestaltet;
dasz sonach da, wo es sich um eine Theilung des Staatsvermögens, als welche ihrer allgemeinen rechtlichen Natur nach selbst eine Handlung des bürgerlichen Verkehres ist, handelt, einzig die Gegenstände der erstern Klasse in Anschlag kommen dürfen, wogegen die letztern mit allen andern dem Staate zustehenden Hoheitsrechten von selbst, und ohne weder eine Schatzung noch einem sonstigen Acte des Theilungsverkehrs zu unterliegen, an denjenigen Theil, in dessen Gebiete sie sich befinden, übergehen;
dasz nun Schanzen und andere Festungswerke der Hauptsache nach in die zweite der angeführten Klassen gehören, indem sie, ohne ihre ganze Natur und Wesen, wonach sie zunächst zum Schutze der Anliegenden Oertlichkeit bestimmt sind, abzulegen, nicht als Gegenstand des bürgerlichen Verkehrs, weder in Beziehung auf Theilung, noch auf anderweitige Veräuszerung, noch auf Benutzung, gedacht, folglich auch nicht in einem Tausch- oder Geldwerth ausgedrückt werden können;
dasz diese rechtliche Natur der Festungswerke sich auch durch den Umstand, dasz dieselben ganz oder theilweise durch den gesammten Kanton Basel, mithin auch durch Beiträge der Landschaft errichtet und unterhalten wurden, um so wenigen ändert, als selbst beiden anerkannten Theilungsobjecten die Art ihrer Entstehung und das Verhältnisz der von dem einen oder andern der jetzigen Kantonstheile geleisteten Beiträge laut frühern Urtheilen auszer alle Berücksichtigung fällt;
dasz aber die im Streite liegenden Festungswerke, wenn gleich nicht in der Hauptsache, doch auf untergeordnete Weise, in einer gedoppelten Beziehung auf den bürgerlichen Verkehr gedacht, und insoweit auch bei der Aufzählung und Theilung des Staatsvermögens in eine gewisse Berücksichtigung gezogen werden müssen, inden namentlich:
a) es möglich und wirklich der Fall ist, dasz einzelne Theile der Schanzen, Graben u. dgl. unbeschadet ihrer wesentlichen Bestimmung und unabhängig von derselben, einen gewöhnlichen Ertrag und Nutzen, ähnlich ordentlichen Vermögensstücken abwerfen, und so eines gewissen privatrechtlichen Verkehres fähig werden;
b) es nicht blos als denbkar, sondern nach vielfachen Erfahrungen der neuern Zeit als eine nahe liegende Möglichkeit erscheint, dasz Festungswerke geschleift, und die dazu gewiedmeten Grundstücke in gewöhnliche Vermögensstücke verwandelt, und zum Gegenstande des bürgerlichen Verkehrs gemacht werden;
dasz nun in der ersten Beziehung (litt. a) der fragliche Ertrag nach seinem Durchschnittswerthe geschätzt, und in ein Capitalbetrag oder sonst dem Inventar als Gegenstand der Theilung einverleibt werden musz, wobei wohl solche Unkosten, welche allfällig für wirkliche Hervorbringung und Perception jenes Nutzens besonders erlaufen, nicht aber diejenigen, welche die allgemeine Erhaltung der Festungswerke in dem für ihre Hauptbestimmung erforderlichen Zustande mit sich bringt, in Abrechnung fallen;
dasz in der zweiten Rücksicht (litt. b) zwar einerseits die bezeichnete Möglichkeit des Uebergangs in wirkliches Staatsvermögen im Ganzen näher als bei andern dem Verkehr entzogenen Gegenständen liegt, sonach dieselbe bei der gegenwärtigen Theilung allerdings nicht auszer Acht gelassen wer-

den darf, anderseits aber es nach der gegenwärtigen Lage der Acten durchaus unmöglich ist, den Grad der Wahrscheinlichkeit jener Veränderung so zu berechnen, dasz daraus ein bestimmtes, in einem Geldwerth auszudrückendes Resultat gezogen werden könnte. [94])

This distinction between public and private domain and its consequences with respect to the partition of state-activa in case of state succession has, as it seems, not been dealt with on any other occasion by international tribunals.

The Tribunal examined also the question whether the University of Basel must be considered as a 'corporation' with a public or private character. In principle, that question must be solved in the light of national laws and ordinances:

Dasz nun ferner eine selbständige, von dem Staate unterschiedene Corporation als ein besonderes Rechts-Subject und Inhaber eines eigenen Vermögens nur durch die Anerkennung von Seite des Staates bestehen, und nur durch diese ihre künstliche Existenz erhalten und rechtfertigen kann, folglich die Entscheidung, ob die Universität Basel eine Corporation in dem bezeichnete Sinne sei, und als solche insbesondere zu den fraglichen Gütern in jenem Verhältnisz stehe, zunächst aus den Landesgesetzen und anderwertigen Verordnungen der zuständigen Staatsbehörden geschöpft werden musz. [95])

According to the Tribunal, the University of Basel did not enjoy an absolute private law character and so its property could be divided as the public domain of the State:

Die fortdauernde Notwendigkeit, einen groszen Theil der Universitäts Bedürfnisse, wie z. B. drei Viertheile der Besoldungen der Professoren, unmittelbar aus anderweitigen Staatsfond zu bestreiten, auf eine getrennte und selbständige privatrechtliche Existenz der Universität keineswegs hinweiset;
die der s.g. Regenz ertheilen Befugnisse, so weit sie sich auf Verhältnisse des öffentlichen Rechts, wie z. B. Jurisdiction, Vormundschaft u. dgl. beziehen, zu keinem Schlusse auf die privatrechtliche Stellung der Universität berechtigen, in ihrer Beziehung auf das Universitäts-Gut selbst aber als einfache untergeordnete Verwaltungsbefugnisse erscheinen, welche mit der Annahme, dasz das Universitäts-Gut ein mittelbares Staatsgut sei, in keinerlei Widerspruch stehen;
dasz aber, gesetzt auch, es wäre das fragliche Gut durch die erwähnten Gesetze als selbständiges Corporations-Vermögen der Universität anerkannt worden, doch zufolge dem in Erw. 4 angesprochenen Grundsatze dieses Verhältnisz aufhören musz, wenn der Staat, dessen Anerkennung seine Grundlage ausmacht, selbst untergeht, oder, wie im vorliegender Falle geschehen, in Theile zerfällt, welche einen vereinten Willen nicht haben, zumal kein Grund vorliegt, den Willen des einen der neuen Staaten mit Nichtachtung des andern zu anerkennen, vielmehr unter diesen Umständen, da die Bestimmung der fraglichen Corporation und ihres Gutes jedenfalls eine öffentliche, und nicht den Privat-Zwecken ihrer Mitglieder gewiedmet war, folglich bei der Auflösung des bestandenen Rechtsverhältnisses nicht die einzelnen gegenwärtigen Mitglieder als diejenigen Personen erscheinen, auf welche das bisherige Eigenthum der Corporation an ihrem Gut übergeht, — es nur die beiden Kantonstheile, als die aus dem ehemaligen Staate hervorgegangenen neuen Staaten sein können, denen dieses Eigenthum anfällt, und vorerst zu den gleichen ideellen Theilen wie das übrige Staatsgut zusteht;

[94]) Loc. cit. p. 435/8.
[95]) Loc. cit. p. 581.

dasz endlich, wenn sogar im Widerspruch mit allem Angeführten, das Universitätsgut bis auf die neueste Zeit als Corporationseigenthum der Universität zu betrachten wäre, doch anerkannter Maszen dasselbe einerseits seiner Verwendung nach einem reinen Staatszwecke, nämlich dem öffentlichen Unterricht, gewiedmet war, anderseits die Art der Verwendung von der Verfügung der Gesetzgebung des Staates in letzter Instanz abhing, hierdurch aber jenes Eigenthum der Corporation zu einer leeren Form herabsänke, aller Nutzen, alle Dispositions-Befugnisz, kurz alles, was dem Eigenthum seinen wirklichen Werth giebt, auf Seite des Staates sich verstände, so dasz auch unter jener Voraussetzung die dem Staate zustehenden Rechte dem Geldwerthe des gesammten Vermögens wesentlich gleich zu schätzen wären, und sich wiederum kein Grund denken liesze, diese Rechte dem einen Kantonstheil allein mit Ausschlusz des andern zuzusprechen.[96])

It is interesting to compare this decision with the case of Peter Pázmány University v. the State of Czechoslovakia. On December 30, 1923, the University of Budapest, invoking articles 246 and 250 of the Treaty of Trianon, filed an Application, dated December 24, 1923, bringing before the Hungaro-Czechoslovak Mixed Arbitral Tribunal a suit against the Czechoslovak Government regarding certain landed estates which, as alleged by the University, belonged to it, but which were situated in the territory transferred from Hungary to the State of Czechoslovakia and had been retained by the latter State. The University claimed, *inter alia,* that the property in question—the more important part of which is the estates of Vágsellye and Znióváralja—should be restored to it, freed from any measure of sequestration, retention or liquidation, and from any other measure restricting its right of free disposition. On February 3, 1933, the Mixed Arbitral Tribunal decided that the Czechoslovak Government must restore to the applicant University the immovable property claimed by the latter, freed from any measure of transfer, compulsory liquidation or sequestration, and in the condition in which it was before the application of the measures in question. The Czechoslovak Government appealed against this decision and in its application to the Permanent Court of International Justice formulated its claim as follows: "That in its judgment No. 221 delivered on February 3rd, 1933, the Hungaro-Czechoslovak Mixed Arbitral Tribunal wrongly decided that it was competent to take cognizance of the claim brought by the Royal Hungarian Peter Pázmány University, of Budapest, against the Czechoslovak State, under Article 250 of the Treaty of Trianon; that the Royal Hungarian Peter Pázmány University, of Budapest, is not justified in claiming the restitution by the Czechoslovak State of the immovable property specified in Section I of the aforementioned judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal; that the Czechoslovak Government is not bound to restore the aforesaid immovable property to the Royal Hungarian Peter Pázmány Univer-

[96]) Loc. cit. p. 582/3.

sity of Budapest." [97]) In its judgment given on December 15, 1933, the Permanent Court of International Justice held *inter alia:*

> It appears that the University enjoyed a personality in law (french text: personnalité morale) from the time of its foundation, as a consequence of the Deed of May 12th, 1635, by which Cardinal Pázmány transferred certain sums of money to the Rector of the Jesuit College at Nagyszombat for the purpose of creating a University in that town. The Charter, or Bull, issued by Ferdinand II on October 18th of the same year, in his capacity as Roman Emperor and King of Hungary, not only confirmed the Deed of Cardinal Pázmány and invested the University which the latter had created with all the privileges of a Studium generale—privileges which undoubtedly, at that time, included civil capacity, or personality—but it also made express reference to the endowment and the revenues of the University.[98])

Stating that no legislative enactment or other measure abolishing the University's personality in law had been communicated to the Court, it continued:

> The contention of the Czechoslovak Government is that the University was transformed, in the course of its history, by successive stages, into a State establishment, and that its personality became merged in that of the State. In support of this view the Czechoslovak Government relies on, inter alia, the instruments by which Queen Maria Theresa placed the University under the supervision and direction of the State; Law XIX of 1848, which placed the University directly under the authority of the Minister of Public Education; the intervention of the State, as a result of the University reform of 1849, in all matters concerning the legal status of the professors, the administration of the University property; and the inclusion, in 1870, of the University's budget in that of a Government department and its subsequent incorporation in the general State budget.
>
> The Hungarian Government does not dispute these facts, but it contends that they have not resulted in abolishing the University's personality in law.
>
> It is not necessary for the Court to go into the question whether, under Hungarian law, personality in law can be abolished, otherwise than by an express provision, embodied in a law or issued by the competent authority. It is sufficient for it to point out that such abolition could, in any case, only result if the provisions in force were found to be really incompatible with the possession of personality in law; no such incompatibility has been proved, and as a result of its investigation the Court has reached the conclusion that no such incompatibility exists.
>
> It should be observed, in this connection, that when one speaks of the personality in law of the University, all that is meant is purely and simply its capacity in private law, that is to say, its capacity to be the owner of movable or immovable property, to receive legacies or donations, to conclude contracts, etc. A capacity of that kind is in no way inconsistent with very extensive State supervision of the University's activity in the sphere of science and education.
>
> ... Again it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself. No argument against the University's personality in law can therefore be deduced from the fact that it did not enjoy the free disposal of the property in question.[99])

The Court had to ascertain whether the measures applied by the Czechoslovak authorities to the property in question fell within the

[97]) Series A/B No. 61, p. 209/10.
[98]) Loc. cit. p. 229.
[99]) Loc. cit. p. 230/1.

scope of article 250 of the Treaty of Trianon [100]) and whether, consequently, they should be revoked. After that investigation, the Court held that the measures applied to the University's estates were in the nature of compulsory administration or supervision within the meaning of article 250 of the Treaty. As a consequence of that decision, the Court determined that the University was justified in claiming the restoration of its property.

These two decisions differ wholly from each other: whereas the arbitral Tribunal argued that the University of Basel and its property had a public character owing 1) to the objects of the corporation and its property, which objects were public objects and not devoted to the private purposes of its members, 2) to the use to which the University's property was put, being a state purpose, namely public instruction, and 3) to the nature of that use which was dependent on the disposition of the state legislation, the Permanent Court of International Justice, in its turn, held that a corporation, such as the Peter Pázmány University, once it has acquired personality in law, can only lose that personality by virtue of legal prescriptions, which expressly deprive it of proper personality in law, the silence of the law not being sufficient thereto.[101])

The significance, in international law, of the public or private

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[100]) "Nothwithstanding the provisions of Article 232 and the annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions. Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration. ...", article 250 of the Treaty of Trianon, A.J.I.L. Off. Doc. 1921 p. 115. The Court observed: "Clearly, therefore, in determining the treatment of Hungarian property, the Treaty of Trianon takes two factors into account: to person to whom the property belongs, and the territory in which it is situated; its alleged public or private character is of no account. ... The Treaty contains no general rule, like articles 191 and 232 (or, so far as concerns territories transferred from Hungary to Czechoslovakia, like article 250), to determine the treatment of this so-called public property.", loc. cit. p. 238.

[101]) Cf. the decision of the French-German Mixed Arbitral Tribunal, dated July 15, 1925: "Attendu que les départements, communes et autres circonscriptions administratives existent comme personnes juridiques en vertu de la législation de l'Etat dont ils font partie; Att. que cette personnalité, une fois acquise, en vertu de ladite législation, subsiste même dans les cas où le territoire, qui comprend lesdites circonscriptions, serait cédé à un autre Etat, à moins que ce dernier Etat par une nouvelle législation ne les fasse disparaître en les remplaçant par d'autres organismes; Att. que le système du défendeur aurait pour conséquence que toutes personnes morales même celles du droit privé, comme les sociétés anonymes, les associations, les sociétés coopératives et autres, qui existent comme telles en vertu de la législation de l'Etat dont ils relèvent, devraient cesser d'exister aussitôt que le territoire où elles ont leur siège légal serait cédé à un autre Etat, thèse qu'on ne saurait que difficilement soutenir; Att. que le fait des modifications apportées à l'administration des départements et communes par la législation de l'Etat cessionnaire n'entraîne pas un changement de personnalité. ...", Recueil des décisions des T.A.M., Paris, vol. VI, p. 172.

character of such a corporation appears, in the case of state succession, with respect to the exercise of the territorial jurisdiction of the successor State over such a corporation. If a corporation has the character of a public service, the territorial jurisdiction of the successor State prevails wholly (or for the greater part, cf. the proportion made in the Basel arbitration) over the governing jurisdiction of the predecessor State over that corporation. If, on the contrary, a corporation has a private character, the personal jurisdiction of the predecessor State over that private corporation prevails over the territorial jurisdiction of the successor State.

This latter statement is confirmed in the case of citizenship: citizens of the predecessor State are not *ipso iure* citizens of the successor State. Moreover, the legal instrument between the predecessor State and the successor State will, in general, regulate that question in the sense of a right of option and by plebiscite.[102]) Similarly, the successor State is not obliged to take over the officials of the predecessor State. The German-Polish arbitral Tribunal, under the Geneva Convention of May 15, 1922, held:

> Es gibt keine völkerrechtliche Bestimmung, die den ein Gebiet übernehmenden Staat verpflichtet, die auf diesem Gebiete beschäftigten Beamten ohne weiteres zu übernehmen. Infolgedessen kan auch nach dem Völkerrechte nicht von einem Rechte des Beamten auf Uebernahme gesprochen werden. Diese Uebernahme kann daher nur auf dem Wege von Staatsverträgen oder Abkommen erfolgen.[103])
>
> Da es aber keine Bestimmung des Völkerrechts gibt, das der übernehmende Staat verpflichtet sei, die auf dem abgetretenen Gebiete amtierenden unmittelbaren Staatsbeamten zu übernehmen.[104])
>
> Wenn nun der Kläger nicht zu der Beamtenkategorie des Art. 544 des Abkommens gezählt werden kann, so finden auf ihn die allgemeinen völkerrechtlichen Grundsätze Anwendung, die mangels einer Vereinbarung zwischen den Staaten keine Verpflichtung kennen, die Beamten des abgetretenen

[102]) "... qu'en effet, la convention intervenue entre deux Etats, consistant à remettre au sort d'un plébiscite le rattachement à l'un d'eux d'un territoire quelconque et dont les frontières seront fixées d'après les voeux dégagés des votes exprimés par la population dudit territoire, même si cette convention comporte renonciation anticipée à tous ses droits par l'Etat auquel ledit territoire est présentement rattaché, une telle convention ne saurait ipso facto exercer d'influence sur la nationalité et du territoire visé et de ses habitants; que le fait juridique qui conditionne un changement quelconque est le plébiscite lui-même; qu'il n'emporte, d'ailleurs, dans ses résultats que des modifications affectant la souveraineté des Etats intéressés; mais que pendant la période transitoire qui commence à la date de la mise en vigueur du Traité contenant une pareille convention et qui se termine à celle où la population se prononce plébiscitairement, la souveraineté de l'Etat possesseur subsiste sur le territoire disputé; que la renonciation anticipée à ses droits par l'un des deux Etats intéressés est simplement suspendue jusqu'au moment où les résultats du plébiscite sont acquis; que ceux-ci conditionnent et déterminent la réalité et l'étendue de ladite renonciation.", French-German Mixed Arbitral Tribunal, 9-4-1926, Recueil vol. VI, p. 280/1. Cf. vol. II, p. 621 and vol. IV, p. 849.

[103]) Amtliche Sammlung, Berlin 1930/7, vol. I, p. 54, Survey No. 345.

[104]) Ibidem vol. I, p. 132.

Staatsgebietes zu übernehmen. Wenn demnach der neue Staat die Beamten des alten Staates in ihren Stellungen beläszt, so geschieht dies kraft der Souveränität des neuen Staates, und begründet ein neues Beamtenverhältnis. Falls hierbei der neue Staat den in ihren Stellungen belassenen Beamten des alten Staates Versprechungen abgegeben hat, so betrifft dies lediglich das innerstaatliche Verhältnis zwischen den neuen Staate und den Beamten des alten Staates, das keine internationalen Verpflichtungen erzeugt. Da die auf solchen Versprechungen sich gründenden Rechte der Beamten erst nach dem Wechsel der Souveränität entstehen könnten.[105])

In the above-quoted Basel arbitration it was held that, if officials lost their position after state succession, they could not claim damages.

Dasz noch viel weniger der Statz angenommen werden kann, es seien die eigentlichen Staatsbeamten, welche nicht durch spezielle, gegen ihre Personen gerichtete, Regierungs-Acte, sondern in Folge einer allgemeinen Staatseränderung ihre Stellen verlieren, zu einer Ersatzforderung berechtigt, zumal dagegen nicht blosz alle angeführten Vorgänge in anderen Kantonen, sondern auch diejenigen im Kanton Basel selbst streiten.[106])

II. Conflict with jurisdictions of the predecessor State or of third States

A conflict may arise between the territorial jurisdiction of the successor State and jurisdictions of the predecessor State or third States regarding private rights acquired by citizens of the predecessor State who, after the state succession, remained citizens of that State, or by citizens of third States, that is to say, rights acquired under the legislation of the predecessor State. The question arises, then, whether the personal jurisdiction of the predecessor State or of third States over its citizens,[107]) who have acquired private rights, prevails over the territorial jurisdiction of the successor State, in other words: whether a general rule of international law limits the exercise of the successor State's territorial jurisdiction in favour of the exercise of the personal jurisdiction of the predecessor State or of third States. If such a general rule, in the absence of conventional rules applicable to the case, does not exist, it might be concluded that the successor State may exercise its territorial jurisdiction in that matter in a discretionary manner. Since the existence of such a general rule has been denied by some authors,[108]) many decisions of international tribunals will be quoted.

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[105]) Ibidem vol. I, p. 158. "Aus diesem Grunde kann auch keine allgemeinvölkerrechtliche Pflicht des Gebietsnachfolgers bestehen, ein vom Gebietsvorgänger begründetes öffentlich-rechtliches Dienstverhältnis seinerseits fortzusetzen. Solche Pflichten können nur entweder durch Staatsverträge oder durch das innerstaatliche Recht des Nachfolgestaats geschaffen werden.", A. von Verdross: Völkerrecht, Berlin 1937 p. 243.

[106]) Loc. cit. p. 617, decision of January 27, 1834.

[107]) See Chapter II.

[108]) "Beaucoup plus intéressante et plus pertinente à l'égard de la preuve à faire se trouve être naturellement la jurisprudence des tribunaux internationaux, étant

The German-Polish Arbitral Tribunal, under the Geneva Convention of May 15, 1922, held:

> Das gemeine Völkerrecht kennt zwar den Grundsatz, das Privatrechte, die gemäsz den Gesetzen des abtretenden Staates erworben worden sind, von dem erwerbenden Staate nicht willkürlich aufgehoben werden dürfen. Allein die gesetzgebende Gewalt des erwerbenden Staates hat ebenso wie die des abtretenden Staates die Möglichkeit, derartige Rechte im Wege der Gesetzgebung aufzuheben oder zu ändern. Dagegen läszt das gemeine Völkerrecht willkürliche Aenderungen erworbener Rechte auszerhalb der Gesetzgebung allerdings nicht zu. Die Staatsfremden, deren Rechte auf diese Weise ohne Entschädigung entzogen würden, würden bei ihrem Heimatstaate Schutz suchen. Dieser könnte alsdann, wenn er es für angebracht hält, von dem rechtsverletzenden Staate Genugtuung verlangen, die in sehr verschiedener Art geleistet werden könnte. Hierbei könnte aber der fremde Staat, der Genugtuung verlangt, grundsätzlich keine gröszeren Rechte für seine Staatsangehörigen beanspruchen, als sie die eigenen Angehörigen des verletzenden Staates hätten. Dagegen könnten sich die eigenen Staatsangehörigen des erwerbenden Staates, auch die auf Grund der Zession neu Hinzugekommenen, nur an die Gerichte und Verwaltungsbehörden ihres eigenen Staates wenden und lediglich auf Grund der bestehenden Landesgesetze Schadensersatz fordern oder sonstige Schadloshaltung von den Landesbehörden erbitten. Denn es besteht kein völkerrechtlicher Grundsatz, auf Grund dessen die Staatsangehörigen von ihrem eigenen Staate Schadensersatz für die Aufhebung oder Beeinträchtigung ihrer erworbenen Rechte durch Anordnungen staatlicher Behörden auszerhalb der Gesetzgebung verlangen könnten, und zwar schon deswegen nicht, weil das Völkerrecht nur ein Recht zwischen Staaten ist. Es läszt sich also bei eigenen Staatsangehörigen nur ein völkerrechtliches Gebot an den erwerbenden Staat des Inhalts feststellen, dasz Privatrechte von dem gebietserwerbenden Staate zu achten sind und nicht willkürlich aufgehoben werden dürfen, wobei jedoch eine völkerrechtliche Rechtsfolge nicht vorgesehen ist, insbesondere nicht in Gestalt der Schadloshaltung.[109])

Lauterpacht beruft sich ferner auf den Grundsatz des gemeinen Völkerrechts über den Schutz erworbener Rechte bei einem Staatshoheitswechsel. Unbedenklich ist ihm darin beizustimmen, dasz ein solcher Grundsatz im gemeinen Völkerrecht besteht, und das er dem Art. 4 des Genfer Abkommens zugrunde liegt. Ueber den Inhalt dieses Grundsatzes aber ist keine Uebereinstimmung vorhanden, und gerade darum haben bei Schlieszung des Genfer Abkommens die Vertragsparteien, soweit es sich um die Teilung des oberschlesischen Abstimmungsgebiets handelt, in Art. 4 § 2 eine Klarstellung des Inhalts dieses Grundsatzes wenigstens in einigen Punkten vorgenommen. Insbesondere kann es nicht als ein Rechtsgrundsatz des gemeinen Völkerrechts anerkannt werden, dasz der Schutz der erworbenen Rechte sich auch auf die Fälle erstreckt, in denen ein vor dem Wechsel der Staatshoheit erworbenes Recht nach dem Wechsel auf eine andere Person übergegangen ist und erst nach diesem Uebergange aufgehoben wird. Lauterpacht selbst gibt keinen Beleg für einen solchen Rechtssatz. Die Entscheidungen internationaler Gerichte, die er anführt (Jackson H. Ralston, The Law and Procedure of international Tribunals 1926 par. 248-264; Mc. Nair and H. Lauterpacht: Annual Digest of Public International Law Cases 1925/6 Nr. 175, 1927/8 Nr. 175) betreffen überhaupt nicht Fälle des Staatshoheitswechsels.

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données leur autorité et leurs origines. Si cette jurisprudence, par une pratique prolongée, était définitivement fixée sur le principe du respect international des droits acquis, l'existence positive de ce principe en retirerait une confirmation très importante, voire même décisive. Il ne semble pas cependant qu'une pareille conclusion soit jusqu'à présent autorisée.", A. Cavaglieri: La notion des droits acquis et son application en droit international public, R.G.D.I.P. 38 (1931) - 269.

[109]) Amtliche Sammlung vol. II, p. 168, 170.

Der völkerrechtliche Grundsatz wird von Lauterpacht dahin angegeben: die vor dem Wechsel der Staatshoheit erworbenen Rechte dürfen nicht beeinträchtigt werden ("This principle is that the rights acquired prior to the change of sovereignty remain unaffected. They must not be diminished or impaired in any way."). Lediglich aus diesem Grundsatz läszt sich aber ein solcher Rechtssatz, wie Lauterpacht ihn verficht, nicht herleiten. Der Grundsatz beruht auf folgendem Rechtsgedanken. Tritt ein Gebiet unter eine andere Staatshoheit, so erhebt sich die Frage, ob die Rechte der Bevölkerung, die unter der früheren Staatsgewalt und unter deren Gesetzen erworben sind, unter der neuen Staatsgewalt und gegenüber deren Gesetzen bestehen bleiben. Billigkeit und Rechtsempfinden fordern, diese Frage zu bejahen, wenigstens so weit es sich um Rechte privater Natur handelt. Hieraus ergibt sich als notwendiger Inhalt des völkerrechtlichen Grundsatzes, dasz die neue Staatsgewalt die vor dem Hoheitswechsel erworbenen Rechte als fortbestehend anerkennen musz. Dagegen läszt sich nicht als notwendiger Inhalt des Grundsatzes die Erstreckung des völkerrechtlichen Schutzes auf eine erst nach dem Hoheitswechsel eingetretene Rechtsnachfolge ansehen. Denn die Rechtsnachfolge geschieht bereits unter der neuen Staatshoheit und unter deren Gesetzen. Wird ein Recht, das einer Person beim Wechsel der Staatshoheit zustand, demnächst von ihr an einen Dritten abgetreten und erfolgt dann die Aufhebung des Rechts durch eine staatliche Anordnung, so ist derjenige der bei dem Wechsel der Staatshoheit Inhaber des Rechts war, von der Aufhebung gar nicht betroffen; der Rechtsnachfolger aber, der davon betroffen wird, hat das Recht erst unter der Herrschaft des neuen Staates erworben. Den Erwerb des Rechtsnachfolgers völkerrechtlich zu schützen, besteht kein aus der Rechtsidee sich zwingend ergebender Grund. [110])

Das Gutachten führt aus: ... ("but they would be so diminished and impaired if the view were accepted that they continue to exist only if there is no change in the person of the holder. An acquired right which as the result of the change of sovereignty would be deemed to have become strictly personal so that it cannot be transmitted by inheritance or that it cannot be assigned or sold would cease to be a full right as it existed at the time of the change of sovereignty"). Hierauf ist folgendes zu erwidern: Es ist unzutreffend, dasz nach der Auslegung, die das Schiedsgericht der zeitlichen Voraussetzung des Art. 4 des Genfer Abkommens gibt, die vor dem Hoheitswechsel erworbenen Rechte durch den Hoheitswechsel zu streng persönlichen Rechten würden, und nur solange bestünden, als die Person der Rechtsträgers nicht wechselt. Die vom Schiedsgericht vertretene Auslegung des Art. 4 läszt die Natur der vor dem Hoheitswechsel erworbenen Rechte und ihren Bestand gänzlich unberührt. Diese Rechte sind nicht Rechte, die auf dem Völkerrecht, insbesondere auf dem Genfer Abkommen beruhen, sondern vielmehr solche, die gemäsz den im oberschlesischen Abstimmungsgebiet vor der Teilung geltenden deutschen Gesetzen erworben sind, und deren Bestand, Vererblichkeit und Veräuszerlichkeit durch das Genfer Abkommen nicht geändert wird. Art. 4 und 5 gewähren diesen Rechten neben dem ihnen zukommenden innerstaatlichen Schutz einen völkerrechtlichen Schutz. Man kann daher nicht, wie die Klägerin tut, sagen, dasz wenn der völkerrechtliche Schutz entfällt, die Rechte schutzlos und unverkäuflich würden. Denn es verbleibt ihnen nach wie vor der innerstaatliche Schutz, und was die Verwertbarkeit anlangt, so stehen sie nicht slechter als die anderen nach dem Staatshoheitswechsel erworbenen Rechte. [111])

In its advisory opinion on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, dated September 10, 1923, the Permanent Court of International Justice observed:

[110]) Ibidem, vol. III, p. 136, 138, 140.
[111]) Ibidem, vol. III, p. 140, 142.

> Private rights acquired under existing law do not cease on a change of sovereignty. ... It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice. ... Even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty. ... The Court, as has already been seen, is of opinion that no treaty provision is required for the preservation of the rights and obligations now in question. [112])

And in its judgment No. 7, dated May 25, 1926:

> ... the principle of respect for vested rights, a principle which, as the Court had already had occasion to observe, forms part of generally accepted international law. [113])

The Hungarian-Serbian, Croatian and Slovenian Mixed Arbitral Tribunal held in a decision of September 15, 1927:

> ... la règle de droit international que la puissance ayant obtenu par voie de conquête ou de cession un territoire étranger, est tenue au respect des droits privés acquis et, notamment, n'est pas autorisée à soustraire leurs biens privés aux ressortissants de la puissance dont elle est le successeur. [114])

In a case between Austria, Hungary and the Sopron Köszeg Local Railway Company, the arbitral Tribunal held in its award dated June 18, 1929:

> Holding that, in principle, the rights which a private company derives from a deed of concession cannot be nullified or affected by the mere fact of a change in the nationality of the territory on which the public service conceded is operated; that most authorities and the international judgments which conform most nearly to modern views of international law take this view. [115])
>
> ... Considering, on the other hand, that contracts concluded by a concession-holding railway company with a third party, more particularly for the operation of a line which it has built, cannot in principle be relied upon against the State on whose territory the said line is henceforth situated by virtue of the provisions of a treaty; that the said State, though compelled, as already mentioned, to respect those rights which the company derives from its concession, is not bound by any provisions which may be embodied in such a contract as regards the advantages to be respectively accorded to the operating and to the concession-holding party, nor indeed by the existence of a working contract which, for it, is res inter alios acta. [116])
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> ... Holding, in short that the contract clauses under which the Sopron Köszeg Railway Company was working before the war can be pronounced neither wholly invalidated by the change of sovereignty affecting the territories on which its undertaking is situated, nor indeed wholly valid and

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[112]) Series B No. 6, p. 36, 38.
[113]) Case concerning certain German interests in Polish Upper Silesia, Series A No. 7, p. 42.
[114]) Recueil T.A.M. vol. VII, p. 871. See also vol. VIII, p. 582, 587.
[115]) A.J.I.L. 24 (1930) - 167, Survey No. 328.
[116]) Ibidem p. 167/8.

enforceable according to their drafting and tenor up to the expiration of the concession.[117])

Mr. O. Unden, arbitrator in a case between Bulgaria and Greece, observed in his award of November 4, 1931:

> Following the example of the peace treaties of 1913-1914, the Treaty of Neuilly expressly sanctions a general principle of common international law, that concerning respect for private rights in annexed territory, regularly acquired under the former government.[118])
>
> ... That would be an express confirmation of the well-known principle of respect for acquired rights in ceded territory, that is, the novation by the annexing State of an obligation incumbent upon the ceding State.[119])
>
> ... When an international convention imposes upon one of the contracting parties the obligation to respect acquired rights and to recognize official titles until legal proof to the contrary, a general refusal to conform to the rule embodied in the treaty may evidently constitute a violation of that obligation. But this violation can take other forms as well. It may also consist of a refusal to recognize in a given case the validity of a law, under the pretext that the law has not been sufficiently proved.[120])

In a dissenting opinion before the Hungarian-Czechoslovak Mixed Arbitral Tribunal, Mr. A. Alvarez said, on February 19, 1934:

> ... à défaut de stipulations expresses des parties, un Etat qui acquiert une portion de territoire d'un autre Etat est tenu d assumer certaines obligations de celui-ci, de respecter la validité de certains actes juridiques passés dans cette région, ainsi que de certains droits qui y ont pris naissance.
>
> ... Pour les matières qui ne sont pas réglées par les Traités qui consacrent la cession, il faut avoir recours aux principes généraux du droit international. Soutenir le contraire et croire que l'Etat cessionnaire n'a d'autres obligations que celles qu'il a expressément acceptées par lesdits Traités, serait nier l'existence du droit des gens. Ce droit crée, en effet, en cette matière certains droits et impose certaines obligations dont l'Etat acquéreur ne peut se libérer que d'un commun accord avec l'Etat cédant. Mais les principes du droit international à cet égard ne sont précis que pour imposer au cessionnaire l'obligation de reconnaître la validité des actes juridiques passés sur le territoire cédé, de respecter les droits qui y ont été acquis par des particuliers et d'assumer l'exécution de certains contrats souscrits par l'Etat cédant, concernant ce territoire, tels ceux relatifs aux travaux publics. Pour le reste, la doctrine et la pratique ne sont pas uniformes et même tendent à évoluer, surtout depuis la grande guerre. La validité des actes juridiques et le respect des droits acquis doivent être appréciés par l'Etat cessionnaire conformément aux lois en vigueur dans le pays cédant au moment où sont passés ces actes ou sont nés ces droits, sauf si ces lois sont contraires à l'ordre public, — qu'il ne faut pas confondre avec le droit public — de l'Etat cessionnaire. Cette matière relève, ainsi, non pas du droit international privé, comme on pourrait le croire à première vue, mais du droit international public, car il ne s'agit pas de conflits de lois de pays différents, mais de lois à appliquer sur la partie du territoire acquise par un Etat, c'est-à-dire sur laquelle il y a eu un changement de souveraineté.
>
> ... Un droit acquis ne veut pas dire un droit intangible, ni immuable, ni perpétuel: une loi postérieure peut modifier les conditions d'exercice de ce droit. Il n'est pas nécessaire non plus, que les biens auxquels il se réfère

[117]) Ibidem p. 169/70.
[118]) A J.I.L. 28 (1934) - 765, Survey No. 330.
[119]) Ibidem p. 771.
[120]) Ibidem p. 787.

> se trouvent matériellement dans le patrimoine du bénéficaire; il suffit que celui-ci ait une action pour les réclamer. Ainsi, un bail, une rente, le titre d'un vendeur pour exiger de l'acheteur le prix de la chose vendue, sont des droits acquis, bien que les titulaires ne soient pas en possession des sommes qui se rapportent à ces actes.[121])

An arbitral Tribunal, in a case between Austria and Yugoslavia, held in its award dated April 4, 1934:

> ... que sur ce dernier point, l'article 320 se borne à confirmer, ainsi que l'a reconnu la jurisprudence antérieure, ce principe du droit public international que les droits tenus par une compagnie privée, d'un acte de concession, ne sauraient être mis à néant ou lésés du seul fait que le territoire sur lequel est assis le service public concédé a changé de nationalité.[122])

In a decision pronounced in 1838, in a case between Massachusetts and Rhode Island, the United States Supreme Court observed:

> There are two principles of the law of nations which would protect them in their property: first: That grants by a government, de facto, of parts of a disputed territory in its possession, are valid against the State which had the right; second: That when a territory is acquired by Treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred.[123])

As to a disputed territory, to which the Court referred, it must be noted that arbitrators, called upon to decide on such a case, have also confirmed these decisions. In the Caroline case between Germany and Spain, the Mediator, Pope Leo XIII, observed:

> The Spanish Government to render her sovereignty effective engages to establish as quickly as possible in that archipelago a regular administration with sufficient force to guarantee order and the rights acquired.[124])

In a dispute between France and the Netherlands, the arbitrator, Alexander III, Emperor of all the Russias, held:

> En vertue de cette décision arbitrale, le territoire en amont du confluent des rivières Awa et Tapanahui doit appartenir désormais à la Hollande, sans préjudice, toutefois, des droits acquis, bona fide, par les ressortissants français dans les limites du territoire qui avait été en litige.[125])

It may be concluded from these cases that a general rule of international law exists, by virtue of which a successor State, in the exercise of its territorial jurisdiction, is obliged to respect private rights

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[121]) R.G.P.C. 1934-II-16.
[122]) R.G.D.I.P. 41 (1934) - 713, Survey No. 329.
[123]) 12 Pet. 749.
[124]) Proposition dated October 22, 1885, Moore 5-5044, Survey No. 141.
[125]) May 13/25, 1891, Moore 5-4870, Survey No. 153. Cf. also the Cravairola case, Moore 2-2028, Survey No. 107.

acquired under the legislation of the predecessor State. Consequently, the international responsibility of the successor State would be engaged, if it did not respect such rights.[126])

When private rights have been acquired by citizens of the predecessor State, which State has been absorbed by the successor State, and when such citizens are now citizens of the successor State, no conflict of state jurisdictions arises. The question of respect for vested rights is, then, no longer a question of international law, but one of domestic law.

Finally, the question may be raised whether the successor State, in the exercise of its new territorial jurisdiction is obliged, by virtue of a general rule of international law, to take over the rights and duties of the predecessor State over individuals and States. Since that question appears to be a very complicated one, varying with the nature of such rights and duties, and with that other question whether the predecessor State still exists after the state succession, it seems impossible to give any simple solution, the more so as decisons of international tribunals are very scarce in these matters, which are generally regulated by treaty.

Rights and duties of the predecessor State may spring from general international law or from treaties or contracts. As to the former

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[126]) "Attendu qu'il s'agit donc d'une mesure qui affecte la propriété d'un bien ex-ennemi en l'enlevant dans sa totalité au propriétaire, sans son consentement et sans aucune indemnité, mesure qui constitue une violation du principe général du respect des droits acquis et, par conséquent, dépasse les limites du droit international commun.", Rumanian-Hungarian Mixed Arbitral Tribunal, decision of January 10, 1927, Recueil T.A.M. vol. VII, p. 135. In its judgment No. 7, the Permanent Court of International Justice held, moreover: "It should first of all be observed that whereas Head II (of the Convention of Geneva, May 15, 1922) is general in scope and confirms the obligation of Germany and Poland in their respective portions of the Upper Silesian territory to recognize and respect rights of every kind acquired before the transfer of sovereignty, by private individuals, companies or juristic persons, Head III only refers to Polish Upper Silesia and establishes in favour of Poland a right of expropriation which constitutes an exception to the general principle of respect for vested rights." (Series A No. 7, p. 21). "Further, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. ...It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention." (Ibidem p. 22). "Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals." (Ibidem p. 33). And in its advisory Opinion No. 6, the Court observed: "The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here." (Series B No. 6, September 10, 1923, p. 36).

category, the American-British Claims Commission, under the special agreement of August 18, 1910, held in the Brown case, November 23, 1923:

> The contention of the American Agent amounts to an assertion that a succeeding State asquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot indorse this doctrine.[127])

And in the case of the Hawaiian claims, November 10, 1925:

> It is contended on behalf of Great Britain that the Brown Case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one State to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown Case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct State, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct State, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.[128])

In a comment on the Brown case, Sir Cecil Hurst observed:

> Nevertheless, from the point of view of international law, the case shows that liability for the torts of the Government of a former State does not pass to a State conquering and annexing its territory.
>
> ...The doctrines enunciated by the various authors are generally inconsistent with each other, a fact which, of itself, is sufficient to show the absence of any established rule of international law.
>
> ...If the proposition advanced by some writers, that the sum total of the rights and obligations of the former State constitute an hereditas which passes to the new State, were true, it would not cover the case of liability for the wrongful acts of the former State, because under the rules of Roman Law liability to an action ex delicto did not pass to the heirs.
>
> ...In reality there is no true analogy between succession to an hereditas and the acquisition of the territory and the property in such territory of another State by annexation and conquest. Conquest and annexation constitute an act of appropriation by force; the title of the annexing State is founded on might; the title to the property of the former Government rests upon the fact of physical control and the expressed intention to maintain

[127]) Report of Fred. K. Nielsen, Washington G.P.O. 1926, p. 201, Survey No. 303. See also p. 162/202.

[128]) Ibidem p. 160/1. See also p. 85/161.

it. Some property may never come within the power of the annexing State and to such property it gets no title. What the conqueror annexes is the territory of the former State, not the State itself, still less its Government. When once this principle is realized, it will be seen that in sound theory it is impossible to hold the conqueror liable for the torts of the Government which he has displaced, because the torts were the torts of the Government and not the torts of the territory.[129])

The Tripartite Claims Commission established in pursuance of the Agreement between the United States, Austria, and Hungary, signed at Washington on November 26, 1924, held in its Administrative Decision No. I, dated May 25, 1927:

The questions here presented are, what existing Government or Governments are liable for the acts of the Austro-Hungarian Government or its agents resulting in damage to American nationals, is that liability joint or several, and what is its extent? The answer must be found in the provisions of the Treaties of Vienna and of Budapest. It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to the liability of a Successor State for the obligations either ex contractu or ex delicto of a dismembered State. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the Successor States, and while the other group maintains that the obligations do not pass with succession, neither group maintains that a joint liability rests upon two or more Successor States where the territory of a dismembered State has been divided between them.

...Having in mind the pre-war and war relationship between the former Austrian Empire and the former Kingdom of Hungary and their respective responsibilities for the acts of the Austro-Hungarian Monarchy, the Tripartite Agreement under which this Commission is constituted was executed. It recites that all three of the parties are "desirous of determining the amounts to be paid by Austria and by Hungary" under the Treaties of Vienna and of Budapest respectively and provides that the Commissioner "shall determine the amounts to be paid to the United States by Austria and by Hungary". This language imports a distributive and not a joint liability and a purpose to apportion damages for which both may be liable, allocating to each a definite amount. The notes exchanged between the United States and Austria during the negotiation of this Agreement clearly reflect this purpose. This is in harmony with the spirit of the Treaties considered as a whole which indicates a purpose not to create joint obligations as between Austria and Hungary as they now exist but to divide and to allocate to each its separate liabilities. (Wapa v. République d'Autriche, Austro-Yugoslavian Mixed Arbitral Tribunal, III Decisions of Mixed Arbitral Tribunals, 720.)

The Reparation Commission, which under the Treaties of St. Germain and Trianon is clothed with the power to fix the amount of compensation to be paid by Austria and Hungary respectively under the Reparation provisions of the Treaties, has not as yet directly dealt with this question of apportionment as between them. That Commission, however, acting within its jurisdiction has in a number of instances considered questions of credits on their reparation accounts to Austria and to Hungary respectively for warships, mine layers, abandoned war material, and other property formerly belonging to the Austro-Hungarian Government and passing under the Treaties through the Reparation Commission or otherwise to the Allied and Associated Powers. The Reparation Commission in apportioning these credits as between Austria and Hungary accorded to Austria 63.6 per cent and to Hungary 36.4 per cent of the aggregate amount thereof, this being the basis on which the former Austrian Empire and the former Kingdom

[129]) State succession in matters of tort, British Yearbook 1924 p. 165, 177/8.

of Hungary respectively contributed to the acquisition of the ceded property by the Austro-Hungarian Government. It is believed that the rule applicable to the apportionment of credits to which Austria and Hungary are respectively entitled under the Reparation provisions of the Treaties is equally applicable to the apportionment of their liabilities thereunder. The Governments of Austria and of Hungary in the agreement of June 1, 1926, adopted as between themselves a division of liabilities in harmony with the rule here announced.[130])

In this connection, two other decisions of the Basel Arbitration may be quoted:

Indem ... die Verpflichtung des einen Nachbarstaates, die wirklichen Rechte der Angehörigen des andern zu anerkennen und zu schützen, sich unter civilisirten Staaten von selbst versteht, und nicht durch besondere Anerkennungen und Garantieen oder Verträge für die Einzelnen Rechtsverhältnisse festgesetzt und bedungen zu werden pflegt;

dasz insbesondere auch der Satz, dasz diejenigen Beschränkungen, welche sich die Regierung des ungetrennten Kantons Basel durch Ertheilung von Conzessionen für Errichtung von gewissen Anstalten an öffentlichen Flüssen, und die dadurch begründeten Privatrechte von Partikularen oder Corporationen, mit Beziehung auf die künftige Ausübung der diesfälligen Hoheitsrechte aufgelegt haben möchte, nunmehr auf die Regierungen beider Kantonstheile übergegangen sind, sich so sehr von selbst versteht, dasz in dieser Beziehung weder besondere Verträge noch in Ermanglung von solchen vorgängige gerichtliche Regulative als notwendig erscheinen.[131])

Dasz dagegen rücksichtlich aller übrigen Forderungen ein unmittelbares Rechtsverhältnisz von Staat zu Staat in Frage liegt, und die sämtliche Ansprüche einzelner dritter Personen nicht in unmittelbarer rechtlicher Beziehung zu dem Kanton Basel-Stadttheil stehen, sondern durch die Person des Kantons Basel-Landschaft vermittelt sind;

dasz nun aber die vorliegenden zahlreichen Forderungen, sowohl nach der Natur des zum Grunde liegenden thatsächlichen Ereichnisses, als nach der Lage der Acten, nicht einzelnen der selbstständige Gegenstand der prozessualischen Verhandlung und der gerichtlichen Würdigung sein können, sondern massenweise behandelt werden müssen, so dasz aus der Prüfung aller einzelnen Thatsachen und Beweismittel, verbunden mit der Anwendung der einschlagenden allgemeinen Grundsätze, eine nach billigem Ermessen zu bestimmende Gesammtsumme des rechtlichen Schadenersatzes als Resultat hervorgehe.

... Dasz nun auf der einen Seite Verwundung und Tödtung von Menschen in einem, wenn auch ungerecht angehobenen, und mit einer gewissen Ersatzpflicht begleiteten Kriege oder Kampfe zwischen zwei Staaten, keineswegs gleich Schädigungen von Vieh, Waaren, oder andern einfachen Vermögensstücken, eine gewöhnliche civilrechtliche Ersatzforderung der einzelnen Betroffenen gegen den feindlichen Staat begründen kann, auf der andere Seite hingegen allerdings wenigstens eine Gewissenspflicht des eigenen Staates vorhanden ist, seinen Verwundeten und den Hinterlassenen der Getödteten pekuniäre Hilfe zu leisten, und ihnen den im öffentlichen Interesse erlittenen Nachtheil und Verlust soviel möglich zu erleichtern; für welche Obliegenheit, da sie dem einen Staate aus dem für schuldhaft erklärten Verfahren des andern erwuchs, dieser allerdings wie für andern Schaden Abtrag zu thun hat.[132])

It can hardly be maintained that a general rule of international law could be deduced from these instances.

[130]) Final Report of Commissioner (E. B. Parker) and decisions and opinions, Washington G.P.O. 1933, p. 11, 12/3, Survey No. 365.

[131]) Decision of September 15, 1834, loc. cit. p. 728/9.

[132]) Decision of April 21, 1834, loc. cit. p. 823, 824.

As to the second category, the question whether the successor State is obliged to take over the public debts of the predecessor State has been exhaustively dealt with in doctrine.[133]) The opinion of many authors that such a general rule of international law does not exist, was incidentally confirmed by Prof. Eugène Borel, arbitrator in the Public Ottoman Debt case, who stated in his award of April 18, 1925:

> On ne peut considérer comme acquis en droit international positif le principe qu'un Etat acquérant partie du territoire d'un autre doit en même temps se charger d'une fraction correspondante de la dette publique de ce dernier. Pareille obligation ne peut découler que du traité où l'assume l'Etat en cause et elle n'existe que dans les conditions et limites où elle s'y trouve stipuleé.
>
> ... De l'avis de l'Arbitre, il n'est pas possible, malgré les précédents déjà existants, de dire que la Puissance cessionnaire d'un territoire est, de plein droit, tenue d'une part correspondante de la dette publique de l'Etat dont il faisait partie jusqu àlors.[134])

As to the rights and duties resulting from treaties, only two contradictory arbitral awards, on the same question, are available. In April 1824, when the Republic of Colombia was at war with Spain, a war in which the United States were neutral, the American schooner 'Mechanic' sailed from Havana with a general cargo bound for Tampico, Mexico. After having made the latter port, and being on her way to her ultimate destination, she was on May the sixth boarded by the Colombian privateer 'General Santander' and detained for carrying enemy's goods. The supercargo, two passengers, and four of the crew were taken out of the 'Mechanic', which was sent to Laguayra in charge of a prize crew for adjudication. Proceedings were insti-

[133]) "La succession aux dettes est admise en droit privé; quand une personne recueille tout un patrimoine, le passif doit être payé sur l'actif Cette question a en droit international une importance considérable. L'Etat successeur doit-il payer une partie des dettes de l'Etat auquel il succède? Je ne crois pas que les principes du droit civil puissent donner grande ressource pour la solution de cette question. On ne peut, en effet, comparer les successions de souveraineté entre les Etats aux successions de patrimoine entre les particuliers. C'est dans les conventions internationales ou dans la coutume que l'on peut trouver des solutions; il n'y a pas sur ce point de principe général commun aux nations civilisées.", G. Ripert: Les règles du droit civil applicables aux rapports internationaux, Recueil des Cours 44 (1933) - 640. Cf. H. Appleton: Des effets des annexions de territoires sur les dettes de l'Etat démembré ou annexé et sur celles des provinces, départements, etc. annexés, Paris 1895; Th. Baty: Division of States, its effect on obligations, Transactions of the Grotius Society, 9 (1923) - 119/29; idem: The obligations of extinct States, Yale Law Journal, 1926 p. 434; E. H. Feilchenfeld: Public debts and State succession, New York 1931; G. Jèze: Le partage des dettes publiques au cas de démembrement du territoire, Revue de science et de législation financières, 19 (1921) - 59; A. N. Sack: Les effets des transformations des Etats sur leurs dettes publiques, Paris 1927; idem: La succession aux dettes publiques d'Etat, Recueil des Cours 23 (1928) - 145/326; G. Sauser-Hall: La succession aux dettes publiques en cas d'annexion, Schweizerische Juristen-Zeitung 35 (1938) - 161/5; F. Schmidt: Der Uebergang der Staatsschulden bei Gebietsabtretungen, Berlin 1913.

[134]) Edition Geneva 1925, p. 60, 62. Survey No. 353. Cf. Survey Nos. 5, 20 and 253, and Moore 4-3524/44 and 3571/90.

tuted against the cargo of the 'Mechanic', which cargo was condemned as enemy's (Spanish) property by the Court sitting at Puerto Cabello, June 9, 1824. The schooner was restored to the captain, to whom freight was allowed on the cargo. The Government of the United States presented a claim of the Atlantic and Hope Insurance Companies for indemnity in the premises against the Government of Colombia, it being alleged that the cargo was neutral, and not, as found by the Court, enemy property. It must be remembered that the principle "free ships free goods" had been established by the Treaty of October 27, 1795, between Spain and the United States.[135]) Colombia was formed, in 1819, out of the Spanish Kingdom of New Granada and the Captain-Generalship of Venezuela. In 1832, Colombia was dissolved into the new States: Granada, Venezuela, and Ecuador. The Government of the United States then presented its claim before the United States and Ecuadorian Claims Commission under Convention of November 25, 1862, contending that the Treaty of 1795 between Spain and the United States could be opposed, in 1824, to Colombia and was binding on the Colombian Courts. Mr. Hassaurek, delivering the opinion of the Commission, held *inter alia:*

> When this treaty (of 1795 between the United States and Spain) was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treaties of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation the Republic of Colombia could not and did not free herself by her subsequent declaration of independence. Third parties had acquired rights and interests under the treaty which Colombia was not at liberty to disregard, and the United States had a right to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.
>
> That a State never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new State, by a division of territory, that new State has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole State will remain binding on the new State and its subjects.
>
> The authorities in support of this proposition are numerous, but I will only cite the following:
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> > "And so (says Chancellor Kent) if a State should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled by all the parts in common." (Kent's Commentaries, vol. I, p. 25).
>
> Bello says:
>
> > „Even if a State should be divided into two or more, neither its rights nor its obligations are thereby impaired, but must be enjoyed or fulfilled in common or apportioned among the new States by mutual agreement. Bynkershoek censures the conduct of England for denying

[135]) See article 15, Malloy vol. II, p. 1645.

to Holland the rights of fishery established by treaty between Henri III of England and Philip, Archduke of Austria, on the ground that said treaty had been concluded with an Archduke and not with the States general. He also censures the bad faith of Denmark in refusing to keep with those States the compact of Espira, concluded with the Emperor Charles V, in favor of the Belgians." (Principios de Derecho Internacional, 2nd edition, p. 20.)

Phillimore says:

"If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts." (Commentaries on International Law, vol. I, Part II, Ch. 7, secs. 137, 158.)

"Contra evenit (says Grotius) ut quae una civitas fuerat dividatur, aut consensu mutuo, aut vi bellica, sicut corpus imperii Persici divisum est in Alexandri successores; quod cum fit, plura pro uno existunt summa imperia, cum suo iure in partes singulas. Si quid autem commune fuerit, id aut communiter est administrandum, aut pro ratis portionibus dividendum." (Grotius II, C. IX, S. 10, p. 327.)

The United States availed themselves of the very first opportunity to notify the Republic of Colombia that they must consider her bound by the obligations imposed on her by the treaty of 1795, said treaty having been concluded prior to her separation from the mother country. On the 27th of May 1823 Mr. Adams, then Secretary of State, in his instructions to Mr. Anderson, the first American minister appointed to Colombia, said:

"It is asserted that by her declaration of independence Colombia has been entirely released from all her obligations by which, as part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all engagements of Spain with other nations affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and justice."

He refers by way of illustration to the treaties of 1795 and 1819, between the United States and Spain. To the stipulations of the former, Colombia is bound as by an express compact made when she was a Spanish Colony. As to the latter, this treaty having been made after the territories now composing the Republic of Colombia had ceased to acknowledge the authority of Spain, they are not parties to it, but their rights and duties in relation to the subject-matter remain as they had existed before it was made. (British and Foreign State Papers, 1825, C., p. 480.)

The same principle has been continually invoked by the Republics of Ecuador, New Granada and Venezuela, which formerly constituted the Republic of Colombia. Until, for the treaties between Colombia and foreign nations, they had substituted treaties of their own, they claimed to be entitled to all the rights granted and bound to the fulfillment of all the obligations imposed by the treaties of Colombia.

... It seems to be clear, therefore, that Colombia was bound by the treaty of 1795 to respect enemy's property covered by the American flag as neutral property, only excepting contraband of war. The treaty concluded on the 3rd October 1824 between the United States and the Republic of Colombia reiterated the same principle, and although that treaty was made subsequent to the transaction now under examination, it gives an additional sanction to a principle established and recognized long before. Hence, after a careful examination of the question, we are constrained to hold that the condemnation of Soto's goods was a wrongful act for which Colombia is responsible.[136])

A diffirent view was taken by Mr. Little, Commissioner for the United States and Venezuela Claims Commission under Convention

[136]) Moore 3-3223/5, 3226/7, Survey No. 68. Cf. Lapradelle-P. 2-436/40 and Moore 2-1574.

of December 5, 1885, in the case of Amos B. Corwin. He decided that the treaty of 1795 between the United States and Spain was not binding on the Columbian Courts:

> It has been suggested in argument whether, as indeed it seems to have been claimed by the American Minister at Bogota in 1824-1827 that Colombia, having been Spanish territory at the time, was bound as to the United States by the treaty between the latter and Spain of 1795, which embodied the doctrine that "free ships make free goods", making its violation an act of piracy; and that such obligation continued during her struggle for independence. Mr. Chief Justice Marshall, 9 Cranch, 191, said:
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> „The United States having formed a part of the British Empire, their prize law was ours; and when we separated, it continued to be ours, so far as adapted to our circumstances, and was not varied by the power which was capable of changing it."
>
> It is likewise probably true that the Spanish prize law, impressed, it may be, with such conventional modifications as to particular States as were from time to time made, became the prize law of the Spanish-American colonies, subject to the qualifications named. Conceding its operation as to Colombia at independence, it continued under the principle stated only so long as adapted to her condition, and she, of course, was the judge of that. The very act of sending out privateers to prey upon Spanish commerce was at once a determination that the Spanish prize law, with its conventional modifications as to the United States (if before in force), was not adapted to her circumstances, and at the same time a decree "varying it by her power", in conformity with international law.
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> The question arose in the case of the Senora, a Spanish vessel captured by a Carthagenian privateer, and taken again by an American cruiser, supposing it British, during the war of 1812. The Supreme Court of the United States said: "The treaty with Spain can have no bearing on the case, as this Court can not recognize such captors (the Carthagenians) as pirates; and the capture was not made within our jurisdictional limits. In those two cases only does the treaty enjoin restitution." (4 Wheaton, 497.)
>
> Said the same Court in case of the Pastora, a Spanish vessel captured by a privateer under the flag of La Plata, 4 Wheaton, 63, per Marshall, C.J.: "The case of the United States v. Palmer, 3 Wheaton, 610, establishes the principle that the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments of South America may employ against their enemy."
>
> It seems to us, therefore, clear that Spain's engagements to the United States, under the Treaty of 1795, did not extend to and bind Colombia in respect of the doctrine stated, at least at the time of tnis capture, and that the law of nations in this regard was then her only guide, she not as yet having bound herself contrarywise by treaty.[137])

Whereas Mr. Hassaurek advanced the idea that the whole population[138]) is bound by a treaty, and that, even in case of state succession, that population remains bound by it, and that rights acquired by third parties under the treaty must be respected, considering, thus, the population as a constitutive element of the State, Mr. Little, in his turn, observed that a successor State is bound by the treaties of the predecessor State only so long as those treaties are adapted to its circumstances, the successor State being the judge of that. Never-

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[137]) Moore 3-3212/3, Survey No 142.

[138]) Cf. the Basel arbitration with respect to the public domain.

theless, it seems that both these opposing decisions are based on the same idea, namely, that, where the predecessor State is absorbed, the successor State is tacitly bound by the treaties of the former. According to Mr. Hassaurek, such treaties do not extend to the successor State once some legal act has imposed obligations to the contrary; according to Mr. Little, the happening of an event [139]) can effect that the successor State is considered to be no longer bound by the old treaties.

Another idea was put forward by the International Committee of Jurists under Resolution of the Council of the League of Nations dated July 12, 1920 in the Aaland Islands case, which Committee stated that the character and nature of a treaty is the determining factor in any question as to its binding force after state succession:

> The main reason upon which the provisions of 1856 were based is the wish to prevent the Power possessing the very important strategic position of the Aaland archipelago from acquiring too great an influence. This reason retains its full weight, no matter what territorial changes may take place.[140])

The Committee concluded:

> 1) The provisions of the Convention and Treaty of Peace of 30th March, 1856, concerning the demilitarisation of the Aaland Islands are still in force.
> 2) These provisions were laid down in European interests. They constituted a special international status relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations, binding upon it, arising out of the system of demilitarisation established by these provisions.[141])

Although it would be a question more of politics rather than of law to investigate the conventional state practice in these matters, since one single general rule of international law cannot be said to exist regarding rights and duties resulting from treaties in case of state succession, it may be of interest to quote one diplomatic instrument. On February 19, 1831, the Plenipotentiaries of Austria (Esterhazy, Wessenberg), France (Talleyrand), Great Britain (Palmerston), Prussia (Bulow), and Russia (Lieven, Matuszewicz) signed the 19th Protocol of the Conference of London on questions concerning the separation of Belgium from Holland. It was said:

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[139]) "The very act of sending out privateers to prey upon Spanish commerce was at once a determination that the Spanish prize law, with its conventional modifications as to the United States (if before in force), was not adaped to her circumstances, and at the same time a decree 'varying it by her power', in conformity with international law."

[140]) L.N.O.J., Special Supplement No. 3, October 1920, p. 19, Survey Appendix No. VI.

[141]) Ibidem p. 19. Cf. Permanent Court of International Justice. Judgment of June 7, 1932, Series A/B No. 46 (case of the Free Zones of Upper Savoy and the district of Gex).

> D'après ce principe d'un ordre supérieur, les Traités ne perdent pas leur Puissance, quels que soient les changements qui interviennent dans l'organisation intérieure des peuples.[142])

Although this statement, according to its own definition, regards only the case of a change in the internal organization of peoples, it may be argued that it is also applicable in a case of state succession, in that the Protocol added:

> Les traités qui régissent l'Europe, la Belgique, devenue indépendante, les trouvait faits et en vigueur; elle devait donc les respecter, et ne pouvait pas les enfreindre. En les respectant, elle se conciliait avec l'intérêt et le repos de la grande communauté des Etats européens; en les enfreignant, elle eût amené la confusion et la guerre. Les puissances seules pouvaient prévenir ce malheur, et puisqu'elles le pouvaient, elles le devaient; elles devaient faire prévaloir la salutaire maxime, que les événements qui font naître en Europe un Etat nouveau, ne lui donnent pas plus le droit d'altérer le système général dans lequel il entre, que les changements survenus dans la condition d'un Etat ancien ne l'autorisent à se croire délié de ses engagements antérieurs: Maxime de tous les peuples civilisés; — maxime qui se rattache au principe même d'après lequel les Etats survivent à leurs gouvernements, et les obligations imprescriptibles des Traités à ceux qui les contractent; — maxime, enfin, qu'on n'oublierait pas, sans faire rétrograder la civilisation, dont la morale et la foi publique sont heureusement et les premières conséquences et les premières garanties.[143])

It may be concluded from this paragraph that both in the civil law and in international law rules are derived from the general principle that one (person or State), in the exercise of its rights (or of its jurisdictions), may not violate the rights (or jurisdictions) of others; without, however, assimilating the rules of the former category to those of the latter.[144])

Reference: Annuaire de l'Institut de Droit international, 1931-1-185/255; idem: 1934-473/89; A. Cavaglieri: La notion des droits acquis et son application en droit international public, R.G.D.I.P. 38 (1931) - 257; idem: Effets juridiques des changements de souveraineté territoriale, R.D.I.L.C. 61 (1934) - 219; M. Costes: Des cessions de territoires envisagées dans leur principe et dans leurs effets, relatifs au changement de souveraineté et de nationalité, Paris 1914; F. Deàk: Succession of States, Proceedings of the American Society of International Law, 1930-51; Etudes concernant la doctrine de la succession d'Etat. Quatre consultations (Th. Barclay, E. Kaufmann, A. Struycken and Th. Kipp), Berlin 1923; P. Descamps: La définition des droits acquis. Sa portée générale et son application en matière

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[142]) De Clercq 4-13.

[143]) Ibidem p. 15. Cf. C. C. Hyde: The termination of the treaties of a State in consequence of its absorption by another—the position of the United States, A.J.I.L. 26 (1932) - 133/6; S. Kiatibian: Conséquences juridiques de la transformation des Etats sur les traités, Paris 1892; Larivière: Des conséquences des transformations territoriales des Etats sur les traités antérieurs, Paris 1892; L. von Rogister: Zur Lehre von der Staatennachfolge: Gibt es stillschweigenden Eintritt in Staatsverträge? Berlin 1902.

[144]) Therefore, the statement of Mr. Lauterpacht that "the problem of succession, so far as it is treated as a problem of law, is identical in private and international law" is dangerous and leads to confusion (Private Law Sources and Analogies of International Law, London 1927, p. 125). See the Hawaiian Claims case, and the quoted opinions of Sir Cecil Hurst and Georges Ripert, and G. Gidel: Des effets de l'annexion sur les concessions, Paris 1904 p. 12.

de succession d'Etat à Etat, R.G.D.I.P. 15 (1908) - 385; A. Focherini: Le successioni degli Stati, Modena 1910; P. Guggenheim: Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel, Berlin 1925; A. S. Hershey: The succession of States, A.J.I.L. 5 (1911) - 285; H. Herz: Beiträge zum Problem der Identität des Staates, Z. f. ö. R. 15 (1935) - 241; M. Huber: Die Staatensukzession, Leipzig 1898; G. Kaeckenbeeck: The protection of vested rights in international law, British Yearbook 1936-1; idem: La protection internationale des droits acquis, Recueil des Cours 59 (1937) - 321/419; A. B. Keith: The theory of State succession with special reference to English and colonial law, London 1907; A. de Lapradelle: De l'influence du changement de souveraineté sur la loi territoriale, R.G.D.I.P. 32 (1925) - 388; F. B. Sayre: Change of sovereignty and private ownership of land, A.J.I.L. 12 (1918) - 475; idem: Change of sovereignty and concessions, A.J.I.L. 12 (1918) - 705; E. Schiffner: Die moderne Behandlung des Problems der Staatennachfolge, Z. f. ö. R. 11 (1931) - 268; W. Schönborn: Staatensukzessionen, Berlin 1913; W. Schücking: Der Schutz der wohlerworbenen Rechte im Völkerrecht, in Festgabe für Max Huber zum sechzigsten Geburtstag, Zürich 1934; J. Schwartz: Zur Lehre von der Staatensukzession, Niem. Zeit. 48 (1934) - 166; M. Udina: La succession des Etats quant aux obligations internationales autres que les dettes publiques, Recueil des Cours 44 (1933) - 665/773; A. von Verdross: La Cour constitutionnelle d'Autriche et le problème de la succession des Etats, Bulletin I.I.I. 7 (1922) - 20; H. A. Wilkinson: The American doctrine of State succession, Baltimore 1934.

CHAPTER II

PERSONAL JURISDICTION

§ 4. NATURE OF PERSONAL JURISDICTION

We have seen that a State enjoys territorial jurisdiction over all persons and things which find themselves, in fact, within that territory; that this jurisdiction is, in principle, exclusive with regard to other States but that its exercise, within territorial limits, is not always exclusive with regard to international law owing to general rules of international law, which may limit that exercise in favour of foreign state jurisdictions. It follows that, apart from territorial jurisdiction, some other state jurisdiction must exist, which may be exercised outside territorial limits.

Population may be considered as the second element of a State. Whereas individuals are subject to the territorial jurisdiction of the State of their residence by virtue of the *fact* that they reside in that territory, a *legal* relation exists between that State and individuals (its population) by virtue of their 'nationality' conferred to them by the State according to its domestic law.[1]) This legal relation continues even if the 'nationals' (citizens or subjects) of a given State leave the territory of that State. "A man's nationality", it was held by the British-Mexican Claims Commission under Convention of November 19, 1926, Lynch case, "forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State. If the citizen leaves the territory of this sovereign State and goes to live in another country, the duties and rights which his nationality involves do not cease to exist, although such rights and duties may change in their extent and character. A man's nationality is not necessarily the same from his birth to his death. He may according to circumstances lose his nationality in the

[1]) E.g. by virtue of the ius sanguinis rule, the ius soli rule, marriage, adoption, naturalization, etc.

course of his life. He may elect to become a citizen of another sovereign State. Moreover, the country into which he has moved may, by its domestic laws, impose upon him the nationality of the new country and in this way a state of dual nationality may be created."[2])

A State may confer its nationality not only upon natural persons, but also upon artificial persons. The same Commission held in the Madeira Company case that "although much controversy exists as regards the nationality of corporations, it may be said that a majority of States have in their legislation accepted as such the country of domicile (Borchard: Diplomatic Protection of Citizens Abroad, p. 618). The Commission adopt the same criterion and they adhere to their decision No. 10 (F. W. Flack), No. 4, where they expressed the opinion that the Certificate of Incorporation, combined with the fact that 'the Company was domiciled in London and its affairs conducted from there, is sufficient proof of British nationality'." [3])

Vessels, too, have a nationality: the Bulgarian-Greek M.A.T. held

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[2]) Ed. London 1931 p. 71, Survey No. 376

[3]) Ed. London 1933 p. 71. Cf. some other decisions: "If it may be said that business firms have a nationality, such nationality is that of the country in whose territory they reside, under whose laws they have been formed, and by which they are governed.", Peru-U.S.A., arb., C. 4-12-1868, Moore 2-1654, Survey No. 84; "The fact is that limited companies owe their existence to the law in conformity to which they have been organized, and consequently their nationality can be no other than that of said law.", U.S.A.-Venezuela, arb., C. 17-2-1903, Ralston-D. p. 78, Survey No. 258; "Que suivant la doctrine et la jurisprudence traditionnelles de tous les pays, la nationalité d'une société anonyme est déterminée par le lieu où est établi son siège social, du moment que son établissement n'est pas purement nominal.", Belgian-German M.A.T., 16-10-1923, Recueil vol. III p. 573. It has been denied, in decisions of the M.A.T., that private companies had a proper nationality: "Attendu que le Tribunal adoptant les motifs du jugement dans l'affaire Charbonnage Frédéric Henri contre l'Etat allemand (I, 422), estime que les sociétés en commandite en tant que personnes morales n'ont pas de nationalité proprement dite...", French-German M.A.T., 30-11-1923, Recueil vol. III p. 892. In the case referred to, it was held by the same Tribunal (Asser, President): "Attendu que les sociétés anonymes n'ont pas de nationalité proprement dite, puisqu'une telle nationalité, d'une part, confère des droits (tels que le droit de vote, le droit d'être nommé à des fonctions publiques, la protection contre l'extradition, etc.) et, d'autre part, impose des obligations (telles que le service militaire) qui ne peuvent s'appliquer qu'aux personnes physiques; Att. que les sociétés anonymes, nées d'un contrat entre des personnes physiques (les fondateurs), doivent leur existence comme personnes morales à une fiction légale; Att. que les lois, en créant cette fiction, ont établi des règles pour la formation des sociétés, les pouvoirs de leurs organes, la répartition de leurs bénéfices, leur dissolution, etc., règles de droit privé, visant les relations des sociétés avec leurs actionnaires, avec leurs administrateurs et avec les tiers; Att. que la loi régissant cette matière est la loi de l'Etat où la société a été formée, où elle a son siège social et où elle a été enregistrée; Att. qu'il en résulte qu'une société anonyme est, au point de vue du droit privé, soumise aux dispositions de tel code ou de telle loi spéciale en vigueur dans le pays où elle a son siège social sans qu'elle ait obtenu la nationalité de ce pays; Att. qu'en dehors de la personnalité juridique, représentée par la société même, il faut considérer les actionnaires, c'est-à-dire les personnes qui, en possédant les actions, participent aux bénéfices et après la dissolution de la société au solde de la liquidation, tandis que réunis en assemblée générale, ils exercent le pouvoir suprême et contrôlent la gestion du conseil d'adiministration;

on July 23, 1926, that "l'opinion unanime des auteurs reconnaît que tout vaisseau doit avoir une nationalité et une seule nationalité — et que c'est le pavillon qui la détermine, à moins que les documents du bord et les registres du navires ne viennent s'y opposer. Le pavillon est un signe si apparent que l'importance de son emploi est reconnue sans exception, peut-on dire, par tous les auteurs et par la jurisprudence des cours de prises." [4])

It is clear that, in domestic law, nationality is of great importance, involving rights and corresponding duties upon both the State and its subjects or citizens. But its significance in international law is no less important: [5]) nationality entitles a State to personal jurisdiction over its citizens, subjects, and vessels, a jurisdiction to be exercised when such persons and vessels leave the national territory or territorial waters. As Mr. Fred. K. Nielsen duly observed: "Nationality is the justification in international law for the intervention of one government to protect persons and property in another country." [6]) Consequently, a conflict arises between the personal jurisdiction of the State of allegiance and the territorial jurisdiction of the State of residence, which conflict must be solved by the application of general rules of international law, if conventional rules are not applicable.[7])

It may be concluded that, as opposed to territorial jurisdiction, which is based on a given territory and should be exercised within territorial limits, personal jurisdiction is based on nationality and may also be exercised outside territorial limits.

Att. que ces actionnaires étant des personnes physiques, peuvent avoir une nationalité; Att. que la nationalité de la majorité des actionnaires détermine le caractère de l'entreprise qui forme l'objet de la société anonyme.", Recueil vol. I p. 427/8. But in an arbitration between Chile and France it was held: "Qu'à la vérité la Compagnie consignataire soutient à tort qu'en sa qualité de personne juridique elle n'a pas de nationalité; que cette prétention est en contradiction avec les principes généralement admis d'après lesquels les législations des divers Etats distinguent entre les personnes morales indigènes et les personnes morales étrangères, dont la capacité en matière commerciale ou de procédure est le plus souvent réglée,—surtout en ce qui touche les sociétés anonymes—,par des traités internationaux; qu'il faut considérer comme déterminante, au point de vue de la nationalité, la loi sous l'empire de laquelle la personne morale, corporation ou société anonyme, s'est formée, et dont sa capacité dépend, soit communément la loi en vigueur au siège social." (July 5, 1901, Descamps-R. 1901 p. 367, Survey No. 172). Cf. Italy-Peru, P.C.A., 3-5-1912, A.J.I.L. 6 (1912) - 748, Survey No. 299; and P.C.I.J. Series A No. 7, p. 56, 68, 70, 74.

[4]) Recueil M.A.T. vol. VII p. 42. Aircraft has also a nationality.

[5]) "La nationalité, correctement définie, est, par conséquent, un lien juridique entre l'individu et l'Etat, essentiellement de droit public, mais qui produit ses contrecoups dans le droit privé, et dont l'existence dépend soit de faits régis par le droit privé, soit de faits appartenant au droit public ou au droit international.", France-Mexico, arb., C. 25-9-1924, ed. Paris p. 41, Survey No. 363.

[6]) Mexico-U.S.A., arb., C. 10-9-1923, ed. Washington G.P.O. p. 51, Survey No. 355 (idem in: Egypt-U.S.A., arb., 8-6-1932, ed. Washington G.P.O. p. 72, Survey No. 396).

[7]) No conflict of state jurisdictions arises when one vessel is on the high seas, over which no State has any jurisdiction.

§ 5. ATTRIBUTION OF PERSONAL JURISDICTION

Since population is an essential element of a State, each State is competent, in principle, to determine the rules for the acquisition of its nationality. It has been confirmed, in international decisions too, that those rules are part of the municipal law of the State. In its advisory opinion no. 10 on the exchange of Greek and Turkish populations, the Permanent Court of International Justice held that "the national status of a person belonging to a State can only be based on the law of that State".[1]) It is obvious that nationality may give rise to conflict of laws—a matter of private international law—but even in public international law a conflict between personal jurisdictions may arise concerning the attribution of such jurisdiction to a particular State, namely when a State confers its nationality upon a person, who has the nationality of a foreign State. If such a case occurs and is brought before an international tribunal, international law—general or conventional rules and rules of procedure—is applicable. "Que sans doute, said Umpire Ramiro Gil de Uribarri, quand il se soulève une question de compétence par suite de cette circonstance que les lois de deux Etats attribuent à un même individu une nationalité différente, les tribunaux de chacun des deux Etats appliquent leur loi propre; mais qu'il n'en est plus de même lorsque la question se pose devant un Tribunal Arbitral, lequel décide conformément aux principes du droit international." [2]) In the Salem case between Egypt and the United States it was observed:

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[1]) February 21, 1925, Series B No. 10 p. 19. "It is a generally-established principle that the individual status is governed by the laws of the country of which a man or woman is a citizen or subject.", France-Venezuela, arb., C. 19-2-1902, Ralston-D. II p. 224, Survey No. 242; "Sauf conflit sur ce point d'Etat à Etat, la nationalité d'une partie relève en principe de la souveraineté seule de l'Etat qui la reconnaît comme son ressortissant.", German-Rumanian M.A.T., 6-11-1924, Recueil M.A.T. IV-848; Cf. article 2 of the Convention on certain questions relating to the conflict of nationality laws, Hague Codification Conference 1930: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.", A.J.I.L. Off. Doc. 1930 p. 192. Consequently, the same may be said of citizenship, which "is determined by rules prescribed by municipal law" (Austria, Hungary-U.S.A., arb., C. 26-11-1924, G.P.O. p. 72, Survey No. 365). The General Claims Commission United States and Mexico, under Convention of September 8, 1923, stated in the Solis case that "citizenship is a domestic matter in no way governed by international law, although multiplications of nationality frequently result in international difficulties." (G.P.O. 1929, p. 49, Survey No.354).

[2]) Italy-Peru, arb., 30-9-1901, Descamps-R. 1901 p. 711 and 802, Survey No. 230.

> The Arbitral Tribunal is therefore entitled to examine whether the American citizenship of Salem really exists. Such examination is not impeded by the principle of international law that every sovereign State is, generally speaking, sovereign in deciding the question as to which persons he will regard as his sujects, because the bestowal of citizenship is a manifestation of his international independence. In fact, as soon as the question of nationality is in dispute between two sovereign powers, it cannot be exclusively decided in accordance with the national law of one of these powers. In the present case it should be ascertained whether one of the powers, by bestowing the citizenship against general principles of international law, has interfered with the right of the other power, or if the bestowal of the citizenship is vitiated because it has been obtained by fraud. In order to decide the question of fraud it will be necessary to examine if the false representations with which the nationality of a certain power has been acquired refer to those points on which, according to the law of that power, the acquisition of nationality is essentially dependent. So far the notion of fraud cannot be constructed without taking into consideration the national law of the power which bestowed the citizenship.[3])

It seems to be recognized by international tribunals that a State is competent to confer its nationality upon foreigners:

> The Umpire is of opinion that according to international law every country has a right to confer, by general or special legislation, the privilege of nationality upon a person born out of its own territory; but in the absence of special consent or treaty such naturalization has, within the limits of the country of origin, no other effect than the government of said country chooses voluntarily to concede. ... As the laws concerning nationality and

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In other sense: Mexico-U.S.A., arb., C. 10-9-1923, G.P.O. p. 111, Survey No. 355. Similarly, if a State espouses the claim of its citizen or subject, proof of nationality is a matter of international law of procedure: "Personnellement, je ne vois pas de motifs décisifs pour prescrire, comme règle fondamentale devant être observée dans les tribunaux d'arbitrage ou les commissions mixtes, l'administration de la preuve de la nationalité des réclamants individuels en stricte conformité des règles insérées éventuellement dans la législation nationale de l'Etat demandeur, mais que l'on peut souvent déduire seulement de sa jurisprudence ou de sa doctrine nationale, moins encore pour exiger l'observation des moyens de preuve prescrits par la législation, la jurisprudence ou la doctrine de l'Etat défendeur. A mon avis, un tribunal international a le devoir de déterminer la nationalité des réclamants d'une façon telle, que pour lui ladite nationalité est certaine, indépendamment, en principe, de ce que prescrit le droit national de chaque réclamant individuel. Les dispositions nationales ne sont pas pour lui sans valeur, mais il ne se trouve pas lié par elles; il peut poser des exigences plus rigoureuses que la législation nationale, par exemple pour pouvoir démasquer des naturalisations obtenues in fraudem legis, mais il peut également se contenter d'exigences moins sévères, dans des cas où raisonnablement, il ne lui paraît pas nécessaire, afin de former son opinion, de mettre en action l'appareil entier de preuves formelles. Et je ne vois aucune raison convaincante, pour laquelle un tribunal international, comme celui saisi des réclamations britanniques, espagnoles et françaises contre le Portugal, pour cause de confiscation des biens ecclésiastiques, appelé à connaître de demandes de nationaux de plusieurs Etats, serait obligé de former son opinion sur la nationalité des réclamants de chaque groupe sur la base de dispositions légales, d'une jurisprudence ou d'une doctrine chaque fois différentes; à mon avis, il est beaucoup plus logique de ne lier le tribunal à aucun système national de preuves, mais de lui laisser la liberté parfaite d'apprécier les preuves produites selon les circonstances. En d'autres mots, je me déclare partisan du premier système, qui jouit aussi de l'appui de la majorité des tribunaux internationaux.", France-Mexico, arb., C. 25-9-1924, Prof. Verzijl, President, ed. Paris p. 48, Survey No. 363. Cf. D. V. Sandifer: Evidence before international Tribunals. Chicago 1939, p. 148/56.

[3]) June 8, 1932, G.P.O. p. 35/6, Survey No.396.

naturalization differ in almost every country, it follows that very frequently persons may have more than one nationality; for instance, one by locality of birth, one by descent, and one by naturalization. Such cases can not be avoided, except by special treaty stipulations. [4])

It is the right of every nation to prescribe by law the terms and conditions upon which, and the rules and forms of proceedings through which foreigners may become its citizens. These are the laws of naturalization. It is essential to the independence and sovereignty of a State that its right to determine for itself how foreigners may become its citizens shall be held sacred, and shall not be questioned by any other State. ... The reasons upon which this settled rule of international law is founded are obvious. Citizenship, in all republics and constitutional monarchies, is the primary source of political power. ... Hence it is essential to the independence, sovereignty, and equality of each State that it shall determine for itself exclusively, and free from all foreign interference, who are its citizens and who are not. Hence its decisions on this subject—its laws—are binding on all who reside in its territory and are subject to its jurisdiction; and, in this respect, are held binding and are respected and not disputed by other States. Such laws do not operate exterritorially. [5])

Every independent State has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions, and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extra-territorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each State does not extend beyond the limits of its own territory. [6])

It is a principle that it is the province of the internal legislation of States to declare or concede nationality to the individuals who form them, establishing the means by which it may be acquired, preserved or lost, and the manner that said States shall consider the character of their nationals as fixed. [7])

Das Staatsbürgerrecht, mit dem die persönliche, durch Abstammung oder Wohnsitz vermittelte Zugehörigkeit zu einer staatlichen Gemeinschaft bezeichnet wird, hat für den Einzelnen nicht nur Bedeutung für seine öffentlichen Rechte und Pflichten, sondern es hängt davon auch in weitgehendem Masze seine privatrechtliche Stellung und seine ökonomische Existenz ab. Das gibt der Staatsangehörigkeit einen status-ähnlichen Character, und sie macht einen Teil der Persönlichkeit aus. Sie ist deshalb als solche grundsätzlich überall zu achten und anzuerkennen. Während für Einzelfälle die Frage des Erwerbes und Verlustes der Staatsangehörigkeit von jedem Staat frei geregelt wird, bestimmt sich bei Gebietsabtretungen der Wechsel der Staatsangehörigkeit nach überstaatlichem Recht, insbesondere nach den im Zusammenhang mit der Gebietsabtretung darüber aufgestellten oder daraus sich ergebenden Normen. [8])

As to vessels, it was stated by the Permanent Court of Arbitration that "generally speaking it belongs to every Sovereign to decide to

[4]) Spain-U.S.A., arb., C. 12-2-1871, Buzzi case, Lewenhaupt, Umpire, Moore 3-2615, Survey No. 91.

[5]) France-U.S.A., arb., C. 15-1-1880, Lebret case, opinion Mr. Aldis, Moore 3-2498, Survey No. 116.

[6]) U.S.A.-Venezuela, arb., C. 5-12-1885, N. de Hammer and A. de Brissot case, opinion Mr. Andrade, Moore 3-2457, Survey No. 142.

[7]) Spain-Venezuela, arb., C. 2-4-1903, Esteves case, Ralston-D. p. 922, Survey No. 264.

[8]) Germany-Lithuania, arb., 10-8-1937, Z.f.a.ö.R.u.V. 1937 p. 908, Survey No. 359.

whom he will accord the right to fly his flag and to prescribe the rules governing such grants, and (whereas) therefore the granting of the French flag to subjects of His Highness the Sultan of Muscat in itself constitutes no attack on the independence of the Sultan." [9]) And in the Montijo case between Colombia and the United States it was held by the Umpire Robert Bunch that the Government of the United States considered the Montijo as an American ship. On that point it was the sole judge.[10])

It may be asked now whether this jurisdiction is exclusive with regard to other States. In its advisory opinion No. 4 concerning the Nationality Decrees issued in Tunis and Morocco, the Permanent Court of International Justice held that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." [11]) But it added that "in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law." [12]) In its advisory opinion no. 7 on acquisition of Polish nationality the same Court said that "though, generally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations referred to above." [13]) Mr. G. Kaeckenbeeck, arbitrator in a case between Germany and Poland, observed: "s'il est vrai qu'en matière de nationalité la compétence de chaque Etat est, en principe, exclusive, il n'en est pas moins vrai que, lorsque l'acquisition de la nationalité est réglée dans des Traités internationaux, l'autonomie de l'Etat est limitée par les engagements conventionnels qu'il a pris." [14]) Prof. Verzijl, President of the French-Mexican Claims Commission under Convention of September

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[9]) France-Great Britain, 8-8-1905, A.J.I.L. 2 (1908) - 924, Survey No. 276.
[10]) July 26, 1875, Moore 2-1434, Survey No. 108.
[11]) February 7, 1923, Series B No. 4 p. 24. Cf. article 1,1 of the quoted not ratified Convention of the Hague Codification Conference 1930: "It is for each State to determine under its own law who are its nationals.", A.J.I.L. Off. Doc. 1930, p. 192.
[12]) Ibidem p. 24.
[13]) September 15, 1923, Series B No. 7 p. 16.
[14]) July 10, 1924, ed. Vienna p. 387, Survey No. 358.

25, 1924, was of opinion that not only treaties, but also international custom could restrict that jurisdiction:

> Car s'il est vrai que, en règle générale, tout Etat est souverain pour déterminer quelles personnes il considérera comme ses ressortissants, il n'en est pas moin vrai que, ainsi que l'a constaté la Cour permanente de justice internationale dans son avis consultatif concernant les décrets de nationalité, promulgués au Maroc et en Tunisie, que cette souveraineté peut être limitée par des règles du droit des gens, règles qui peuvent s'enraciner non seulement dans des traités formels, mais encore dans une *communis opinio iuris* sanctionnée par le droit coutumier.[15])

And in article 1, 2 of the quoted Convention of the Hague Codification Conference 1930 it was stipulated that, apart from international conventions and custom, general principles of law could also encroach upon the exclusive character of the personal state jurisdiction.[16]) It is clear that a State may restrict its personal jurisdiction by treaty; if, however, in the absence of such a treaty, it is contended that a general rule of international law has the same effect, the existence of such a rule must be proved. In a Draft Convention on nationality prepared by the Research in international law of the Harvard Law School in anticipation of the first Conference on the Codification of international law, The Hague 1930, it was said in article 2 that "except as otherwise provided in this Convention, each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a State to confer its nationality is not unlimited." [17]) However, the Committee did not state *what* rule of international law limits that state jurisdiction. In a comment on that article it was said:

> It may be difficult to precise the limitations which exist in international law upon the power of a State to confer its nationality. Yet it is obvious that some limitations do exist. They are based upon the historical development of international law and upon the fact that different States may be interested in the allegiance of the same natural person. If State A should attempt, for instance, to naturalize persons who have never had any connection with State A, who have never been within its territory, who have never acted in its territory, who have no relation whatever to any persons who have been its nationals, and who are nationals of other States, it would seem that State A would clearly have gone beyond the limits set by international law. Thus, if State A should attempt to naturalize all persons living outside its territory but within 500 miles of its frontier, it would clearly have passed those limits; or similarly if State A should attempt to naturalize all persons in the world holding a particular political or religious faith or belonging to a particular race.

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[15]) Pinson case, ed. Paris p. 72.

[16]) "This (municipal) law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.", loc. cit. p. 192.

[17]) A.J.I.L. Off. Doc. Special Number, April 1929, p. 13.

> The existence of these limitations in international law has often been stated, but occasion has not often arisen in which it was necessary to attempt to apply them.[18])

Indeed, no authoritative decision of an international tribunal on that point is available. However, the international judge or arbitrator has had occasion to examine another question, namely the dual nationality of a claimant, whose claim the State of allegiance had espoused. Sometimes it has been held that the nationality of origin prevailed:

> The coexistence of two nationalities in the same individual not being theoretically admitted in international law, and... the nationality of origin being in every way the one that should prevail.[19])

The others, the nationality of the respondent State was said to prevail:

> Thus the conflict of double citizenship has been solved by eminent authorities, establishing that in the cases where such double citizenship occurs the law of the respondent or defendant nation prevails.
> (In the event of conflict of laws creating double citizenship, that of respondent nation must control. Brignone case, Ralston's Report p. 710. In case of double citizenship neither country can claim the person having the same as against the other nation, although it may as against all other countries. Miliani case, ibidem p. 754.)[20])

Sometimes, again, actual residence was decisive:

> According to the principles already invoked, that nobody can be a citizen but of one State, that citizenship is inherent in the person and cannot be imposed, and that in case of conflict between several citizenships that is to be preferred which is more in accordance with the actual position of the person, namely, that of the place of his actual residence and domicil.[21])

> It is therefore her nationality, since such is the law of her domicil, which law prevails when there is a conflict as held by the umpire in the claim of Maninat heirs (p. 44) before this same tribunal.[22])

> In the opinion of the umpire, where, as in this case, there appears to be a conflict of laws.... the prevailing rule of public law, to which appeal must then be taken, is that she is deemed to be a citizen of the country in which she has her domicil.[23])

In the Canevaro case, the Permanent Court of Arbitration held that effective nationality' was decisive:

> And whereas, according to Peruvian legislation (Art. 34 of the Constitution), Raphael Canevaro is a Peruvian by birth because born on Peruvian territory, and, on the other hand, the Italian legislation (Art. 4 of the Civil Code) assigns to him Italian nationality because he was born of an Italian father;
> And whereas, as a matter of fact, Raphael Canevaro has on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens and where he

[18]) Ibidem p. 26.
[19]) Italy-Venezuela, arb., C. 13-2-1903, Ralston-D. p. 713, Survey No. 257.
[20]) France-Venezuela, arb., C. 19-2-1902, Ralston-D. II p. 65, Survey No. 242.
[21]) U.S.A.-Venezuela, arb., C. 5-12-1885, Moore 3-2459, Survey No. 142.
[22]) France-Venezuela, arb., C. 19-2-1902, Ralston-D. II p. 241/2, Survey No. 142.
[23]) Great-Britain-Venezuela, arb., C. 13-2-1903, Ralston-D. p. 445, Survey No. 254

went to defend his election, and also especially by accepting the office of Consul General of the Netherlands, after soliciting the authorization of the Peruvian Government and then of the Peruvian Congress;

And whereas, under these circumstances, whatever Raphael Canevaro's status may be in Italy with respect to his nationality, the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant. [24])

In the Salem case, however, it was held that this so-called principle was not sufficiently established in international law:

Indeed, it is generally admitted that every person of age is entitled to choose his nationality. This rule however does only mean that the State which he leaves cannot reclaim him from the State the nationality of which he acquires, and that the State of origin shall not be entitled to contest the other State's right to bestow nationality on an immigrant. But the above-mentioned principle does not prevent the State of origin making by its national legislation the loss of its nationality dependent on a special permission of its government, which means that it may treat the emigrant again as its national as soon as he returns into its territory.

On the other hand the Arbitral Tribunal cannot admit that where such a return occurs the State of origin be entitled by international law to maintain that its claim is more important in justice than the claim of the new State. The principle of the so-called "effective nationality" the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous Canevaro case; but the decision of the Arbitral Tribunal appointed at that time has remained isolated. In spite of the Canevaro case, the practice of several Governments, for instance the German, is that if two powers are both entitled by international law to treat a person as their national, neither of these powers can raise a claim against the other in the name of such person (Borchard p. 588). [25])

The Tribunal was of opinion that the following rule of international law exists, namely "that in case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power." [26]) The 'existence' of this so-called rule clearly shows the "non-existence" of a general rule of international law restricting the personal jurisdiction of a State. Such a general rule can no more be deduced from the above quoted decisions, which are, it seems, rather *ad hoc* decisions. Moreover, article 3 of the above-quoted Convention of the Hague Codification Conference 1930 says: "Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses." [27])

It may be concluded that, in the absence of treaty stipulations, each State enjoys, 'in the present state of international law', a personal

[24]) Italy-Peru, 3-5-1912, A.J.I.L. 6 (1912) - 747, Survey No. 299. Cf. Revue de droit international privé 8 (1912) - 337, and L. Renault in Annuaire de l'Institut de Droit international 1888/9 p. 25.

[25]) Egypt-U.S.A., arb., 8-6-1932, G.P.O. p. 39/40, Survey No. 396. See also the dissenting opinion of the American arbitrator, Fred. K. Nielsen, ibidem p. 81/2.

[26]) Ibidem p. 42.

[27]) Loc. cit. p. 192.

jurisdiction being exclusive with regard to other States. "It would be a distinct gain", said Mr. W. E. Hall, "if it were universally acknowledged that it is the right of every State to lay down under what conditions its subjects may escape from their nationality of origin, and that the acquisition of a foreign nationality must not be considered good by the State granting it as against the country of origin, unless the conditions have been satisfied. It may at the present day be reasonably expected that the good sense of States will soon do away with such rules as are either vexatious or unnecessary for the safeguarding of the national welfare." [28])

Reference: Annuaire de l'Institut de Droit international 1894/5-162; idem: 1895/6-66, 194; idem: 1896-125, 233, 270; idem: 1927-1-1; idem: 1928-1/32, 678/707, 760/1; J. Basdevant: Conflits de nationalités dans les arbitrages vénézuéliens de 1903-1905, Revue de droit international privé 5 (1909) - 41/63; E. Bourbousson: Traité général de la nationalité dans les cinq parties du monde, Paris 1931; League of Nations: Conference for the Codification of international law, Bases of discussion, vol. I Nationality, No. C. 73. M. 38. 1929. V; idem: Actes, vol. II, No. C. 351 (a) M. 145 (a) 1930. V. (also A.J.I.L. Off. Doc. 1930 p. 192); C. Cogordan: La nationalité au point de vue des rapports internationaux, Paris 1890; E. de Germiny: Les conflits de nationalités devant les jurisdictions internationales, Paris 1916; Harvard Research, A.J.I.L. Special Number April 1929 p. 13/129; E. Isay: De la nationalité, Recueil des Cours 5 (1924) - 429/68; J. Kosters: La nationalité à la Conférence de La Haye de 1930, Revue de droit international privé 25 (1930) - 412, 599; M. Lambie: Presumption of cessation of citizenship, A.J.I.L. 24 (1930) - 264; H. Lessing: Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit zu Straf- und Sicherungszwecken, Leiden 1937; P. Louis-Lucas: Les conflits de nationalités, Recueil des Cours 64 (1938) - 5/69; C. Pfeiffer: Das Problem der effektiven Staatsangehörigkeit im Völkerrecht, Leipzig 1933; Proceedings of the American Society of International Law, 1910-46, 1925-59, 1926-59, 1928-31; R. Quadri: La sudditanza nel diritto internazionale, Padova 1936; S. Rundstein: Die allgemeinen Rechtsgrundsätze des Völkerrechts und die Fragen der Staatsangehörigkeit, Z. f. V. 16 (1932) - 14; Dr. Schnurre: Die Behandlung der mehrfachen Staatsangehörigkeit in der Rechtssprechung internationaler Gerichte, Juristische Wochenschrift 1928-1175; C. Weselowski: Les conflits de lois devant la justice internationale, Paris 1936; W. W. Willoughby: Citizenship and allegiance in constitutional and international law, A.J.I.L. 1 (1907) - 914; E. S. Zeballos: La nationalité, 4 vol., Paris 1914/9.

[28]) A Treatise on International Law, Oxford 1924, 8th ed. p. 293. The idea of reciprocity was expressed by Switzerland at the Hague Codification Conference 1930: "Switzerland has always upheld the principle generally admitted, namely, that questions connected with the acquisition and loss of nationality fall solely within the domestic jurisdiction of each State. As soon as a State, in virtue of this principle, considers itself to possess sovereign rights in respect of this question, it is logical that that State should recognize that other States have the sole right of legislation in respect of the granting and loss of their own nationality.", Bases of discussion p. 19.

§ 6. EXERCISE OF PERSONAL JURISDICTION

In this paragraph, the question to be examined is what conflict may arise when a State exercises its personal jurisdiction over its citizens abroad and over its private vessels outside territorial waters.

A. Citizens abroad

When a citizen of a particular State leaves the national territory and enters a foreign country, he remains subject to the personal jurisdiction of the State of allegiance by reason of his nationality, but, at the same time, he becomes subject to the territorial jurisdiction of the State of residence, which, as has been observed, has jurisdiction over all persons and things on its territory.[1]) The situation of an individual being subject to two different state jurisdictions may give rise to complicated conflicts of those jurisdictions.

I. The first question which arises is: what jurisdiction prevails? That question concerns the contents of both jurisdictions. Two principles are generally admitted by most state legislations: first, that the laws of a State concerning the status and capacity of persons are applicable to citizens even if they reside on foreign territory, and, secondly, that, in the absence of a special rule to the contrary, the laws of a State are applicable to citizens as well as to foreigners residing on the state territory. Three situations are, then, possible:
a. Personal jurisdiction prevails: the State of allegiance may exercise its personal jurisdiction over its citizens abroad without infringing the territorial jurisdiction of the State of residence. Exercising its personal jurisdiction as a state function, the State of allegiance may address to its citizens abroad general or special orders: it may levy taxes on them, it may recall them for military service,[2]) etc. From such an exercise, no conflict, generally speaking, will arise with the territorial jurisdiction of the State of residence: it concerns a relation between the State of allegiance and its citizen abroad, not a relation between the State of allegiance and the State of residence. It is, consequently, a matter of municipal law, not of international law.
b. The personal jurisdiction of the State of allegiance may be exercised concurrently with the territorial jurisdiction of the State of

[1]) See Chapter I, § 1 (especially p. 1, note 4).
[2]) Cf. article 179 of the Treaty of Versailles.

residence in case of marriage between a citizen of the former State and a citizen of the latter State. It is a matter rather of private international law, regulated, moreover, by treaties.[3])

c. Territorial jurisdiction prevails: the State of residence may exercise its territorial jurisdiction over foreigners on its territory without infringing the personal jurisdiction of the State of allegiance. From such an exercise, in accordance with the applicable local laws, no conflict, generally speaking, will arise with the personal jurisdiction of the State of allegiance: it concerns a relation of the State of residence and the foreigner on its territory, not a relation between the State of residence and the State of allegiance. It is, consequently, a matter of municipal law, not of international law. This view has been confirmed by international tribunals.

1. "The admission of foreigners to the territory of a State", said the Permanent Court of International Justice in its advisory opinion concerning the treatment of Polish nationals and other persons of Polish origin or speech in the Dantzig territory, "is a question which is not necessarily connected with the legal status of persons within its territory." [4]) And the Umpire of the Belgian-Venezuelan Mixed Claims Commission under Convention of March 7, 1903, said that "the right to expel foreigners from or prohibit their entry into the national territory is generally recognized; that each State reserves to itself the exercise of this right with respect to the person of a foreigner if it considers him dangerous to public order, or for considerations of a high political character, but that its application cannot be invoked except to that end." [5])

2. When an individual is admitted to reside on foreign territory, he is presumed to know the local laws: the Umpire of the U.S.-Venezuelan Mixed Commission under Convention of December 5, 1885, observed in the Horatio case that "whether the captain knew the law or not, can afford him no defence for its violation if such a law existed. Neither foreigner nor native can plead ignorance of the law as an excuse for its violation. This is a fundamental principle absolutely essential for the maintenance of social order, which tolerates no exception, and from the consequences of which there is no escape." [6]) And the Umpire of the German-Venezuelan Mixed Claims Commission under Convention of February 13, 1903 held in

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[3]) Cf. the Treaty of The Hague relative to marriage, June 12, 1902, de Martens N.R.G. 2-31-706, etc.

[4]) February 4, 1932, Series A/B No. 44 p. 41.

[5]) Ralston-D. p. 267, Survey No. 262.

[6]) Moore 3-3024/5, Survey No. 142.

the Christern case that "all foreigners residing in or doing business with a country are equally bound with its citizens to know the laws of the country." [7])

3. The person and property of a foreigner are subject to the local laws. As to property, it was held by Commissioner Wadsworth of the Mexican-U.S. Claims Commission under Convention of July 4, 1868 in the McManus case that "foreigners, with regard to their local property, are subject to the laws of the country where they may reside. The acts of the authorities are presumably in accordance with the laws until it is proven that they are otherwise." [8]) As to their person, it was held:

> It is a perfectly well understood principle of law that no citizen of a foreign nation, excepting, perhaps, in certain cases, a representative clothed with diplomatic privileges, is free from the obligation of conforming himself to the laws of the country in which he is residing. If he wilfully violates them he is suject to the same penalties which are imposed upon native citizens. [9])

> La regla de derecho de que las personas que van á un país extranjero á residir ó á ocuparse en el comercio deben obedecer sus leyes y someterse de buena fe á los tribunales establecidos, ó de que cuando los buques mercantes de un país visiten los puertos de otro con objetos mercantiles, deben fidelidad temporal y están sujetos á jurisdicción de ese país, apenas puede considerarse en conexión con este caso. [10])

> Every nation, whenever its laws are violated by anyone owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the prescribed penalties upon the transgressor, if found within its jurisdiction; provided always that the laws themselves, the methods of administering them, and the penalties prescribed are not in derogation of civilized codes. [11])

> (It is a) general principle of international law that all aliens are subject to the jurisdiction of the country in which they reside and must therefore abide by all laws and decrees of the lawful authorities of the country. [12])

> Whereas, in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country. [13])

> ... the following principles of international law:
> 1. that the jurisdiction of a State over the national territory is exclusive;
> 2. that foreigners visiting a country are subject to the local law, and must look to the courts of that country for their judicial protection;

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[7]) Ralston-D. p. 524, Survey No. 256.
[8]) Moore 4-3413, Survey No. 82.
[9]) Great Britain-U.S.A., arb., Alabama case, op. Adams, 14-9-1872, Moore 4-4095, Survey No. 94.
[10]) Great Britain-Honduras, arb., 18-4-1899, ed. Honduras 1899 p. 107, Survey No. 226.
[11]) U.S.A.-Venezuela, arb., C. 17-2-1903, Ralston-D. p. 170, Survey No. 258.
[12]) Mexico-U.S.A., arb., C. 8-9-1923, G.P.O. 1931 p. 212, Survey No. 354.
[13]) Rep. Comm.-U.S.A., arb., 5-8-1926, A.J.I.L. 22 (1928) - 419, Survey No. 333.

3. that a State cannot rightfully assume to punish foreigners, for alleged infractions of law to which they were not, at the time of the alleged offence, in any wise subject.[14])

... que siendo prescripción general e ineludible de derecho público, que todo extranjero acate la legislación del país en que resida.[15])

4. Just as a State is competent to refuse admission of foreigners into its territory, it is also competent to expel hem:

Attendu qu'on ne saurait contester à un Etat la faculté d'interdire son territoire à des étrangers quand leurs menées ou leur présence lui paraissent compromettre sa sécurité; qu'il apprécie, d'ailleurs, dans la plénitude de sa souveraineté la portée des faits qui motivent cette interdiction;
... Attendu qu'en reconnaissant à l'Etat le droit d'expulser on ne saurait lui dénier les moyens d'assurer l'efficacité de ses injonctions;
Qu'il doit pouvoir surveiller les étrangers dont la présence lui paraît dangereuse pour l'ordre public, et, s'il craint que ceux auxquels il interdit son territoire n'échappent à cette surveillance, les garder à vue.[16])

1. A State possesses the general right of expulsion; but,
2. Expulsion should only be resorted to in extreme instances, and must be accomplished in the manner least injurious to the person affected;
3. The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accepts the consequences.[17])

There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defence of the country from some danger anticipated or actual.[18])

Wenn Art. 44 (des Genfer Abkommens) selbst dem genau geregelten Wohnrecht des Art. 43 gegenüber das Recht der vertragschlieszenden Teile vorbehält, dem Wohnberechtigten wie jedem anderen Ausländer aus Gründen der inneren oder aüszeren Sicherheit des Staates den Aufenthalt in ihrem Gebiet zu versagen, so ist damit das grundsätzliche Recht jedes souveränen Staates über den Verbleib von Ausländern in seinem Staatsgebiet nach freiem Ermessen zu verfügen, auch hier ohne jede Einschränkung anerkannt. Für die Ausübung dieses Rechtes kann vorbehaltlich bestimmter Vereinbarungen in Staatsverträgen nur die eigene Auffassung der Staaten selbst über dasjenige maszgebend sein, was ihre innere oder äuszere Sicherheit bedingt. Diese Auffassung kann wechseln und hat zweifellos im Laufe der letzten Jahrzehnte bei den verschiedensten Staaten und unter den verschiedensten Verhältnissen wiederholt gewechselt. Dabei handelt es sich aber immer um einen Ausflusz eines der wichtigsten Rechte souveräner Staaten, dessen Ausübung für die beim Genfer Abkommen beteiligten Staaten durch den Vorbehalt des Art. 44 auch auf dem Gebiete des Wohnrechts ihrem freien Ermessen überlassen ist und daher auch vom Schiedsgericht im einzelnen

[14]) France-Turkey, P.C.I.J., Judgment No. 9, diss. op. Moore, 7-9-1927, Series A No. 10, p. 94
[15]) Cuba-U.S.A., arb., 7-6-1930, ed. Habana p. 72, Survey No. 389.
[16]) Belgium-Great Britain, arb., 26-12-1898, de Martens N.R.G. 2-29-269, Survey No. 217.
[17]) Italy-Venezuela, arb., C. 13-2-1903, Ralston-D. p. 705, Survey No. 257. See also ibidem p. 780.
[18]) Netherlands-Venezuela, arb., C. 28-2-1903, Ralston-D. p. 914/5, Survey No. 261.

Falle nicht auf seine Notwendigkeit nachgeprüft werden kann. Sofern nur die beteiligte Behörde ernstliche Gründe für die Ausweisung angeben kann, ist das Schiedsgericht nicht in der Lage, die Beachtung dieser Gründe als unerheblich oder unzureichend abzulehnen.[19])

There may be no rule of international law or practice with regard to precise, proper methods of expelling an alien, such as those that have been suggested by writers, by conducting a man to an international border or by delivering him to a representative of his Government. But when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge such as is made in the instant case, account being taken of the manner in which expulsion might have been effected.[20])

The arbitrary arrest, detention or deportation of a foreigner may give rise to a claim in international law. But the claim is not justified if these measures were taken in good faith and upon reasonable suspicion, especially if a zone of military operations is involved.[21])

5. It should be added that the State of residence may limit the exercise of its territorial jurisdiction over foreigners in favour of the personal jurisdiction of the State of allegiance by treaty. The personal jurisdiction, then, prevails over the territorial jurisdiction, as in case of Capitulations.[22])

II. Now the second question arises, namely: may this prevailing territorial jurisdiction be exercised in a discretionary manner with regard to international law, or does some general rule of international law exist, which rule limits that exercise? It has been maintained by international tribunals that this exercise is limited in that sense, that the State of residence must treat foreigners just as its own citizens, equality of treatment being a general principle of international law. Prof. Verzijl, President of the French-Mexican Mixed Claims Commission under Convention of September 25, 1924, held: "mais toujours est-il que, particulièrement en matière d'indemnités pour cause de dommages révolutionnaires, c'est un principe acquis de droit international coutumier que, si un Etat accorde des indemnités à ses propres nationaux, il est obligé, pour ne pas manquer à son devoir international, d'assurer au moins le même traitement aux ressortissants étrangers. La promesse d'égalité de traitement pour les étrangers et les nationaux ne fonctionne donc pas seulement comme un simple incident au cours des négotiations diplomatiques, mais plutôt comme un principe de droit international sous-entendu."[23]) Similarly, in a dissenting opinion before the Rumanian-Hungarian Mixed Arbitral Tribunal, Mr. Antoniade observed that "la doctrine du droit

[19]) Germany-Poland, arb., C. 15-5-1922, Amtliche Sammlung vol. 5 p. 162, Survey No. 345.
[20]) Mexico-U.S.A., arb., C. 8-9-1923, op. Nielsen, G.P.O. 1929 p. 64, Survey No. 354.
[21]) France-Great Britain, P.C.A., 9-6-1931, A.J.I.L. 27 (1933) - 160, Survey No. 392.
[22]) Cf. the Narik case between Greece and the Netherlands, March 5, 1918.
[23]) Ed. Paris, p. 20/1, 105, Survey No. 363.
ed. The Hague p. 411, Survey No. 310.

international, ainsi que le droit conventionnel qui règle d'Etat à Etat ces questions, admettent que l'étranger a droit à une protection de sa personne et de ses biens égale à celle que les lois assurent aux nationaux; que cette égalité de traitement implique que les biens immeubles d'un étranger sont soumis aux lois qui régissent la propriété immobilière dans le pays où ils sont situés; que, s'il y a eu dernièrement une tendance chez certains publicistes de demander pour les biens des étrangers une protection plus grande que celle accordée aux nationaux, cette tendance n'a pas été suivie par la majorité de la doctrine, ni n'est passée dans le droit conventionnel (cf. Fauchille, op. cit., t. I, p. 930-944; de Louter, Le droit international positif, t. I, p. 206; Cours du professeur Borchard in Bibl. Visseriana, t. III, p. 19 et suiv." [24]) The German-Polish Arbitral Tribunal under Convention of May 15, 1922, was of opinion that, if the State of residence exercises its territorial jurisdiction over foreigners in that manner, the personal jurisdiction of the State of allegiance is not infringed: "wenn ein Rechtsbehelf den Ausländern in demselben Umfange wie den eigenen Staatsangehörigen gewährt wird, so kann man darin unmöglich ein Beeinträchtigung der Rechte der dritten Staaten erblicken; handelt es sich doch um eine Masznahme zugunsten, nicht aber zuungunsten der Ausländer." [25]) Prof. Max Huber, arbitrator in a case between Great Britain and Spain concerning British claims in the Spanish zone of Morocco, appears to support this contention, saying that "d'une manière générale, une personne établie dans un Etat étranger est, pour la protection de sa personne et de ses biens, placée sous la législation territoriale et cela dans les mêmes conditions que les ressortissants du pays." [26]) From this viewpoint it has been concluded that the foreigner has no greater right and cannot expect better treatment than what is accorded to nationals. Mr. Zuloaga, arbitrator for Venezuela in the German-Venezuelan Mixed Claims Commission under Convention of February 13, 1903, said that "it is a principle of international law, as I understand, that the foreigner has no greater right than which is granted to nationals." [27]) And in the Italian-Venezuelan Mixed Claims Commission under Convention of the same date he observed: "it is a generally accepted principle of international law that strangers can not expect, in any country, better treatment than is accorded the nationals." [28]) The

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[24]) January 10, 1927, Recueil M.A.T. vol. 7, p. 159.
[25]) April 30, 1928, Steiner case, Amtliche Sammlung vol. I, p. 30, Survey No. 345. Cf. also Cuba-U.S.A., arb., 7-6-1930, ed. Habana p. 62/3, 93/4, Survey No. 389.
[26]) Reports The Hague, May 1, 1925, p. 53, Survey No. 352.
[27]) Kummerow case, Ralston-D. p. 537, Survey No. 256.
[28]) Sambiaggio case, Ralston-D. p. 673, Survey No. 257.

Mixed Claims Commission Great Britain-U.S.A. under Convention of August 18, 1910, was of opinion that it had not been shown in the Cadenhead case "that there was a denial of justice, or that there was any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country." [29]) And Mr. F. G. Roa, Mexican Commissioner in the Special Claims Commission Mexico-U.S.A. under Convention of September 10, 1923, said that "one of the fundamental principles of protection of aliens is this, that they cannot be placed in a more favorable situation than the other inhabitants of a country." [30])

It seems, however, that this conception has no foundation in general international law. No general rule of international law restricting the State of residence to assure equality of treatment of all foreigners on its territory could be conceived. That matter appertains in principle, as has been observed, to municipal legislation, or, in special cases, to conventional regulations. "Equality of legal status between citizens and foreigners is by no means a requisite of international law,",[31]) as was correctly said by the General Claims Commission Mexico-U.S.A. under Convention of September 8, 1923. And the Commission added: "in some respects the citizen has greater rights and larger duties, in other respects the foreigner has." In the Hopkins case, the same Commission held:

> If it be urged that under the provisions of the Treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is requiered to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens. [32])

The Mixed Claims Commission Great Britain-U.S.A. under Convention of August 18, 1910, held that "it is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which

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[29]) Report Nielsen p. 507, Survey No. 303.
[30]) G.P.O. p. 104, Survey No. 355.
[31]) G.P.O. 1927, p. 28, Survey No. 354.
[32]) Ibidem p. 50/1.

is refused to the subjects of other Governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination." [33]) In international law, such considerations can only be regarded as mere statements of fact.

A more interesting idea was advanced by Mr. de Martens, arbitrator in the Costa Rica Packet case, who said in his award: "that the sovereignty of the State and the independence of the judicial or administrative authorities could not prevail to the extent of arbitrarily suppressing the legal security, which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country." [34]) According to him, the State of residence may not exercise its territorial jurisdiction over foreigners within its territory in an arbitrary manner. If so, the territorial jurisdiction can no longer be said to prevail. It follows, that in such a case a conflict arises between two different state jurisdictions. In this respect, it might be argued that the State of residence, by injuring the foreigner arbitrarily, injures at the same time the State of allegiance, which will protect its injured citizen, and will consequently exercise its personal jurisdiction against the State of residence, so that the territorial jurisdiction of the latter no longer prevails. It is all important to know exactly what general principle of international law governs this new relation between both States. In article 1 of adopted texts at the Hague Codification Conference 1930 concerning the responsibility of States for damage caused in their territory to the person and property of foreigners it was said that "tout manquement aux obligations internationales d'un Etat du fait de ses organes, qui cause un dommage à la personne ou aux biens d'un étranger sur le territoire de cet Etat, entraîne la responsabilité internationale de celui-ci." [35]) When this text is compared with the award of Mr. de Martens, it follows from both that international law imposes obligations upon a State exercising its territorial jurisdiction over the person and property of foreigners. Mr. Goetsch, Commissioner for Germany in the German-Venezuelan Mixed Claims Commission under Convention of February 13, 1903, said that "it ought to be considered as an obligation that international law imposes upon all civilized nations, to offer protection to foreigners. ... From the obligation of furnishing protection springs the obligation of freeing itself from blame in case

[33]) Report Nielsen p. 80, Survey No. 303.
[34]) February 13/25, 1897, Moore 5-4953, Survey No. 188.
[35]) Actes de la Conférence pour la codification du droit international, Geneva, December 31, 1930, League of Nations No. C. 351 (c). M. 145 (c). 1930. V. p. 237.

protection in a particular case was not possible." [36]) And Mr. R. Fazy, arbitrator in a dispute between Germany and Rumania held in his award of September 27, 1928 that "le respect de la propriété privée et des droits acquis des étrangers fait sans conteste partie des principes généraux admis par le droit des gens. ... Toutefois, si le droit des gens autorise un Etat, pour des motifs d'utilité publique, à déroger au principe du respect de la propriété privée des étrangers, c'est à la condition sine qua non que les biens expropriés ou réquisitionnés seront équitablement payés le plus rapidement possible." [37]) The question must thus be examined whether the "arbitrarily suppressing (of) the legal security, which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country" constitutes a "manquement aux obligations internationales", a failure to the international obligations of the State of residence. The principle of the international responsibility of States will be the guiding principle here. International responsibility of States has been dealt with exhaustively in doctrine and by international tribunals; therefore, only a few points will be mentioned here.

It is the task of the international judge or arbitrator to examine, in each case, whether there has been any act or omission, towards the person or property of foreigners, on the part of the State of residence, and, if so, whether that act or omission is unlawful under international law. As to the first point, it seems to be admitted, in doctrine as well as in decisions of international tribunals, that a State's international responsibility is not engaged by acts or omissions of private individuals, which acts or omissions have not been approved by the State. As to the second point, the international judge or arbitrator should determine the contents of international obligations and find as a fact whether there has been any default in fulfilling them. The solution of that question will vary in each case according to the licit or illicit character of the alleged act or omission. Sometimes, international responsibility has been engaged in case the State of residence did not respect the life, property, or liberty of the foreigner in its territory, or in case of bad faith, of abus de droit, of denial of justice, etc., varying, thus, with the legislative, executive, or judicial organs of the State, in others cases, no responsibility has been engaged in case of "unexpected deeds of violence, which reasonable foresight ant the use of ordinary cautions can not prevent",[38]) of necessity, of force majeure, etc. Meanwhile, the criterion of the licit of illicit

[36]) Fulda case, Ralston-D. p. 544, Survey No. 256.
[37]) R D.I. 1929-1-158/9, Survey No. 326.
[38]) U.S.A.-Venezuela, arb., C. 5-12-1885, Moore 3-3041, Survey No. 142.

character of an objectively established State's default in fulfilling international obligations seems to have been mitigated by the idea of "international standards" ("niveau habituellement admis"),[39]), to which the exercise of state jurisdictions should correspond.[40])

The determination of a State's default in fulfilling international obligations with regard to foreigners has certain consequences in international law:

1. The international responsibility of the State of residence is engaged and the question of reparation arises. That question, which will be left out of consideration here, must be solved by the application of rules of international law. Prof. Max Huber, arbitrator in a dispute between Great Britain and Spain concerning British claims in the Spanish zone of Morocco, held:

> Les questions de savoir si un Etat est responsable vis-à-vis d'un autre pour des dommages subis par des ressortissants de ce dernier, et quelle est, le cas échéant, la compensation due, sont par leur nature d'ordre juridique: il s'agit de l'existence éventuelle d'une règle de droit et de son application à un différend concret. Ce sont plus particulièrement des questions de droit international parce que, la responsabilité d'un Etat vis-à-vis d'un autre Etat ne pouvant pas être déterminée par le droit d'un seul Etat, elles relèvent nécessairement du domaine international.[41])

2. The territorial jurisdiction of the State of residence no longer prevails; that State must respond to a claim if the State of allegiance insists. Following Prof. Borchard, "in determining whether the State has a legal right to protect its nationals abroad, we must observe whether practice and law place the defendant State under a legal duty to receive or respond to a claim if the claimant State insists. Of this duty there can be little doubt, and it seems therefore of some advantage to indicate that the State has not merely a moral right or privilege to espouse and press a claim internationally, but a legal right to do so."[42])

3. The State of allegiance may exercise its personal jurisdiction by protecting its injured citizen. Prof. Huber stated in the arbitration just quoted:

> L'Etat dont un ressortissant établi dans un autre Etat se trouve lésé dans ses droits, est en droit d'intervenir auprès de cet Etat si la lésion constitue une violation du droit international. D'autre part, le simple fait qu'un dommage a été causé, non plus que le fait que l'indemnité demandée ou la punition exigée par le damnifié n'ont pas été obtenues, ne justifient pas en

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[39]) France-Great Britain, P.C.A., 9-6-1931, Grotius 1934 p. 252, Survey No. 392.
[40]) See especially the decisions of the General Claims Commission Mexico-U.S.A. under Convention of September 8, 1923 (G.P.O. 1927 p. 73, 91, 103, 165, etc.).
[41]) Reports The Hague, May 1, 1925, p. 42, Survey No. 352.
[42]) The protection of citizens abroad and change of original nationality, Yale Law Journal 43 (1934) - 372.

> eux-mêmes l'intervention diplomatique: il faut qu'un élément particulier survienne qui fasse naître une responsabilité internationale. ... Pour qu'une responsabilité internationale naisse, il est nécessaire qu'il y ait soit violation d'une clause prescrivant un traitement particulier de l'étranger, soit violation manifeste et grave des règles applicables aux nationaux au même titre qu'aux étrangers. Le caractère territorial de la souveraineté est un trait si essentiel du droit public moderne, que l'intervention étrangère dans les rapports entre l'Etat territorial et les individus soumis à sa souveraineté, ne peut être admise qu'à titre exceptionnel. [43])

It is clear that the international responsibility of the State of residence is engaged when a clause perscribing a particular treatment of the foreigner has been violated by that State. However, inasmuch as the idea of international standards may be considered as a basis of appreciation for the international judge or arbitrator, it will not be sufficient to hold, as Prof. Huber did, that the international responsibility of the State is engaged also in case of "a manifest and grave violation of rules applicable to nationals on the same footing as to foreigners." It would be erroneous to apply, in international disputes, rules of state responsibility according to municipal law. As the Hague Codification Conference 1930 pointed out: "un Etat ne peut décliner sa responsabilité internationale en invoquant son droit interne." [44])

4. That exercise, as protection, is based on nationality, as was pointed out in paragraph 4. Each State must decide when it will do so.[45]) In the above-quoted Costa Rica Packet case, the arbitrator, Mr. de Martens, said: "the State has not only the right but even the duty of protecting and defending its nationals abroad by every means authorized by international law, when they are subjected to arbitrary pro-

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[43]) Loc. cit. p. 53.

[44]) Op. cit. p. 237 (article 5). Cf. P.C.I.J., Judgment 25-5-1926, Series A No. 7, p. 33.

[45]) See, for instance, the Note of the U.S. Secretary of State Cass, from July 25, 1858, to his Minister at Nicaragua: "The United States believe it to be their duty, and they mean to execute it, to watch over persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations. Wherever their citizens may go through the habitable globe when they encounter injustice they may appeal to the Government of their country, and the appeal will be examinated into with a view to such action in their behalf as it may be proper to take. It is impossible to define in advance and with precision those cases in which the national power may be exerted for their relief, or to what extent relief shall be afforded. Circumstances as they arise must prescribe the rule of action. In countries where well defined and established laws are in operation, and where their administration is committed to able and independent judges, cases will rarely occur where such intervention will be necessary. But these elements of confidence and security are not everywhere found, and where that is infortunately the case, the United States are called upon to be more vigilant in watching over their citizens, and to interpose efficiently for their protection when they are subjected to tortious proceedings, by the direct action of the Government, or by its indisposition or inability to discharge its duties."

ceedings or injuries committed to their prejudice." [46]) It is confirmed by international tribunals that the State of allegiance is competent („has the right") to exercise its personal jurisdiction in order to protect and defend its citizens abroad in fact and in law [47]) ("by every means authorized by international law"):

> The law of nations acknowledges the right of a Government to insist on the penal prosecution of offenders having committed crimes against its own citizens or subjects living in the country of the criminals, and the law of nations admits of the right of resorting to reprisals and retorsion in cases of persevering denial of justice, though it must be admitted that a readiness to resort to such means is growing fainter with every advance of international good will. [48])

> The right of States to give protection to their subjects abroad, to obtain redress for them, to intervene in their behalf in a proper case, which generally accepted public law always maintains, makes these municipal statutes under discussion in direct contravention thereto and therefore inadmissible principles by those States who hold to these general rule of international law. [49])

> The citizen or subject of a State who goes to a foreign country is, during his stay in the latter, subject to its laws and amenable to its courts of justice for any crime or offense he may commit in contravention of the municipal laws, nor can the government to which he owes allegiance and which owes him protection properly interpose unless justice is denied him or unreasonably delayed. This principle, however, does not interfere with the rigt and duty of a State to protect its citizens when abroad from wrongs and injuries; from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties and punishments, incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves. [50])

> These rules of conduct recognize the right and duty of a State to protect its citizens or subjects at home or abroad, and the corresponding obligation of a State to make due reparation and give just compensation for injuries inflicted upon another State, or upon its citizens or subjects. And whenever

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[46]) Moore 5-4952.

[47]) In law, protection will generally be preceded by exhaustion of the local remedies by virtue of the so-called Calvo clause. The General Claims Commission Mexico-U.S.A. under Convention of September 8, 1923, held: "The Commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause." (G.P.O. 1927, p. 25, Survey No. 354). As to this clause, see e.g.: Peru-U.S.A., arb., C. 12-1-1863, Moore 2-1637, Survey No. 71; Colombia-U.S.A., arb., 18-5-1866, Moore 2-1413, Survey No. 74; Great Britain-U.S.A., arb., C. 8-5-1871, diss. op. Frazer, Moore 4-3750, Survey No. 93; Great Britain-Honduras, arb., 18-4-1899, Ed. Honduras p. 108, Survey No. 226; U.S.A.-Venezuela, arb., C. 17-2-1903, Ralston-D. p. 193, Survey No. 258; Mexico-U.S.A., arb., C. 8-9-1923, G.P.O. 1927-22, 1931-281, Survey No. 354; Hungary-Rumania, 10-1-1927, Recueil M.A.T. vol. 7, p. 150, 158; Bulgaria-Greece, arb., 4-11-1931, A.J.I.L. 28 (1934) - 787, 789, Survey No. 330; Egypt-U.S.A., arb., 8-6-1932, G.P.O. p. 43/4, 109, Survey No. 396; Bulgaria-Greece, arb., 29-3-1933, ed. Uppsala p. 25/6, 29, Survey No. 330; Finland-Great Britain, arb., 9-5-1934, ed. London passim, Survey No. 397; P.C.I.J., Judgments Series A/B Nos. 76 and 77, etc.

[48]) Mexico-U.S.A., arb., C. 4-7-1868, Moore 3-3003, Survey No. 82.

[49]) Great Britain-Venezuela, arb., C. 13-2-1903, Ralston-D. p. 379, Survey No. 254.

[50]) U.S.A.-Venezuela, arb., C. 17-2-1903, Ralston-D. p. 165, Survey No. 258.

two independent nations have by solemn compact provided a forum to determine the extent of the injuries inflicted by the one upon the other, and the means of redress therefor, the legislation of neither of the contracting parties can interpose to limit or defeat the jurisdiction of that forum in respect of any matter fairly within the purview of the compact. ... And the right of a State to intervene for the protection of its citizens whenever by the public law a proper case arises can not be limited or denied by the legislation of another nation.[51])

Considering that an injury to a seaman on a vessel may impede the operation of the vessel and adversely affect the interests of the owner and interfere with the government of the flag under which the seaman serves, and on the other hand that by accepting employment on a vessel under the American flag the seaman is entitled to the protection of that flag against agression by foreign agencies, it follows that a national interest is involved and that the government concerned may justly assert an international right to protect the seaman under its flag on that ground. For these reasons the action of Congress and of the Department of State in asserting this right to give an alien seaman who has taken out his first citizenship papers the status of an American citizen for the purpose of protecting him against acts of foreign governments may properly be regarded as merely declaratory of an existing international right based on the recognized principles of international law.[52])

International law recognizes the right of a nation to intervene to protect the interests of its nationals in foreign countries, through diplomatic representations, and through instrumentalities such as those afforded by international tribunals. It seems to be clear that the recognition of this right is fundamental grounded on the often asserted theory that an injury to a national is an injury to the State to which the national belongs. If this theory were not sound it is difficult to perceive why the existence of this right of intervention should be recognized with regard to a limited number of persons within the territorial jurisdiction of a sovereign nation which is broadly described by Mr. Chief Justice Marshall in the opinion written by him in the case of the Exchange (7 Cranch, 116, 136), in which he said:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

A nation has a right to insist upon the observance of obligations of international law which in a certain sense, undoubtedly qualify so far as aliens are concerned, those plenary sovereign rights which, as described by Chief Justice Marshall, a nation may exercise with regard to the persons and property of its own nationals. An alien has a right to rely upon an observance of rights which are secured to nations by international law and which inure to his benefit. Persons dependent upon him have that right, and international tribunals have the power to award redress for the disregard of such rights.[53])

The relation of rights and obligations created between two States upon the commission by one of them of an act in violation of international law, arises only among those States subject to the international juridical system. There does not exist, in that system, any relation of responsibility between the transgressing State and the injured individual for the reason that the

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[51]) U.S.A.-Venezuela, arb., C. 17-2-1903, Bainbridge, Ralston-D. p. 185, 186, Survey No. 258.

[52]) Germany-U.S.A., arb., C. 10-8-1922, G.P.O. p. 233/4, Survey No. 350.

[53]) Mexico-U.S.A., arb., C. 8-9-1923, sep. op. Nielsen, G.P.O. 1927, p. 123/4, Survey No. 354.

latter is not subject to international law. The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by international law upon each member of the community of nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is united by the bond of nationality. The only juridical relation, therefore, which authorizes a State to exact from another the performance of conduct prescribed by international law with respect to individuals is the bond of nationality. This is the link existing between that law and individuals and through it alone are individuals enabled to invoke the protection of a State and the latter empowered to intervene on their behalf. [54])

International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through such means as are afforded by international tribunals. From the standpoint of domestic obligations, governments consider it a duty to extend such protection. ... It is a well-recognized right on the part of consular officers to communicate, in appropriate cases, with local authorities concerning the protection of nationals. [55])

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. ... Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. [56])

Il est incontestable qu'à un certain point l'intérêt d'un Etat de pouvoir protéger ses ressortissants et leurs biens, doit primer le respect de la souveraineté territoriale, et cela même en l'absence d'obligations conventionelles. Ce droit d'intervention a été revendiqué par tous les Etats: ses limites seules peuvent être discutées. En le niant, on arriverait à des conséquences inadmissibles: on désarmerait le droit international vis-à-vis d'injustices équivalent à la négation de la personnalité humaine; car c'est à cela que revient tout déni de justice. [57])

Mr. de Martens said that the State has not only the right but even the duty of protection and defending its nationals abroad. Whether a State has the duty to protect [58]) and whether the citizen has a right to be protected,[59]) that question is one of municipal law, not of international law, which cannot oblige a State to protect its own citizens nor give the latter a right to be protected abroad by he State of allegiance. In a dissenting opinion before the General Claims Commission Mexico-U.S.A. under Convention of September 8, 1923, Mr. F. K. Nielsen observed with justice that "a claimant's right to protection

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[54]) Mexico-U.S.A., arb., C. 8-9-1923, G.P.O. 1931 p. 187/8, Survey No. 354.
[55]) Mexico-U.S.A., arb., C. 10-9-1923, op. Nielsen, G.P.O. p. 96/7, Survey No. 355.
[56]) Great Britain-Greece, P.C.I.J., Judgment No. 2, 30-8-1924, Series A No. 2, p. 12.
[57]) Great Britain-Spain, arb., 1-5-1925, Reports The Hague p. 53, Survey No. 352.
[58]) Cf. Mexico-U.S.A., arb., C. 4-7-1868, Prats case, op. Palacio, Moore 3-2893/4, Survey No. 82.
[59]) Cf. Moore 3-2325/6, 2570, 2688, etc.

from his Government is determined by the law of that Government. The right of the Government to extend protection is secured by international law. And the merits of a complaint in any given case are determined by that law." [60])

It may be concluded from the above:

First, that a general rule of international law limits the normal exercise of a State's personal jurisdiction over individuals abroad to citizens, which by the bond of nationality enjoy the status of the State of allegiance.[61])

Secondly, that the exercise in law of that jurisdiction is restricted by the same rule, which becomes a rule of procedural law, namely of the nationality of the claim, provided that the international responsibility of the State of residence, which exercised its territorial jurisdiction over the injured foreigner below the "international standard of civilized justice"—in accordance to which that State is internationally obliged to exercise its territorial jurisdiction over foreigners on its territory—has been engaged.[62])

Thirdly, that the same "international standard of civilized justice" restricts, on its turn, the exercise of the territorial jurisdiction of the State of allegiance over foreigners within its own territory. If, as Prof. Borchard states in the Preface of his The diplomatic protection of citizens abroad, "the standard of treatment which an alien is entitled to receive is incapable of exact definition", its application in international practice nevertheless gives some colour to the contention that, in international law, the exercise of state jurisdictions is based on the general principle of law that rights may not be so exercised as to offend the rights of others.

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[60]) G.P.O. 1931 p. 270. "Governments are constituted to afford protection, not to guarantee it." (Italy-Venezuela, arb., C. 13-2-1903, op. Zuloaga, Sambiaggio case, Ralston-D. p. 678, Survey No. 257).

[61]) Such as political actions with regard to the State of residence, the assistance given by diplomatic and consular officers, etc.

[62]) It is obvious that the elements of civil responsibility cannot be applied to responsibility of States according to international law. "La différence entre la responsabilité en droit civil et en droit international n'est pas dans le fondement de la responsabilité, ni dans la conception de la faute, elle est simplement dans la détermination des obligations qui pèsent sur les sujets de droit.", Georges Ripert: Les règles du droit civil applicables aux rapports internationaux, Recueil des Cours 44 (1933) - 616.

York 1928; C. Th. Eustathiadès: La responsabilité internationale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international, Paris 1936; A. V. Freeman: The international responsibility of States for denial of justice, London 1938; Harvard Research, A.J.I.L. Off. Doc. Special Number April 1928, p. 133/239; O. Hoyer: La responsabilité internationale des Etats, Paris 1930; League of Nations, Hague Codification Conference 1930 and Actes de la Conférence (also in A.J.I.L. Off. Doc. 1930 p. 46/74); G. Salvioli: La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux, Recueil des Cours 28 (1929) - 231/89; Ch. de Visscher: La responsabilité des Etats, Bibliotheca Visseriana, vol. II p. 89/119.

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*B. Private vessels outside territorial waters *)*

We will examine what conflict of state jurisdictions may arise when a private vessel of a particular State leaves the territorial waters of that State and enters, successively, 1) the high seas, 2) the marginal sea of a foreign State, and 3) the inland waters of a foreign State. Thus, under this head, only private vessels will come up for discussion, whereas public vessels will be dealt with in Chapter III, § 9.

Following the terminology of the international Convention for the unification of certain rules relating to the immunity of state-owned vessels, signed at Brussels on April 10, 1926,[63]) a private vessel may be defined as a vessel 'appropriated to commercial and non public

*) As no dispute concerning private aircraft abroad has been brought before an international tribunal, as it seems, this matter will not be dealt with here.

[63]) L.N.T.S. vol. 176, p. 199.

services', whereas in a Draft Convention of the Harvard Research it is said to mean 'a privately owned and privately operated vessel or a vessel the legal status of which is assimilated to that of such a vessel." [64]) As to the meaning of 'territorial waters' of a State, the same Draft Convention held: "The territorial waters of a State consist of its marginal sea and its inland waters. The marginal sea of a State is that part of the sea within three miles (60 to the degree of longitude at the equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river-mouth. The inland waters of a State are the waters inside its marginal sea, as well as the waters within its land territory. The high sea is that part of the sea outside marginal seas." [65])

I. The high seas

Since no State can display state-activities upon the high seas of the globe, the high seas entitle no State to any jurisdiction. The character of the high seas has thus, in the first place, a negative aspect in international law: there is absence of state jurisdictions.[66]) So, in principle, all States may use it in common.[67]) In its session of September 1927, the Institut de Droit international declared that the principle of the freedom of the high seas involved the following consequences:

1. Liberté de navigation en haute mer, sous le contrôle exclusif, sauf convention contraire, de l'Etat dont le navire porte le pavillon.
2. Liberté de pêche en haute mer, sous les mêmes conditions.
3. Liberté d'immersion en haute mer des câbles sous-marins.
4. Liberté de circulation aérienne au-dessus de la haute mer. [68])

The absence of state jurisdictions on the high seas does not mean, however, that vessels navigating them escape the domain of law. In the Lotus case it was held that "it is certainly true that—apart from

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[64]) Harvard Research on Territorial Waters, A.J.I.L. Off. Doc., Special Number April 1929, article 22, p. 245.

[65]) Articles 1 to 4, loc. cit. p. 243.

[66]) In the Lotus case, Judgment No. 9, September 7, 1927, the Permanent Court of International Justice said incidentally that "in virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas...", Series A. No. 10, p. 25.

[67]) "The term 'high seas', as used by legislative bodies, the courts, and text writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts, it is held to mean the waters of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights...", Great Britain-U.S.A., C. 8-5-1871, Second Court of Commissioners of the Alabama Claims, Moore 4-4335.

[68]) Annuaire de l'Institut 1927-3-339.

certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly." [69]) The character of the high heas has thus, in the second place, a positive aspect: vessels navigating the high seas are subject to the jurisdiction of the State, the flag of which they fly. In other words, States have jurisdiction, not over the high seas, but over their vessels navigating the high seas.

What character does this jurisdiction bear? In the Pelletier case between Haiti and U.S.A. it was held that a vessel "is *regarded* *) as part of the territory of the country to which it belongs"; [70]) in the Costa Rica Packet case, Mr. de Martens, arbitrator, said that "on the high seas even merchant vessels *constitute* *) detached portions of the territory of the State whose flag they bear"; [71]) and in the Lotus case is was held that "a ship on the high seas is *assimilated* *) to the territory of the State the flag of which it flies." [72]) If this assimilation of ship and territory involves that vessels, just as is state territory, are subject to the territorial jurisdiction of the State of the flag, that conception can be upheld neither in doctrine nor in practice. For, as has been observed in § 4, vessels are subject to the personal jurisdiction of the State, the flag of which they fly, by virtue of the nationality conferred on them by that State.

"A merchant ship", said Mr. Loder in his dissenting opinion in the Lotus case, using a terminology of the Case of the French Government prepared by Prof. J. Basdevant as Agent for France, "being a complete entity, organized and subject to discipline in conformity with the laws and subject to the control of the State whose flag it flies, and having regard to the absence of all territorial sovereignty upon the high seas, it is only natural that as far as concerns criminal law this entity should come under the jurisdiction of that State." [73]) Moreover, the idea of 'ship is territory' may be said, agreeing with Lord Finlay in his dissenting opinion in the same case, to be "a new and startling application of a metaphor", [74]) for it is contrary to well settled rules of international law, which will be dealt with hereafter and by virtue of which a private vessel sojourning in foreign inland waters is subject to the territorial jurisdiction of the littoral State. Why should a vessel, in such circumstances, cease to be "a detached

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[69]) Loc. cit. p. 25.
*) My italics.
[70]) June 13, 1885, Moore 2-1773, Survey No. 131.
[71]) Moore 5-4952, Survey No. 188.
[72]) Loc. cit. p. 25.
[73]) Loc. cit. p. 39. See the French Case, Series C. p. 209, and the French Counter-Case, p. 255.
[74]) Loc. cit. p. 52.

and floating portion of the national territory"? And why so, again, in case of hot pursuit, or, in war-time, in case of visit, seizure or confiscation when a neutral vessel has contraband on board? The idea of territoriality is an idea of local situation, and, as such, an absolute idea not susceptible of being upheld in some cases and rejected in others.

The question arises whether this personal jurisdiction of the State of the flag over its private vessels on the high seas is exclusive with regard to other States. Mr. N. G. Upham, American Commissioner in the Mixed Commission Great Britain-U.S.A. under Convention of February 8, 1853, was of the opinion, in the Enterprise case, that "each country is entitled to the free and absolute right to navigate the ocean as the common highway of nations, and while in the enjoyment of this right retains over its vessels the exclusive jurisdiction of its own laws. The Emperor Antoinus said 'though he was the lord of the world, the law only was the ruler of the sea'; ... Indeed, the free right of each nation to navigate the ocean is now nowhere contested, and it carries with it, as a necessary result, the exclusive jurisdiction on the high seas of the laws of each country over its own vessels." [75]) In the same instance, Umpire Bates held in the Creole case that "a vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. ... These rights, sanctioned by the law of nations—viz, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country—must be respected by all nations, for no independent nation would submit to their violation." [76]) In the Pelletier case it was said that "it is the general rule of the law of nations that offenses committed by a vessel at sea or on board while in a port of a foreign country are justiciable, or triable, only in the courts of the country to which the vessel belongs." [77]) The arbitrator in the Costa Rica Packet case said that "on the high seas even merchant vessels ... are only justiciable by their respective national authorities for acts committed on the high seas." [78]) The Permanent Court of In-

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[75]) Moore 4-4353, 4354, Survey No. 47.

[76]) Moore 4-4377, 4378. Cf. American Institute of International Law, Project No. 12, article 7: "The law of each nation applies to its merchant vessels on the high seas, including passengers and crew, and the property of the nation and of its nationals found thereon.", A.J.I.L. Off. Doc. Special Number October 1926, p. 324.

[77]) Moore 2-1773.

[78]) Moore 5-4952.

ternational Justice held in the Lotus case that "in virtue of the principle of the freedom of the seas ... no State may exercise any kind of jurisdiction over foreign vessels upon them. ... That State (of the flag) exercises its authority upon it (ship on the high seas), and no other State may do so." [79]) The Institut de Droit international declared, as has already been stated, that there exists "liberté de navigation en haute mer, sous le contrôle exclusif, sauf convention contraire, de l'Etat dont le navire porte le pavillon." Consequently, it may be argued that, in principle, a State enjoys exclusive jurisdiction over its private vessels navigating the high seas, or negatively expressed, it has no jurisdiction over foreign vessels navigating them. In the Lotus case, again, it was held that "if a war vessel, happening to be at the spot where a collision occurs, between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law." [80]) The Mixed Claims Commission Great Britain-U.S.A. under Convention of August 18, 1910, held that "the fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful avocation on the high seas, except in time of war or by special agreement. The 'Wanderer' was on the high seas. There is no question here of war. It lies therefore on the United States to show that its naval authorities acted under special agreement. Any such agreement being an exception to the general principle, must be construed stricto iure." And: "it is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies." [81]) Mr. T. M. C. Asser, arbitrator in the 'James Hamilton Lewis' case between Russia and U.S.A. was of opinion that "the policy of the defendant party according to which it was permitted to a war ship of a State to pursue beyond territorial waters a vessel whose crew had rendered themselves guilty of an illegal act in territorial waters or on the territory of that State could not be regarded as conforming to international law, since the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless this rule has been derogated by a special convention." [82])

[79]) Loc. cit. p. 25.
[80]) Loc. cit. p. 25.
[81]) Report Nielsen p. 462, 480, Survey No. 303.
[82]) November 29, 1902, U.S. For. Rel. 1902, App. I, p. 456, Survey No. 236.

Although it is quite clear that the personal jurisdiction of the State of the flag, in the absence of a special rule to the contrary, over its vessels on the high seas is exclusive with regard to other States and that no conflict will arise between States concerning the attribution of jurisdictions on the high seas, the Permanent Court of International Justice stated in the Lotus case that "the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted",[83]) and that "there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown." [84])

From this famous case, on which many comments have been made,[85]) only a few points of interest in this paragraph will be extracted. First, the drawing up of the Special Agreement, signed at Lausanne on October 12, 1926, has had a great influence both upon the procedure and the decision. According to this, the Court had to decide the following questions:

> Has Turkey, contrary to article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish sailors and passengers?
>
> Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases? [86])

It appears from the facts and from the arguments of both Parties that the dispute could not be regarded as a conflict about the *exercise,* bu about the *attribution* of state jurisdictions. The Court itself remarked that the arguments related exclusively to the question "whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case." [87]) However,

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[83]) Loc. cit. p. 27.

[84]) Loc. cit. p. 30.

[85]) See, inter alia: G. Canonne: Essai de droit pénal international. L'affaire du Lotus, Paris 1929; H. Hayri: L'abordage en haute mer en droit international public maritime, Paris 1939; R. Portail: L'affaire du Lotus devant la Cour permanente de justice internationale et devant l'opinion publique, Paris 1928; H. Walther: L'affaire du Lotus, Paris 1928; further, articles in: A.J.I.L. 22 (1928) - 8/14, idem 29 (1935) - 495/9; British Yearbook 1927 p. 108/28; Law Quarterly Review 44 (1928) - 154/63; Michigan Law Review 26 (1928) - 361/82; R.D.D I. 19 1927) - 521/49; R.D.I. 1928-65/134, 135/65; R.D.I.L.C. 55 (1928) - 1/32, 124/56, 400/21; R.G.D.I P. 35 (1928) - 361/76; Weekblad van het Recht 1927 Nos. 11716/7; Yale Law Journal 37 (1928) - 484/90, etc.

[86]) Loc. cit. p. 5.

[87]) Loc. cit. p. 13.

the Special Agreement was drawn up as if the dispute concerned a conflict about the *exercise* of state jurisdictions ("has Turkey ... *acted* in conflict with ..."). The Agent for France rightly considered the dispute as a conflict concerning the ***attribution*** of state jurisdictions. He asked the Court for judgment to the effect that

> Under the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, and the principles (French text: règles) of international law, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, *belongs* exclusively to the French courts. Consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting M. Demons, etc. ...[88])

The Agent for Turkey, Mahmout Essat Bey, laid stress, in accordance with the Special Agreement—which was ultimately altered at the request of the Turkish Government—on the *exercise* of Turkey's territorial jurisdiction. He contended, *inter alia*, that article 15 of the Convention of Lausanne referred simply and solely, as regarded the jurisdiction of the Turkish Courts, to the principles of international law. "Consequently, Turkey, when *exercising*[89]) jurisdiction in any case concerning foreigners, need, under this article, only take care not to act in a manner contrary to the principles of international law"; that article 6 of the Turkish Penal Code was not, as regarded the case, contrary to the principles of international law; that vessels on the high seas formed part of the territory of the nation whose flag they flew, and that in the case under consideration, the place where the offence was committed being the Boz-Kourt flying the Turkish flag, Turkey's jurisdiction in the proceedings taken was as clear as if the case had occurred on her territory.

> Even if the question be considered solely from the point of view of the collision, as no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, that country has jurisdiction to institute criminal proceedings. As Turkey is *exercising*[89]) jurisdiction of a fundamental character, and as States are not, according to the principles of international law, under an obligation to pay indemnities in such cases ...[90])

When Turkey argued that, exercising her territorial jurisdiction and applying article 6 of her Penal Code, she had not "acted in conflict with the principles of international law", and that, if so, France had to prove which principle had been violated by Turkey;[91])

[88]) Loc. cit. p. 6.
[89]) My italics.
[90]) Loc. cit. p. 9.
[91]) "Nous sommes devant vous en vertu d'un compromis; d'après ce compromis, M. l'agent français doit apporter la preuve que la Turquie a enfreint un principe existant de droit international. La preuve de l'existence de ce principe ne nous

when France contested this view of the case, maintaining that Turkey should show by virtue of which principle of international law she had jurisdiction over Mr. Demons, which principle should effect a derogation of the exclusive jurisdiction of France over the Lotus; [92]) when finally the Court said that

> having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide [93])

it is obvious that is was more difficult for France to win her case than for Turkey.

The Court was of opinion that collision on the high seas brings the jurisdiction of two different countries into play:

> the offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the Lotus, whilst its effects made themselves felt on board the Boz-Kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction. [94])

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incombe pas. L'article 15 de la Convention de Lausanne et le texte du compromis ne nous attribuent pas ce rôle; c'est M. l'agent français qui doit prouver l'existence d'une disposition prohibitive. L'agent turc n'a pas à apporter la preuve d'une disposition permissive. Le compromis et l'article 15 précité ne permettent pas cette interversion des rôles, et nous nous excusons.", Speech of the Turkish Agent, Series C p. 115.

92]) "Selon la conception de M. l'agent du Gouvernement turc, il faudrait au contraire prendre ici pour point de départ la souveraineté de la Turquie et se borner à rechercher s'il existe des règles prohibitives du droit international qui limitent le libre exercice, par la Turquie, de sa souveraineté. Cette façon de poser la question me paraît tout à fait défectueuse. L'article 15, je ne saurais trop le répéter, prescrit que la compétence soit réglée conformément aux principes du droit international, il parle des principes du droit international, il ne fait aucune allusion aux solutions particulières que pourrait édicter la loi turque. Encore bien moins fait-il intervenir en première ligne, comme le veut la thèse du Gouvernement turc, la loi turque. Cet article 15, dis-je, prescrit de régler la compétence pénale des tribunaux turcs selon les principes du droit international; dans le droit international, nous trouvons ce principe incontestable de la compétence de l'Etat du pavillon pour crimes commis en haute mer: voilà un de ces principes de droit international. Il s'agit ici de savoir s'il y aura une dérogation à ce principe, dérogation qui consisterait en une compétence concurrente des tribunaux turcs pour le cas du Lotus. Cette dérogation à un principe de droit international ne peut être consacrée que par une règle de droit international; je ne comprends pas une dérogation à un principe de droit international résultant d'une règle de droit national: il faut donc que nous avons ici une règle permissive du droit international pour fonder cette dérogation. Cette façon de poser la question, qui consiste à rechercher ce que dit le droit international et si un principe de droit international comporte une dérogation, est seule conforme à l'article 15 de la Convention de Lausanne.", Speech of the French Agent, Series C p. 151/2.

93]) Loc. cit. p. 12.

94]) Loc. cit. p. 30/1.

Bij the President's [95]) casting vote—the votes being equally divided—, the Court gave judgment to the effect that Turkey had not acted in conflict with the principles of international law.[96])

The Court came to this conclusion, principally, by assimilating a State's personal jurisdiction over its private vessels on the high seas to the State's territorial jurisdiction. Such an assimilation is erroneous since a private vessel cannot be assimilated, in international law, to the territory of the State of the flag. The Court held that the collision was due to an "act of negligence or imprudence having its origin on board one ship, whilst its effects made themselves felt on board another." So doing, the Court localized the collision on board the Turkish vessel; that vessel is assimilated to Turkish territory, so Turkey could exercise her territorial jurisdiction.[97]) However, what is relevant in international law in case of collision is, where it takes place: on the high seas or in territorial waters. The collision between the Lotus and the Boz-Kourt occurred on the high seas, not in the territorial waters of a State, and nowhere on French or Turkish territory. There, on the high seas, France had exclusive jurisdiction over the Lotus, as Turkey over the Boz-Kourt. The Court did not declare by virtue of what rule of international law the personal jurisdiction of France over the Lotus ceased to be exclusive.[98])

Finally, the decision of the Court holding that in case of collision each State has a concurrent jurisdiction would, in doctrine as well as in practice, have consequences which are contrary to the international law system and maritime policy. In doctrine: in municipal law, a State may invoke its sovereignty; in international law, the

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[95]) Prof. Max Huber.

[96]) Loc. cit. p. 32.

[97]) Lord Finlay, in his dissenting opinion, said that this view of the Court appeared "to be based on a misconception of the proposition that a ship on the high seas may be regarded as part of the territory of the country whose flag she flies. Turkey's case is that the crime was committed in Turkish territory, namely, on a Turkish ship on the high seas, and that the Turkish Courts therefore have a territorial jurisdiction. A ship is a movable chattel, it is not a place; when on a voyage it shifts its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. It appears to me to be impossible with any reason to apply the principle of locality to the case of ships coming into collision for the purpose of ascertaining what court has jurisdiction; that depends on the principles of maritime law. Criminal jurisdiction for negligence causing a collision is in the courts of the country of the flag, provided that if the offender is of a nationality different from that of his ship, the prosecution may alternatively be in the courts of his own country.", loc. cit. p. 53.

[98]) It should be noted that the Lotus case had no precedent in international decisions.

attribution of state jurisdictions is not fixed by the will of each State, but by principles of international law, by virtue of which a State may not arbitrarily extend its personal jurisdiction over foreigners or foreign vessels.[99])

Prof. V. Bruns wrote:

> Wird in einem Staat ein Strafgesetz erlassen, das im Ausland von Ausländern begangene Handlungen mit Strafe belegt, so wird dadurch der Normenbestand der übrigen Staaten nicht verändert. Denn die Rechtsnorm des Staates A ist im Staate B als solche nicht auch Rechtsnorm. Für die übrigen Staaten und ihre Angehörigen bedeutet der Erlasz eines solchen Strafgesetzes keine Setzung einer Rechtsnorm, sondern lediglich eine Tatsache. In der Schaffung des Gesetzes liegt die Bedrohung mit einem Eingriff in die Rechtssphäre der übrigen Staaten. Schon das Gesetz als solches bedeutet eine Gefährdung, seine Vollziehung im Einzelfall einen Eingriff in die Hoheitssphäre des fremden Staates, solange nicht eine ausdrückliche Erlaubnisnorm des Völkerrechts besteht.[100])

In practice: it would be contrary to maritime policy if a captain, who by some negligent act or omission caused a collision on the high seas, could be prosecuted in the courts of the injured parties. In his Speech Prof. Basdevant said:

> Puis, quel serait le résultat singulier et incompatible avec les exigences de la navigation maritime auquel on aboutirait si on reconnaissait à tout Etat la liberté de poursuivre l'officier d'un navire, parce qu'il lui est survenu un abordage dont on entend le rendre responsable?
>
> Voici un navire qui vient à sombrer dans un abordage; ce navire transportait de nombreux passagers appartenant à diverses nationalités; il transportait des marchandises dont les propriétaires, chargeurs, destinataires, assureurs sont répandus sur toute la surface du globe. Est-il possible que le capitaine auquel on imputera la faute de l'abordage soit poursuivi n'importe où? Est-il possible qu'il soit poursuivi en tous pays? Ce serait lui fermer en quelque sorte les ports des Etats les plus divers après même que son cas aurait été jugé par ses autorités nationales et que celles-ci, après l'enquête la plus impartiale et la plus approfondie, auraient reconnu son innocence.
>
> Ouvrir ainsi, pour les cas d'abordage et pour la répression pénale, la compétence aux tribunaux d'un Etat quelconque est absolument incompatible avec les exigences du commerce maritime. Admettre une telle solution, ce serait une régression impossible. Je dis une régression car, jusqu'ici, jamais une telle prétention n'a été émise, encore bien moins mise en pratique. Des abordages sont restés célèbres: ils avaient entraîné des pertes considérables; ils ont donné lieu souvent à des instances judiciaires d'ordre civil tendant à réparation, devant des tribunaux de pays divers. Mais on ne s'est jamais avisé d'ouvrir des poursuites pénales devant des tribunaux quelconques, des tribunaux de tous les pays dont des ressortissants étaient intéressés de près ou de loin à l'abordage.[101])

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[99]) Wrongfully the Court said that "the contention of the French Governement to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to *exercise* (my italics) jurisdiction, is opposed to the generally accepted international law." (loc. cit. p. 19). The French Government did not make such a contention, as has been observed above, unless the Court assimilated also the question of *attribution* of jurisdiction to that of *exercise* of jurisdiction, which assimilation is fundamentally erroneous. Cf. also the considerations of the Court on pp. 18 and 19.

[100]) Völkerrecht als Rechtsordnung I, Z. f. a. ö. R. u. V. I (1929)-1-56.

[101]) Series C. p. 40.

In the same Speech, Prof. Basdevant said:

> il existe peut-être des compétences subsidiaires ou concurrentes. Il existe certainement une de ces compétences concurrentes largement ouvertes: celle que l'on rencontre en cas de piraterie. Il en existe même d'autres. Quelles sont-elles?
>
> C'est là un point que je n'examine pas. Je dis seulement qu'une compétence subsidiaire ou concurrente ne peut exister que sur la base du droit international. [102])

If this statement means that piracy gives rise to a concurrent jurisdiction on the high seas, in derogation of the exclusive jurisdiction of the State of the flag, it should be ascertained whether other States have a jurisdiction *concurrent* with the jurisdiction of the State of the flag, which was flown by a private vessel navigating the high seas and committing acts of piracy there, and whether those States have, indeed, the same *personal* jurisdiction over such a vessel; if not, concurrent jurisdictions cannot be said to exist.

While acts of piracy have, in fact, been known for centuries, their judicial significance and consequences in international law is a problem of a more recent date: according as the practical importance played by piracy decreases, its theoretical importance in international law seems to increase.[103]) Meanwhile, many national legislations have defined piracy as a crime, and since only one or two decisions of international tribunals are available dealing with piracy under international law, attention should be paid to a distinction between piracy under municipal law and piracy under international law. Establishing, in 1932, a draft convention on piracy, the Harvard Research held in the introduction to that convention:

> Under the law of many States, but not all States, there is a crime called piracy. This crime is defined variously so as to include a narrower or wider range of offences, as compared with piracy under the law of nations. Furthermore, even where the range of the municipal crime is relatively narrow and covers categories of offences which in part parallel those of international law piracy, there will be found a lack of coincidence in some characteristics of the offences, e.g. in the place of their occurrence. International law piracy is committed beyond all territorial jurisdiction. Municipal law piracy may include offences committed in the territory of the

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[102]) Ibidem p. 38/9.

[103]) "Das Piraterierecht als völkerrechtliches Rechtsinstitut in dem heutigen Sinne ist eine Erscheinung jungen Datums. Der Gedankenkreis der Meeresfreiheit, in den es sich einfügt (s. o. 1), ist noch im 18., in einzelnen Beziehungen selbst noch im Anfang des 19. Jahrhunderts nicht mehr als ein von einer—freilich stets wachsenden—Anzahl von Staaten verfochtenes politisches Prinzip. Mag auch die Piraterie zu allen Zeiten bekämpft worden sein, so sind doch die rechtlichen Grundlagen des Einschreitens in alter und neuer Zeit durchaus verschieden. Einen der Gründe der Unsicherheit ihres völkerrechtlichen Tatbestandes darf man darin sehen, dass sie ihre heutige Stellung im System des Völkerrechts erst erlangte, als ihr tatsächliches Vorkommen schon selten geworden war.", Paul Stiel: Der Tatbestand der Piraterie nach geltendem Völkerrecht unter vergleichender Berücksichtigung der Landesgesetzgebungen, Leipzig 1905, p. 30.

State. It is to be noted, then, that piracy under the law of nations and piracy under municipal law are entirely different subject matters and that there is no necessary coincidence of fact-categories covered by the term in any two systems of law.[104])

And further:

Since, then, pirates are not criminals by the law of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the law of many States for punishing foreigners whose piratical offence was committed outside the State's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations, in a sense which a strict technical interpretation would give those terms.[105])

Piracy is by the law of nations a special, common basis of jurisdiction beyond the familiar grounds of personal allegiance, territorial dominion, dominion over ships, and injuries to interests under the State's protection. This is the only practical legal significance of the statements under discussion.[106])

... Properly speaking, then, piracy is not a legal crime or offence under the law of nations. In this respect it differs from the municipal law piracy which is a crime by the law of a certain State. International law piracy is only a special ground of state jurisdiction—of jurisdiction in every State. This jurisdiction may or may not be exercised by a certain State. It may be used in part only. How far it is used depends on the municipal law of the State, not on the law of nations. The law of nations on the matter is permissive only. It justifies state action within limits and fixes those limits. It goes no further.[107])

Thus, as opposed to municipal law piracy, "international law piracy is committed beyond all territorial jurisdiction". In his dissenting opinion in the Lotus case, Prof. J. B. Moore observed that

in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say "piracy by law of nations", because the municipal laws of many States denominate and punish as "piracy" numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations. Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—hostis humani generis—whom any nation may in the interest of all capture and punish.[108])

And the Judicial Committee of the Privy Council was of opinion that

whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of

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[104]) A.J.I.L. Off. Doc. 1932, p. 749.
[105]) Ibidem p. 756.
[106]) Ibidem p. 757.
[107]) Ibidem p. 759/60.
[108]) Series A. No. 10, p. 70.

> such piracy has placed himself beyond the protection of any State. He is no longer a national, but hostis humani generis and as such he is justiciable by any State anywhere. Grotius (1583-1645), De iure belli ac pacis, Vol. II, cap. 20, section 40.[109])

Since, then, in international law, a vessel committing acts of piracy on the high seas is not subject to any state jurisdiction,[110]) each State is competent, in cases of piracy, to stop and seize such a vessel on the high seas.[111]) "Every State has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy", it is said in article 2 of the Harvard draft convention.[112])

Piracy itself is defined in article 3 an 4 of the same convention. Article 3 provides:

> Piracy is any of the following acts, committed in a place, not within the territorial jurisdiction of any State:
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this acticle.[113])

And article 4:

> A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence

109) *In re* a reference under the Judicial Committee Act, 1833. The Committee added that "actual robbery is not an essential element in the crime of piracy iure gentium. A frustrated attempt to commit a piratical robbery is equally piracy iure gentium" (July 26, 1934, A.J.I.L. 29 (1935) - 141).

110) Article 2 of an amended draft convention of Mr. Matsuda, reporter on piracy for the League of Nations Committee of Experts for the progressive codification of international law, 1926, provided that "... in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.", League of Nations, Document No. C. 196. M. 70, 1937, V, p. 119. See also W. E. Hall: A treatise on international law, Oxford 1924, § 81 ("A pirate either belongs to no State or organized political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject." "Absence of competent authority is the test of piracy".)

111) In international law, it is irrelevant whether a vessel retains its national character although it has become a pirate ship. Such a question is a matter of municipal law. Article 5 of the Harvard draft convention holds: "A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the State from which it was derived." (loc. cit. p. 825). The draft convention of Mr. Matsuda holds in article 2: "It is not involved in the notion of piracy that the ship should not have the right to fly a recognized flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies." (loc. cit. p. 119).

112) Loc. cit. p. 768. Cf. article 5 of the draft convention of Mr. Matsuda loc. cit. p. 119.

113) Loc. cit. p. 768/9.

of paragraph 1 of article 3, or to the purpose of committing any similar act within the territory of a State by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the State to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of article 3, or after the commission of any similar act within the territory of a State by descent from the high sea, as long as it continues under the same control.[114])

The conclusion to be drawn from the above is that a State does not enjoy jurisdiction over a piratical vessel on the high seas, *concurrently* with the jurisdiction of the former State of the flag, which was flown by the pirate. That State ceases to enjoy jurisdiction over its piratical vessel. If, in case of piracy, every State may stop and seize the piratical vessel, that jurisdiction cannot be regarded as a derogation of the former exclusive personal jurisdiction of the State of the flag.

Moreover, it is impossible to maintain that any other State than the State of the flag can have a (concurrent) *personal* jurisdiction over the piratical vessel. Article 5 of the above quoted draft convention of Mr. Matsuda provides:

If the crew of a ship has committed an act of piracy, every *warship* has the right to stop and capture the ship on the high sea.[115])

And in article 121 of the Harvard draft convention it was held:

A seizure because of piracy may be made only on behalf of a State, and only by a person who has been authorized to act on its behalf.[116])

Paul Stiel wrote:

Eine in der Litteratur sehr verbreitete Meinung lehrt, es bestehe als Korrelat der Feindschaft des Piraten gegen das Menschengeschlecht ein Befugnis jedes Handelsschiffes, ihn — ohne staatliche Ermächtigung — gefangen zu nehmen und unter gewissen Voraussetzungen sogar zu betrafen. Diese Lehre ist zweifach unrichtig; eine solche Befugnis gibt es nicht; wenn es sie aber gäbe, so wäre sie nicht als eines der konservierten kriegsrechtlichen Elemente des Piraterierechtes zu verstehen.[117])

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[114]) Loc. cit. p. 822. Following the draft convention of Mr. Matsuda, "piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons..." (article 1, loc. cit. p. 119).

[115]) Loc. cit. p. 119.

[116]) Loc. cit. p. 846. The comment on that article held: "Warships have been the traditional means of capturing pirates on the sea; but today police boats and other means are useful. Indeed there seems no good reason why a State may not choose, through its law or government, its own agencies for seizure, subject to the check that it is responsible for its seizures. ... only States should exercise the special authority under international law to seize for piracy, so that clear state responsibility will accompany each exercise of this special authority.", loc. cit. p. 846/7.

[117]) Op. cit. p. 49.

It appears that only public vessels may stop and seize piratical vessels [118]) on the high seas. Public vessels, however, are not subject to a State's personal jurisdiction, but, as will be seen in paragraph 9, to its governing jurisdiction. Consequently, it is not possible to maintain that piracy gives rise to a concurrent personal jurisdiction on the high seas: [119]) so far, no derogation of a State's exclusive personal jurisdiction over its private vessels on the high seas seems to exist.[120])

II. The marginal sea

Let us examine what conflict of state jurisdictions arises when a private vessel enters the marginal sea of a foreign State. With this in view, a few words must be said about the idea of the 'marginal sea' and the jurisdiction of the coastal State over it.

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[118]) Following article 3 of the draft convention of Mr. Matsuda "only private ships can commit acts of piracy..." (loc. cit. p. 119).

[119]) The Pelletier case between Haiti and U.S.A. clearly shows that, in the 19th century, the exact meaning of piracy under international law was not well established. The award of the sole arbitrator, William Strong, who had to decide the claim "according to the rules of international law existing at the time of the transactions complained of", was not performed (award June 13, 1885, Moore 2-1757 (especially p. 1773/4), Survey No. 131; cf. Moore 5-4629/36).

[120]) It is obvious that States can limit freedom of navigation, freedom of fishing, freedom of immersion of submarine cables on the high seas by treaty. As to navigation, see e.g. Convention pour l'unification de certaines règles en matière d'abordage, Brussels September 23, 1910, de Martens N.R.G. 3-7-711; Convention pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes, Brussels September 23, 1910, de Martens N.R.G. 3-7-728; International convention for the safety of life at sea, London May 31, 1929, A.J.I.L. Off. Doc. 1937-105; Agreement concerning manned lightships not on their stations, Lisbon October 23, 1930, L.N.T.S. vol. 112 p. 22; Agreement concerning maritime signals, Lisbon October 23, 1920, L.N.T.S. vol. 125 p. 96; see also Institut de Droit international concerning the "création d'un Office international des eaux", Annuaire 1929-1-155/228, 1931-1-6/24, 1932-65/6, 1934-545/71, 711/3. As to fisheries, the Permanent Court of Arbitration observed in the North Atlantic Coast Fisheries arbitration that "though a State cannot grant rights on the high seas it certainly can abandon the exercise of its right to fish on the high seas within certain definite limits" (Great Britain-U.S.A., 7-9-1910, A.J.I.L. 4 (1910) - 978, Survey No. 291); see also Survey Nos. 49, 96, 166, 170, 195, etc.; Convention internationale pour régler la police de la pêche dans la mer du Nord en dehors des eaux territoriales, The Hague, May 6, 1882, de Martens N.R.G. 2-9-556; Convention for the regulation of whaling, Geneva, September 24, 1931, A.J.I.L. Off. Doc. 1936-167; Agreement for the regulation of whaling, London, June 8, 1937, A.J.I.L. Off. Doc. 1940-106. Cf. the Resolution of the Institut de Droit international concerning „les fondements juridiques de la conservation des richesses de la mer", Annuaire 1936-1-329/96, 1937-35/7, 93/131, 268/71. As to submarine cables, see e.g. Convention concernant la protection des câbles sousmarins, Paris, March 14, 1884, de Martens N.R.G. 2-11-281; Annuaire de l'Institut de Droit international 1879/80-1-351/94, 1902-12/8, 301/32, 1927-1-171/90, 1927-3-296/9, 343/4; Proceedings of the American Society of International Law 1921-70/6. About the high seas in general, see e.g. Annuaire de l'Institut de Droit international 1927-1-103/46, 1927-3-257/67, 339; E. W. Crecraft: Freedom of the seas, New York 1935; Th. M. Fulton: The sovereignty of the sea, London 1911; G. Gidel: Le droit international public de la mer, vol. 1, La haute mer, Chateauroux 1932; P. B. Potter: The freedom of the seas in history, law, and politics, New York 1924, etc.

Following the definition of the Harvard Research, the marginal sea "is that part of the sea within three miles (60 to the degree of longitude at the equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river mouth".[121]) In the Grisbadarna case concerning the sea-limit between Sweden and Norway, the Permanent Court of Arbitration at The Hague held in its award dated October 23, 1909, incidentally, that in accordance with the fundamental principles of the law of nations, both ancient and modern, "the maritime territory is an essential appurtenance of land territory."[122]) For the coastal State, the marginal sea has a geographical importance with respect to vessels arriving from the high seas into its inland waters, leaving the latter in the direction of the high seas or passing through the marginal sea; it is also important for the defence of the coastal line and its adjacent waters, and, finally, it has an economic interest as regards fishing,[123]) the 'richesses de la mer',[124]) etc. For foreign vessels, the marginal sea has the same geographical interest; moreover, these vessels will be subject to police regulations, customs regulations, etc. of the coastal State. It appears, indeed, that the marginal sea may be regarded as an essential appurtenance of the land territory of the coastal State for the fulfilment of state-activities. Since the coastal State *can* exercise state-activities on its maritime territory, it *must* do so in an effective manner, just as on its land territory,[125]) in order to accomplish both its national and international obligations.[126]) If so, the marginal sea entitles a State to a territorial (maritime) jurisdiction

[121]) A.J.I.L. Off. Doc., Special Number April 1929, p. 250.

[122]) A.J.I.L. 4 (1910) - 231, Survey No. 288. Cf. the Hague Codification Conference 1930, Report on Territorial Waters, Annex I concerning the legal status of the territorial sea, article 1: "The territory of a State includes a belt of sea described in this Convention as the territorial sea.", A.J.I.L. Off. Doc. 1930 p. 239.

[123]) "It is a universally recognized principle of international law that a State has jurisdiction over sea-fishing within its territorial waters, and to apply thereto its municipal law, and to impose in respect thereof such prohibitions as it may think fit.", Great Britain-U.S.A., arb., C. 18-8-1910, Report Nielsen p. 512, Survey No. 303.

[124]) Cf. Ph. C. Jessup: L'exploitation des richesses de la mer, Recueil des Cours 29 (1929) - 405/508, etc.

[125]) See § 1, p. 10.

[126]) "E impossibile che la potestà d'impero di uno Stato cessi del tutto dove finisce la terra ferma. Troppi e troppo gravi interessi dello Stato potrebbero essere sacrificati, se esso fosse nell'impossibilità di far sentire la sua autorità immediatamente al di là del limite della superficie solida. La difesa dello Stato si troverebbe presso che paralizzata, tutte le sue funzioni amministrative inceppate o ostacolate se l'azione si arestasse necessariamente dove la terra confina col mare. Occorre anche non dimenticare che in questo tratto di mare si esercitano attività industriali che presentano spesso importanza rilevantissima per intere popolazioni: le popolazioni costiere, in molti luoghi, traggono dall'attività che esplicano su questa zona di mare i mezzi di sussistenza, e uno Stato non potrebbe rinunziare a regolarla e proteggerla senza danni gravi.", D. Anzilotti: Corso di diritto internazionale, vol. I, Rome 1912, p. 176.

over its marginal sea,[127]) *i.e.*, the air space above it, vessels on it, and the subsoil.[128])

In international law, the chief aspect of this jurisdiction is that over foreign vessels navigating the marginal sea. Mr. Nielsen, American Commissioner in the General Claims Commission Mexico-U.S.A. under Convention of September 8, 1923, said that "international law recognizes the right of a nation to subject foreign vessels within its jurisdiction to its authority, and to apply to them its maritime code",[129]) and that "it is of course well established that, when a merchant vessel belonging to one nation enters the territorial waters of another nation, it becomes amenable to the jurisdiction of the latter and is subject to its laws, except in so far as treaty stipulations may relieve the vessel from the operation of local laws." [130]) Thus, unless there be special agreement to the contrary, this jurisdiction, being a special aspect of the very territorial jurisdiction of a State, is exclusive with regard to other States.[131]) Therefore, the delimitation in space of state territory with regard to the high seas is very important:[132]) within those limits, a State may exercise its territorial jurisdiction, but not, in principle,[133]) outside it (on the high seas).[134]) So

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[127]) "L'Etat a un droit de souveraineté sur une zone de la mer qui baigne la côte, sauf le droit de passage inoffensif réservé à l'article 5. Cette zone porte le nom de mer territoriale.", Règles sur la définition et le régime de la mer territoriale, Annuaire de l'Institut de Droit international 1894/5, article 1, p. 329. "Les Etats ont la souveraineté sur une zone de la mer qui baigne leurs côtes dans l'étendue et sous les restrictions déterminées ci-après. Cette zone porte le nom de Mer Territoriale.", Projet de règlement relatif à la mer territoriale en temps de paix, idem Annuaire 1928, article 1 p. 755. "The sovereignty of a State extends to the outer limit of its marginal seas.", Harvard Research article 13, loc. cit. p. 288. Cf. article 1 of the Convention relating to the regulation of aerial navigation, Paris October 13, 1919: "... for the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.", L.N.T.S. 11-190.

[128]) "The territory of a coastal State includes also the air space above the territorial sea, as well as the bed of the sea, and the subsoil.", Hague Codification Conference 1930, article 2 of Annex I to the Report, loc. cit. p. 240.

[129]) G.P.O. 1927, p. 250, Survey No. 354.

[130]) G P.O. 1929 p. 176/7.

[131]) "The technical study by the engeneers Barberena and Alcaine declares the existence of two zones in which, according to the law of nations and the internal laws of the riparian States, they may exercise their jurdisdiction, to wit, the zone of one marine league contiguous to the coasts, wherein the jurisdiction is *absolute and exclusive* (my italics), and the further zone of three marine leagues, wherein they may exercise the right of imperium for defensive and fiscal purposes.", Salvador-Nicaragua, C.A.C.J., 9-3-1917, A.J.I.L. 11 (1917) - 706, Survey Appendix No. III.

[132]) See § 2, B, p. 22.

[133]) Hot pursuit is an exception to this principle; *vide infra.*

[134]) Cf., in other sense, the systems of P. Fauchille ("droit de conservation", in his Traité de droit international public, Paris 1925, I, 2-147), and of A. de Lapradelle ("servitudes côtières", R.G.D.I.P. 5 (1898) - 264, 309). It may be observed that the Agent of the U.S. in the North Atlantic Coast Fisheries Arbitration

the delimitation of the breadth of the marginal sea, as fixing at the same time the limit of the coastal State's territorial jurisdiction, is a matter of international law and in fact closely connected with that law's requirement of the effective exercise of state jurisdictions. It is not the function of this study to examine the historical development of the idea of the marginal sea nor of its judicial character.[135]) Meanwhile, it should be noted that it is one thing to state what *should* be the law and another what *is* the law. In two arbitrations in the 19th century, the breadth of the marginal sea was said to be determined by the range of cannon. In a dispute between Great Britain and the United States concerning the Behring Sea, the arbitral tribunal observed in its award given on August 15, 1893:

> Par l'Ukase de 1821 la Russie a revendiqué des droits de juridiction dans la mer connue aujourd'hui sous le nom de mer de Behring, jusqu'à la distance de cent milles italiens au large des côtes et îles lui appartenant; mais, au cours de négociations qui ont abouti à la conclusion des Traités de 1824 avec les Etats-Unis et de 1825 avec la Grande Bretagne, elle a admis que sa juridiction dans ladite mer serait limitée à une portée de canon de la côte; et il apparaît que, depuis cette époque jusqu'à l'époque de la cession de l'Alaska aux Etats-Unis, elle n'a jamais affirmé en fait ni exercé aucune juridiction exclusive dans la mer de Behring, ni aucun droit exclusif sur les pêcheries de phoques à fourrure dans ladite mer, au delà des limites ordinaires des eaux territoriales.[136])

And Mr. de Martens held in the Costa Rica Packet case that

> the right of sovereignty of the State over territorial waters is determined by the range of cannon measured from the low-water mark.[137])

A three-mile limit was laid down in the arbitral treaty of the above quoted Behring Sea arbitration,[138]) and, in conformity to this, adopted by the Tribunal;[139]) in an agreement between Germany and Spain

(Survey No. 291) did not invoke this latter system, though it was favourable in his thesis.

[135]) See e.g. A. Raestad: Kongens Strömme, Kristiania 1912, and: La mer territoriale, Paris 1913; P. Th. Fenn: Origins of the theory of territorial waters, A.J.I.L. 20 (1926) - 465/82; G. Gidel: Le droit international public de la mer, vol. III, La mer territoriale et la zone contiguë, p. 23/61, etc. In a recent study, entitled "Des graven stroom" (Communications of the Royal Dutch Academy of Sciences, vol. 3 no. 4, Amsterdam 1940), Prof. E. M. Meyers of Leiden University concluded that he had established positive evidence as to the Dutch origin of the territorial sea; he gathered valuable data concerning the "Flemish Stream". Mr. Raestad published also many documents of ancient authors (Bartolus, Baldus, etc.), and of various state-practice (e.g. Norman influence in the Kingdom of the Two Sicilies at the end of the 14th century, see La mer territoriale p. 18/9, 54/5), which seem to indicate that the origin of the marginal sea cannot be based on the state-practice of one coastal State only.

[136]) Moore 1-937/8, Survey No. 170.

[137]) Moore 5-4952, Survey No. 188. Cf. Louisiana-Mississippi, U.S.S.C., 23-4-1906, 202 U.S. 52 (A.J.I.L. 1 (1907) - 207).

[138]) Article 6, no. 5, Survey No. 170.

[139]) "Nous, ... la majorité des Arbitres, décidons et prononçons que les Etats-Unis n'ont aucun droit de protection ou de propriété sur les phoques à fourrure qui fréquentent les îles appartenant aux Etats-Unis dans la mer de Behring, quand ces phoques se trouvent en dehors de la limite ordinaire de trois milles.", Moore 1-938/9.

in order to submit the question of the sinking of the Norwegian S.S. 'Tiger', May 7, 1917, to an international Commission of Inquiry,[140]) and in a decision of the Mixed Claims Commission Panama-U.S.A. under Convention of July 28, 1926.[141])

All that can be concluded from decisions of international tribunals, state-practice and doctrine, seems to be that modern international law requires a minimum limit of three miles as the width of a coastal State's marginal sea for the fulfilment of state-activities. A fixed width for *all* marginal seas could not be determined by a general rule of international law since the capacity of exercising state-activities upon the marginal sea in an effective manner will vary according to *each* coastal State. Hence it becomes evident that the Hague Codification Conference 1930 did not reach a general agreement to fix the width of the territorial sea for the future.[142]) In a recent decision, of November 20, 1939, the Supreme Court of California came to the conclusion that, by the law of nations, a State can define its boundaries on the sea, and that "the extent of territorial jurisdiction is primarily a question for the law-making power."[143]) Doing so, a State does not infringe foreign state jurisdictions: it only limits the exercise of such jurisdictions on the high seas. The extent

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[140]) "La Commission aura pour objet d'examiner et de décider la question de savoir si le vapeur norvégien 'Tiger' a été poursuivi, arrêté et coulé par un sous-marin allemand en dedans ou en dehors de la zone de trois milles marins de la côte espagnole.", Survey Appendix No. V.

[141]) The 'David' was arrested "within the three-mile limit according to the ordinary rules for measuring territorial waters.", Report Hunt p. 814, Survey No. 375. Cf. also the Turner case, Lapradelle-P. 1-494. Article 2 of the Règles sur la définition et le régime de la mer territoriale, adopted by the Institut de Droit international on March 31, 1894, provided: "La mer territoriale s'étend à six milles marins (60 au degré de latitude) de la laisse de basse marée sur toute l'étendue des côtes.", Annuaire de l'Institut 1894/5 p. 329; article 2 of the Projet de règlement relatif à la mer territoriale en temps de paix, 1928, provided: "L'étendue de la mer territoriale est de trois milles marins. Un usage international peut justifier la reconnaissance d'une étendue plus grande ou moins grande que trois milles.", Annuaire 1928 p. 755.

[142]) In his Report on Territorial Waters, Prof. François observed: "With regard, however, to the breadth of the belt over which the sovereignty of the State should be recognised, it soon became evident that opinion was much divided. These differences of opinion were to a great extent the result of the varying geographical and economic conditions in different States and parts of the world. Certain delegations were also anxious about the consequences which, in their opinion, any rules adopted for time of peace might indirectly have on questions of neutrality in time of war. The Committee refrained from taking a decision on the question whether existing international law recognises any fixed breadth of the belt of territorial sea. Faced with differences of opinion on this subject, the Committee preferred, in conformity with the instructions it received from the Conference, not to express an opinion on what ought to be regarded as the existing law, but to concentrate its efforts on reaching an agreement which would fix the breadth of the territorial sea for the future. It regrets to confess that its efforts in this direction met with no success.", A.J.I.L. Off. Doc. 1930 p. 234/5.

[143]) A.J.I.L. 34 (1940) - 151, in re The People v. Stralla and Adams (98 California Decisions, 440).

of territorial jurisdiction beyond three miles may be of a defensive and economic advantage for the coastal State, in time of war it may be to its disadvantage with respect to the effective maintenance of neutrality, etc. A weighing off against each other of both factors will certainly influence any arbitrary extension of the marginal sea, and, thus, of the territorial jurisdiction of the coastal State.

So far, no conflict arises between the coastal State and foreign flag-States concerning the attribution of state jurisdictions in the marginal sea. Now the question arises whether the coastal State may exercise its territorial jurisdiction, in the marginal sea, over foreign private vessels in a discretionary manner with regard to international law. In principle, this jurisdiction prevails, as has been said, over the personal jurisdiction of the foreign State of the flag and is exercised within the width of the marginal sea. Since the sea-limit of the latter cannot be fixed as can a land-boundary-line, but rather as a zone,[144]) the coastal State will exercise its territorial jurisdiction, as state-practice shows, also in that zone, the so-called "zone contiguë".[145]) Following article 20 of the draft convention of the Harvard Research "the navigation of the high sea is free to all States. On the high sea adjacent to the marginal sea, however, a State may take such measures as may be necessary for the enforcement within territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection."[146]) "This article", it is said in a comment, "would restrict the taking of such measures to that part of the high sea which is adjacent to the marginal sea. It would seem to serve no useful purpose to attempt to state what is adjacent in terms of miles as the powers described in this article are not dependent upon sovereignty over the locus and are not limited to a geographical area which can

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144) See § 2 B, p. 22.

145) G. Gidel: op. cit. p. 361/78; Ph. Marshall Brown: Protective jurisdiction over marginal waters, Proceedings of the American Society of International Law, 1923-15/31; H. W. Briggs: Les Etats-Unis et la loi de 1935 sur la contrebande. Etude de la zone contiguë et des critères de 'raisonnabilité', R.D.I.L.C. 66 (1939) - 217/55.

146) Loc. cit. p. 333/4. Project No. 12, article 12, of the American Institute of International Law provides: "The American Republics may extend their jurisdiction beyond the territorial sea, parallel with such sea, for an additional distance of ... marine miles, for reasons of safety and in order to assure the observance of sanitary and customs regulations.", A.J.I.L. Off. Doc. Special Number October 1926 p. 324; and article 12 of the Projet de règlement relatif à la mer territoriale en temps de paix, elaborated by the Institut de Droit international, 1928: "Dans une zone supplémentaire contiguë à la mer territoriale, l'Etat côtier peut prendre les mesures nécessaires à sa sécurité, au respect de sa neutralité, à la police sanitaire, douanière, et de la pêche. Il est compétent pour connaître, dans cette zone supplémentaire, des infractions aux lois et règlements concernant ces matières. L'étendue de la zone supplémentaire ne peut dépasser neuf milles marins.", Annuaire de l'Institut 1928 p. 758.

be thus defined. The distance from shore at which these powers may be exercised is determined not be mileage but by the necessity of the littoral State and by the connection between the interests of its territory and the acts performed on the high sea." [147])

In connection with this question, which cannot be governed by one single general rule of international law as it varies with the actual practice of each coastal State, it may be asked whether the exercise of a coastal's State territorial jurisdiction over a foreign private vessel, begun in the marginal sea, may be continued on the high seas. This extension of the exercise has been denied by Mr. T. M. C. Asser, arbitrator in the quoted 'James Hamilton Lewis' case between Russia and U.S.A., wherein he said that "the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless this rule has been derogated by a special convention." [148]) Indeed, it has been argued above that, on the high seas, a State's personal jurisdiction is exclusive over its private vessels. However, the question under consideration, the so-called 'hot pursuit', does not concern the exercise of a State's *personal* jurisdiction over its private vessels, but the continued exercise of its *territorial* jurisdiction over its marginal sea, and, consequently, over all vessels navigating that sea. If hot pursuit is actually recognized in international law, that exercise is in accordance with the origin and nature of the marginal sea, the existence of which has been regarded, centuries ago, as a necessary appurtenance of the land-territory for the protection of pacific navi-

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[147]) Loc. cit. p. 334; see also p.251.

[148]) See p. 126. In the same sense: P. Fedozzi: La condition juridique des navires de commerce, Recueil des Cours 10 (1925) - 79/81. Cf. the case of the 'Itata", award under Convention of August 7, 1892, between Chile and U.S.A., Moore 3-3067, Survey No. 173. Prof. Gidel denies that it is a case of hot pursuit ("Il est difficile de penser que le cas de l'Itata, bien qu'il soit mentionné par la réponse officielle des Etats-Unis (Bases, II, 94) et par les auteurs américains (par exemple Jessup, op. cit. p. 110) à l'occasion de la hot pursuit, rentre véritablement dans cette catégorie.", La mer territoriale et la zone contiguë, p. 354). He quotes Moore's Digest of International Law, vol. 2, p. 986, where it is said: "When information was received of the escape of the Itata, orders were given to the U.S.S. Charleston and the U.S.S. Omaha to go in search of her, and if she was found at sea to seize her and bring her into port. If she was convoyed by a Chilean war vessel, the circumstances of the escape were to be explained and a demand made for her restauration to the possession of the United States; if this demand was refused, it was to be enforced if practicable." The Commission held however: "Assuming it to be true that after the departure of the Itata from the port of San Diego she *was pursued* (my italics) by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress, the question arises whether or not such action on the part of the United States was allowed by the laws of nations. After an examination of many authorities on international law and numerous decisions of courts, we are of opinion that the United States committed an act for which they are liable in damages and for which they should be held to answer.", Moore 3-3070.

gation against pirates,[149]) as well as with the nature of the very territorial jurisdiction of the coastal State, which jurisdiction, as has been observed, should be exercised in an effective manner. Mr. Ch. E. Hughes said:

> It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and in order to avoid liability to other governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized. It does not follow, however, that this Government is entirely without power to protect itself from the abuses committed by hovering vessels. There may be such a direct connection between the operation of the vessel and the violation of the laws prescribed by the territorial sovereign as to justify seizure even outside the three-mile limit. This may be illustrated by the case of "hot pursuit" where the vessel has committed an offence against those laws within territorial waters and is caught while trying to escape. The practice which permits the following and seizure of a foreign vessel which puts to sea in order to avoid detention for violation of the laws of the State whose waters it has entered, is based on the principle of necessity for the "effective administration of justice" (Westlake, Part. I, p. 177). And this extension of the right of the territorial State was voted unanimously by the Institute of International Law in 1894.[150])

Mr. E. W. Hall wrote:

> It has been mentioned that when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape woul have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful.[151])

It appears now from decisions of international tribunals,[152]) doc-

[149]) "La juridiction sur la mer territoriale était, à l'origine, réduite à la seule compétence d'y protéger la navigation pacifique contre les entreprises des pirates.", A. Raestad: La mer territoriale, Paris 1913, p. 52; cf. E. M. Meyers, op. cit. p. 35.

[150]) Recent questions and negociations, A.J.I.L. 18 (1924) - 231/2.

[151]) A treatise on international law, 8th edition, Oxford 1924 p. 309. Cf. also the comment of the Harvard Research 1929 on the quoted article 21: "There is considerable authority for the proposition that a State may continue on the high sea a pursuit begun in territorial waters. If a vessel is found within territorial waters under circumstances justifying its arrest for an offense committed there or elsewhere over which the State pursuing has jurisdiction and if the vessel attempts to escape and is pursued, there seems to be no sound basis for asserting that it obtains sanctuary by crossing the three-mile limit. The situation is unlike that upon land where the offender by crossing the boundary line passes from one jurisdiction to another. The continuation of the pursuit on the high sea does not infringe upon the territorial sovereignty of any other State.", loc. cit. p. 358.

[152]) See the 'I'm alone' case between Canada and U.S.A., Survey No. 357. In the Joint Interim Report, dated June 30, 1933, the Commissioners held: "On the assumptions stated in the question, the United States might, consistently with the

trine [153]) and draft conventions [154]) that modern international law recognizes hot pursuit, which seems to be the only exception to the rule of that law, by virtue of which a coastal State may exercise its territorial jurisdiction over foreign vessels within the limits of its marginal sea only.[155])

It has been contended that a general rule of international law limits the exercise of a coastal State's territorial jurisdiction over its marginal sea in case of 'innocent passage' by private foreign vessels: a limitation in favour of the exercise of the personal jurisdiction of the State of the flag.[156]) In one arbitration this question was discussed, namely in a case between the Republic of Panama on behalf

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Convention (of January 23, 1924, between U.S.A. and Great Britain to prevent the smuggling of intoxicating liquors into the U.S.), use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in § 8 of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.", A.J.I.L. 29 (1935) - 328; in the Joint Final Report it was said: "It will be recalled that the 'I'm alone' was sunk on the 22nd of March, 1929, on the high seas, in the Gulf of Mexico, by the U.S. revenue cutter 'Dexter'. By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law. ... The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo. The act of sinking the ship, however, by officers of the U.S. Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the U.S. ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the U.S. should pay the sum of $ 25,000 to His Majesty's Canadian Government.", ibidem p. 330/1. See also W. C. Dennis: The sinking of the 'I'm alone', A.J.I.L. 23 (1929) - 351/62.

153) G. Gidel: op. cit. p. 339/60, 490/92; A. S. Hershey: Incursions into Mexico and the doctrine of hot pursuit, A.J.I.L. 13 (1919) - 557/69; Ph. C. Jessup: The law of territorial waters and maritime jurisdiction, New York 1927 p. 106/12; H. L. Martens: Das Recht der Nacheile zur See, Grömitz 1937; J. Massin: La poursuite en droit maritime, Paris 1937; G. L. Williams: The iuridical basis of hot pursuit, British Yearbook 1939 p. 83/97, etc.

154) See e.g. the quoted rules adopted by the Institut de Droit international, session 1894 article 8, Annuaire 1894/5 p. 330; session 1928 article 13, Annuaire 1928 p. 759; article 21 Harvard Research 1929, loc. cit. p. 358; article 11 of Annex I to the Report on Territorial Waters, Hague Codification Conference 1930, A.J.I.L. Off. Doc. 1930 p. 245/6, and the Bases of Discussion p. 92/6, and the Actes de la Conférence p. 99/103, 216.

155) If the coastal State exercises this jurisdiction, which prevails over the personal jurisdiction of the foreign State of the flag, contrary to the established prescriptions of international law, it engages its international responsibility. See G. Gidel op. cit. p. 359/60.

156) Cf. the following draft conventions reflecting the viewpoint of many authors on international law: „Tous les navires sans distinction on le droit de passage inoffensif par la mer territoriale, sauf le droit des belligérants de réglementer et, dans un but de défense, de barrer le passage dans ladite mer pour tout navire, et sauf le droit des neutres de réglementer le passage dans ladite mer pour les navires de guerre de toutes nationalités.", article 5 of the Règles sur la définition et le régime de la mer territoriale, Institut de Droit international, Annuaire 1894/5

of the Compania de Navegación Nacional and the United States of America, under Convention of July 28, 1926.[157]) The facts were as follows: "On May 11, 1923, the steamer Yorba Linda, belonging to the General Petroleum Corporation, collided with the steamer David, belonging to the Compania de Navegación Nacional. On June 20, 1924, the Compania de Navegación Nacional started suit against the General Petroleum Corporation in the first Circuit Court of Panama, claiming that the collision was caused by the Yorba Linda's negligence. The General Petroleum Corporation was not a resident of Panama, and apparently had no property in Panama. The suit was not begun by personal service but through service by publication under articles 470-473 of the Judicial Code of Panama. The Petroleum Company never appeared. The Panamanian Court designated an attorney to represent it. The case was tried. Evidence of negligence and of damages was submitted by the plaintiff. No evidence was put in by the defendant, although an argument on the law was made by the attorney appointed te represent it by the Court. A judgment was given in favor of the Navegación Company. On September 1, 1925, this judgment was affirmed by the Supreme Court of Panama, the damages being fixed at 27,103.50 balboas, plus attorneys' fees of 383.10 balboas. The judgment was never satisfied. It is conceded that the proceedings which resulted

p. 329; "Les navires de commerce ont le droit de passage inoffensif par la mer territoriale. Ils sont, toutefois, soumis aux lois et règlements de police et de navigation édictés par l'Etat côtier. Les navires marchands qui enfreignent ces lois et règlements sont justiciables de la juridiction de cet Etat.", article 6 of the Projet de règlement relatif à la mer territoriale en temps de paix, idem Annuaire 1928 p. 757; "Merchant vessels of all countries may pass freely through the territorial sea, subject to the laws and regulations of the Republic to which the said sea belongs.", article 9 of Project no. 12 of the American Institute of International Law, A.J.I.L. Off. Doc. Special Number October 1926 p. 324; "A State must permit innocent passage through its marginal sea by the vessels of other States, but it may prescribe reasonable regulations for such passage.", article 14 Harvard Research 1929, A.J.I.L. Off. Doc. Special Number April 1929 p. 295; " 'Passage' means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters. Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.", article 3 of Annex I to the Report on Territorial Waters, Hague Codification Conference 1930, A.J.I.L. Off. Doc. 1930 p. 240/1. In that Report, Prof. François observed that "it is precisely because the freedom of navigation is of such great importance to all States that the right of innocent passage through the territorial sea has been generally recognized.", loc. cit. p. 234. See also G. Gidel, op. cit. vol. III p. 193/273; E. Pagliano: Mare territoriale e transito inoffensivo, R.D.D.I. 5 (1910) - 551/66; J. S. Reeves: Submarines and innocent passage, A.J.I.L. 11 (1917) - 147/53.

[157]) American and Panamanian General Claims Arbitration, Report of Bert L. Hunt, Washington 1934 p. 765 et seq., Survey No. 375.

in this judgment, including the method of service, were entirely regular and proper under the law of Panama and that the judgment was valid under that law. It is clear, however, on account of the nature of the service, that the judgment was not valid in the Canal Zone. On September 16, 1925, fifteen days after the Supreme Court decision in the Panamanian suit, the Petroleum Company filed a libel against the Navegación Company in the United States District Court for the Canal Zone, alleging that the collision took place in territorial waters of the United States and that it was caused by the David's negligence. This was a proceeding in rem. There was, of course, no personal service. The filing of the libel was followed on September 18, 1925, by the arrest of the David by the United States marshal. On the following day a stockholder of the Navegación Company gave a bond in the sum of $ 30,000, and the David was released. A hearing was held before Judge Martin of the United States District Court regarding the validity of the David's arrest. On October 27, 1925, Judge Martin handed down an opinion sustaining the arrest. The suit proceeded in a leisurely way untill, on April 25, 1927, the parties arrived at a settlement agreement. Under this agreement the Petroleum Company paid to the Navegación Company $ 16,250, the Canal Zone suit was dismissed, the obligation under the Panamanian judgment was canceled, and releases were exchanged."

The claimant before the Commission asserted "that the arrest of the David was illegal and beyond the jurisdiction of the United States District Court and that this illegal arrest and the resulting necessity of giving a bond and defending the suit in the Canal Zone forced the claimant into a settlement which it would not otherwise have made, and inflicted damages upon it comprising not only the difference between the amount of the Panamanian judgement and the amount of the payment under the settlement agreement, but also the expenses of litigation and the injury to the company's standing resulting from the Canal Zone suit." The assertion that the arrest was beyond the jurisdiction of the District Court was based upon two theories, "first, that the arrest took place outside of the territorial waters of the Canal Zone and, second, that the David was exercising the right of innocent passage and was therefore immune from arrest, even if within Canal Zone waters." [158])

Attention must be paid, here, to the latter theory only, discussed before and decided by the Commission. The Agent of Panama stated: "If in fact, *the right* of innocent transit is, as its very name indicates, *a right*, the violation of *this right* constitutes an international delin-

[158]) Award, Report p. 812/4.

quency and consequently gives rise to the corresponding right to indemnification." [159]) "The right of innocent transit is a real, effective *right;* it is more than that; it is a limitation imposed by international law upon the sovereignty of the littoral State in favor of the maritime navigation of other powers." [160]) And he concluded: "Thus, it is clearly established that the right of innocent passage through the marginal seas is not a simple permit or act of grace, but a *right* in the proper sense of the word, that is to say, a limitation imposed by international law upon the jurisdiction and sovereignty of the littoral State. This right was violated when the authorities of the Zone exercised jurisdiction over the David by arresting her, and consequently the United States is obliged to indemnify the claimant for the damages sustained as a result of this usurpation or jurisdiction." [161])

The Agent for the United States contended: "As heretofore pointed out, under treaty stipulations [162]) between the two Governments as well as under the general principles of international law, there can be no question regarding the right of the United States to exercise general jurisdiction over the waters of the Canal Zone extending 3 miles into the Pacific. The question arises, therefore, whether the jurisdictional rights of the United States *are* limited by the right of innocent passage in such a manner that the arrest of the David, while in transit through Canal Zone waters, constituted a violation of international law." [163]) After quoting many authorities,[164]) he continued: "It is clear that under the general principles of international law the marginal waters of a State are subject to the power and control of the littoral State. It is also clear from the authorities cited that the power and control of the littoral State is limited by the right of foreign vessels to the use of such waters for the purpose of passing through them in the course of a voyage. While, under the authorities cited above, the general rights of the littoral State do not include the rights 'to prohibit or completely obstruct' the passage of such vessels (Ferguson), or to 'the absolute exclusion' of

[159]) Report p. 773. (My italics.)
[160]) Report p. 774. (My italics.)
[161]) Report p. 776/7. (My italics.)
[162]) See the treaty of Washington, November 18, 1903, A.J.I.L. Off. Doc. 1909 p. 130, and the treaty of Panama, September 2, 1914, idem 1916 p. 57.
[163]) Report p. 794.
[164]) As to the exercise of general jurisdiction: Kent, Wheaton, Savador v. Nicaragua (C A.C.J. 1917, vide supra), Jessup, Hall, Oppenheim, Pitt Cobbett, Baty and a decision of the Court of Middelburg in the case of the Government of the Netherlands v. Neptune Steamship Co., September 20, 1914, Journal Clunet 43 (1916) - 657, Weekblad van het Recht no. 9266 (see about this decision Gidel loc. cit. p. 265 note 1). As to the right of innocent passage: Lawrence, Hyde, Hall, Woolsey, Ferguson.

such vessels (Lawrence), or 'to debar' such vessels (Hyde), or 'to deny ... to foreigners' the navigation of such waters or to close them to navigation (Hall), it is clear that the right of innocent passage does not operate to prevent or debar the littoral State from exercising civil or criminal jurisdiction over vessels passing through such marginal waters. As stated by Ferguson, ante, p. 797, the principle that marginal seas are open to navigation is subject 'to the respective maritime territorial jurisdiction'. In other words, the right to pass through the marginal seas does not imply the abandonment of jurisdiction thereover." [165]) And he concluded: "The principle that foreign vessels have a right of innocent passage through marginal waters is admitted. But as shown by the authorities heretofore cited the right of innocent passage and the right of immunity from civil processes are matter entirely apart and unrelated. It has been amply demonstrated that there is no rule of international law which grants to foreign vessels in transit through marginal waters immunity from the jurisdiction of the littoral State. Under such circumstances the execution of civil processes in regard to such vessels cannot be regarded, as contended by Panama, a 'violation of international law'." [166])

According to article 2 of the Claims Convention of 1926, each member of the Commission should 'make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide, according to the best of his judgment and in accordance with the principles of international law, justice and equity, all claims presented for his decision." The majority of the Commission, *i.e.* the Presiding Commissioner D. W. van Heeckeren, and the American Commissioner Elihu Root Jr., decided on June 29, 1933, *inter alia:* "The general rule of the extension of sovereignty over the 3-mile zone is clearly established. Exceptions to the completeness of this sovereignty should be supported by clear authority. There is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters. There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the Commission cannot say that a country may not, under the rules of international law, assert the right to arrest on civil process merchant ships passing through

[165]) Report p. 797/8.
[166]) Report p. 810/1.

its territorial waters. ... The Commission decides that the arrest of the David was not in excess of jurisdiction and therefore that the claim must be disallowed."[167])

Commenting on this decision, Prof. Ph. C. Jessup observed that "the language of the Commission's award, in speaking of the absence of a 'clear preponderance of authority' exempting vessels in such circumstances from arrest, suggests at least a subconscious emphasis on the claimant's burden of proof, comparable to the attitude indicated by the majority opinion in the Lotus case."[168]) And Prof. Gidel wrote that "par son allure générale de décision à forme en quelque sorte négative, la sentence n'est pas sans analogie avec la décision de la Cour permanente de justice internationale de l'arrêt Lotus. Quant au fond, la Claims Commission présidée par le Baron van Heeckeren va plus loin dans le sens de la compétence de l'Etat riverain que n'allait l'article 9 de l'Annexe à l'Acte Final de La Haye (1930)[169]) ou le projet du Research Committee de Harvard (article 16)[170]) ou la Base de discussion (no. 24).[171]) Elle se prononce dans le sens que préconisait notamment la réponse britannique (Point XII, Bases, II, 82)."[172])[173]) One could conceive some doubts as to the op-

[167]) Report p. 815.

[168]) Civil jurisdiction over ships in innocent passage, A.J.I.L. 27 (1933) - 748.

[169]) "A coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State. The above provisions are without prejudice to the right of the coastal State in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the State, for the purpose of any civil proceedings.", A.J.I.L. Off. Doc. 1930 p. 244/5.

[170]) "A State may not exercise civil jurisdiction over a vessel of another State while it is in course of innocent passage through the marginal sea, except in respect of an act committed by the vessel during the course of that innocent passage and not relating solely to the internal economy of the vessel.", A.J.I.L. Off. Doc. Special Number April 1929 p. 297.

[171]) "When a foreign merchant ship is passing through territorial waters but is neither coming from nor bound for a port of the coastal State, the authorities of that State may not, in the exercise of the civil jurisdiction of the State, divert the ship from its course for the purpose of levying an execution or taking measures to preserve the rights of parties to any legal proceedings, except where such action is taken in consequence of events occurring in the waters of the State the effects of which extend beyond the ship itself.", Bases of Discussion, vol. II Territorial Waters, League of Nations, No. C. 74. M. 39. 1929. V. p. 86.

[172]) "The sovereignty of a State extends to all persons and to all things within its territory; and the rights which a State enjoys over its territorial waters are rights of sovereignty. It follows that foreign vessels and the persons and things on board, when passing through or anchored in the territorial waters of the State, are subjected to the sovereignty of the State unless by the accepted rules of international law they are entitled to immunity from the local jurisdiction (foreign vessels of war, diplomatic agents, etc.). States do not in practice exercise juris-

portunity to compare this case with the Lotus case. There is a fundamental difference between the two cases: in the Lotus case, the very question at issue was whether jurisdiction *belonged* to Turkey over the French vessel, whereas, in this case, the very question at issue was whether the United States might *exercise* its territorial jurisdiction over the Panamanian vessel. The question whether that jurisdiction belonged to the United States was not a matter in dispute between the Parties: the Commission rightly held that "the general rule of the extension of sovereignty over the 3-mile zone is clearly established." But it added: "exceptions to the completeness of this sovereignty should be supported by clear authority." Panama had, thus, to prove the existence of a general rule of international law limiting the exercise of the United States' territorial jurisdiction over the Canal Zone. Therefore, the statement of Prof. Borchard, in his comment on this decision, that "innocent passage historically is not an 'exception' to sovereignty nor is the burden on the passing ship to prove such an 'exception' ",[174]) cannot be regarded as sound.

Meanwhile, there seems to be self-contradiction in the decision of the Commission, when it holds, on the one hand, that "there is a

dictional rights over foreign vessels which are merely passing through their territorial waters. There would be no advantage to themselves in doing so, and the exercise of such jurisdiction would be burdensome to the foreign vessels. Rights of jurisdiction are, in practice, only exercised where it is necessary to do so in the interests of good government, but the State itself must be the judge whether or not the interests of good government require it. The good sense of Governments has rendered unnecessary any attempt to conclude agreements as to the occasions on which jurisdiction shall or shall not be exercised. States are deterred from attempts to enforce their jurisdiction unreasonably over vessels passing through their territorial waters by the consideration that, if they did so, they could not complain if their own merchant vessels when passing through the territorial waters of foreign States were subjected to similar treatment. The State is not precluded from exercising jurisdiction (a) in civil or (b) in criminal cases over foreign merchant vessels or persons or property on board when passing through its territorial waters. Jurisdiction is not limited to occurrences happening during the passage. It may be exercised to the same extent and subject to the same limitations as on the national territory. No distinction as to the exercise of jurisdiction is to be made *in law* according to whether the vessel is passing through the territorial waters on its way to or from a port of the coast State or not, but, in practice, a State would be much less disposed to exercise jurisdiction because of something which happened within its territorial waters if the vessel were not coming to or going from one of its ports than if it were doing so. Nor should any distinction be made *in law* according to whether the effect of the occurrence does or does not extend beyond the ship itself or the persons on board, but, in fact and in practice, the distinction is of the first importance. The question whether or not the State feels called upon to exercise jurisdiction depends upon whether or not the exigencies of good government require that such jurisdiction should be exercised. If the effect of the occurrences on board the foreign vessel extends beyond the vessel herself and those on board, the exigencies of good government are more likely to require that jurisdiction should be exercised. A State is entitled to arrest a person on board a vessel passing through its territorial waters."

[173]) La mer territoriale et la zone contiguë, p. 266 note.

[174]) A.J.I.L. 29 (1935) - 104.

clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters", and, on the other hand, that "there is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest." In other words, innocent passage of foreign private vessels *may not be prohibited* by the territorial sovereign, but, at the same time, such vessels *may be arrested* by the latter. According to the Commission, the 'right' of innocent passage limits the territorial jurisdiction. What is meant by the 'right' of innocent passage? At the Hague Codification Conference 1930, Sir Maurice Gwyer said: "Tout d'abord, si je puis m'exprimer ainsi et tout en ayant le plus grand respect pour les rédacteurs des bases nos. 19 à 21, celles-ci me paraissent manquer terriblement de précision, et cela en une matière où la précision est par-dessus tout nécessaire. La base 19 commence par dire que "l'Etat riverain doit reconnaître aux navires de commerce étrangers le droit de passage inoffensif"; mais je ne trouve nulle part dans ces bases une définition de ce droit de passage inoffensif." [175]) Neither the draft conventions quoted, nor the Commission itself gave a definition of the 'right of innocent passage'. In his dissenting opinion, the Panamanian Commissioner, H. F. Alfaro, observed: "Suffice it to say that this right, as is seen from the many citations of authorities made by both parties, has been considered as a necessary appendage to the freedom of navigation on the high seas. To subject a merchant ship sailing coastwise within the 3-mile limit to civil arrest by coastal authorities, violently interrupts such passage and notably abridges the freedom of the seas referred to." [176]) In the same sense, the General Claims Commission U.S.A.-Mexico under Convention of September 8, 1923, held in the Kate A. Hoff case that "recognition has been given to the so-called right of 'innocent passage' for vessels through the maritime belt in so far as it forms a part of the high seas for international traffic." [177]) However, the marginal sea (maritime belt) forms no part of the high seas, the legal status of the one differing wholly from the legal status of the other; freedom of navigation on the high seas does not imply freedom of navigation through marginal seas, the 'right' of navigation on the high seas having nothing to do with the 'right' of innocent passage through marginal seas. Prof.

[175]) Actes de la Conférence, League of Nations, vol. III, no. C. 351 (b). M. 145 (b). 1930. V. p. 62.
[176]) Report p. 818.
[177]) G.P.O. 1929 p. 177, Survey No. 354.

Borchard gave another explanation of innocent passage. He stated: "Innocent passage historically is not an 'exception' to sovereignty nor is the burden on the passing ship to prove such an 'exception'. The privilege of innocent passage, it is believed, has a solid and legal standing as territorial 'sovereignty'. The legal relations involved cannot be resolved by abstract formulae, but by a historical interpretation of the privileges attached to innocent passage and of the need of the riparian State to assert control. Both approaches warrant the conclusion that the interruption of a voyage by arrest for such a purpose as was involved in the Compania case is an unjustified assertion of power." After quoting Basis of discussion no. 24 and article 9 of Annex 1 to the Report on Territorial Waters (Hague Codification Conference 1930), article 16 of the Harvard Research Committee 1929, Gidel in Revue critique de droit international 29 (1934)-38/46,[178]), and J. P. A. François: Handboek van het volkenrecht, vol. I p. 303, he concluded: "In the interests of the freedom of the seas, and in the interests of States whose citizens are engaged in shipping and navigation, of which the United States is one, it may be hoped that the decision of the Commission will not be regarded as a precedent worthy of emulation or application in the future." [179]) He speaks, not of the 'right', but of the 'privilege' of innocent passage, which should have a solid and legal standing as *territorial* sovereignty. It has been argued above, however, that the State of the flag does not enjoy a territorial, but a *personal* jurisdiction over its private vessels; [180]) the conflict arising from innocent passage is not a conflict between two territorial jurisdictions, but a conflict in the exercise of the coastal State's territorial jurisdiction over its marginal sea and of the flag State's personal jurisdiction over its private vessels in passage through that marginal sea. It is therefore easy to see why Prof. Gidel could write: "Quant à tenter la justification du droit de passage inoffensif, ce serait se livrer à une tâche vaine au point de vue de la science juridique: le fondement juridique du droit de passage inoffensif est aussi indémontrable que celui du principe de la liberté de la haute mer (dont il apparaît comme une conséquence, au moins lorsqu' il s'agit du passage tendant à entrer dans les eaux intérieures (ports et rades) d'un Etat étranger ou à en sortir)." [181]) Indeed, it seems impossible to speak of a 'right' of innocent passage limiting the exercise of the coastal State's territorial jurisdiction. 'Passage' is a fact, not a right. At the discussions of the Institut de

[178]) See the same in Gidel's work vol. III p. 263 et seq.
[179]) A.J.I.L. 29 (1935) - 104, 105.
[180]) Cf. the Lotus case, vide supra.
[181]) Op. cit. p. 203.

Droit international, in 1894, concerning the definition and status of the territorial sea, Mr. Kleen observed: "C'est à cet Etat (*viz:* riverain), et à aucun autre, de décider si tel ou tel passage dans ses eaux est 'inoffensif' ou non. Il trouvera souvent nuisible ce que l'offenseur trouvera inoffensif, et qui en sera le juge? ... Le passage libre est toujours présumé, je le veux bien, mais l'Etat riverain doit pouvoir l'interdire: il est un fait, non pas un droit." [182]) The Hague Codification Conference 1930 abandoned the describing of passage as a right, and described it as a fact: "Le passage est le fait de naviguer dans la mer territoriale ..." [183]) It is the coastal State, not the State of the flag, which has to decide whether passage is 'innocent' or not. J. L. Klüber was of opinion that "l'indépendance des Etats se fait particulièrement remarquer dans l'usage libre et exclusif du droit des eaux, dans toute son étendue, tant dans le territoire maritime de l'Etat, que dans ses fleuves, rivières, canaux, lacs et étangs. Cet usage n'est restreint que lorsque l'Etat y a renoncé par convention, en tout ou en partie, ou qu'il s'est engagé à y laisser concourir quelque autre Etat. On ne pourrait même l'accuser d'injustice, s'il défendait tout passage de bateaux étrangers sur les fleuves, rivières, canaux ou lacs de son territoire, le passage des vaisseaux sur mer sous le canon de ses côtes, leur entrée et séjour dans les ports ou en rade." [184]) Prof. Gidel wrote: "En résumé, comme dans les cas où le problème se posait à propos des eaux intérieures, la détermination de la mesure de *l'exercice* de la compétence législative de l'Etat riverain sur le navire privé étranger de passage dans la mer territoriale, apparaît elle aussi comme une question d'opportunité, comme une question de politique juridique." [185]) If, in fact, the coastal State does not prohibit, in general, innocent passage of foreign private vessels through its marginal sea, the non-exercise of the territorial jurisdiction of the coastal State does not imply a 'right' of the State of the flag. One could at most speak, as does Prof. Borchard, of a 'privilege'. Thus, in principle, the territorial jurisdiction of the coastal State prevails over the personal jurisdiction of the State of the flag. Mr. David Hunter Miller observed at the Hague Codification Conference 1930 that: "il faut indiquer expressément qu'en principe, le droit de l'Etat riverain l'emporte sur le droit de passage inoffensif, si les besoins nationaux exigent l'utilisation d'une partie de la mer territoriale, soit

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[182]) Annuaire de L'Institut, 1894/5 p. 152, note 1. Cf. A. Raestad in the Actes of the Hague Codification Conference 1930: "Là, où le passage est inoffensif, il est toujours permis." (vol. III, p. 70).

[183]) Article 3 of Annex I to the Report, Actes de la Conférence p. 213.

[184]) Droit des gens moderne de l'Europe, Stuttgart 1819, § 76, vol. I p. 122/3.

[185]) Op. cit. p. 235. Cf. the quoted reply of Great Britain, p. 168.

en surface, soit dans le sous-sol." [186]) And Prof. Gidel was of opinion that: "le droit de l'Etat riverain, s'il vient à entrer en conflit avec le droit de passage inoffensif, l'emporte sur ce dernier." [187]) In the present state of international law, no general rule seems to exist by virtue of which a coastal State is obliged to allow all foreign private vessels through its marginal sea. Prof. Jessup rightly observed: nevertheless the governmental responses to the League Committee's questionnaire show clearly that this rule is not now deemed to be established as law, though in general it is considered to be a desirable rule for the future." [188]) Consequently, the coastal State does not engage its international responsibility if, for valid reasons, it prohibits the passage of or arrests foreign private vessels navigating its marginal sea, according to the duty of every State to fulfil its international obligations as a member of the international community.

Turning now again to the David case, the statement of the Commission holding that "the arrest of the David was not in excess of jurisdiction", is surely sound in law,[189]) but the Commission held wrongly that the right of innocent passage *forbids* the sovereign actually to prohibit such passage. It may be asked, however, whether

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[186]) Actes de la Conférence, vol. III p. 58.

[187]) Op. cit. p. 218.

[188]) A.J.I.L. 27 (1933) - 749. The replies of the Governments, for the Hague Codification Conference, to Point IX concerning innocent passage of foreign ships through territorial waters are very divergent; see Bases of discussion p. 65 et seq. A good terminology was used in the Convention relating to the regulation of aerial navigation, signed at Paris, October 13, 1919, article 2: "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed..." (L.N.T.S. vol. 11 p. 190), and in the Statute of freedom of transit, signed at Barcelona, April 20, 1921, article 2; "...In order to ensure the application of the provisions of this article (viz relative to free transit), contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters." (L.N.T.S. vol. 7 p. 27).

[189]) In his Report, the American Agent, Bert L. Hunt, observed: "This is doubtless a sound decision on a question which has been the subject of much academic discussion. It is perfectly sound logic and at the same time a correct statement of law to say that, although sovereignty over the marginal seas is restricted by the accepted rule of innocent passage which prevents the State from closing such seas to the innocent transit of foreign vessels, sovereignty, in this respect, as in every other respect, is deemed to be exclusive except when clearly shown to have been restricted. Restrictions of sovereignty generally proceed from the express or implied consent of the sovereign. There is no accepted principle of international law by the adoption of which the nations may be said to have so restricted their sovereignty in favor of others in the marginal seas. The question, therefore, as to whether nations will exercise civil or criminal jurisdiction over such vessels while traversing the marginal seas is one entirely within the discretion of the sovereign will.", p. 819/20. Prof. Jessup was of opinion that "since the principle of the littoral State's sovereignty over its territorial waters is clear, and since the immunities of a ship in innocent passage are by no means clearly established, the decision is undoubtedly sound in law.", loc. cit. p. 750.

the Commission could not have given a decision in equity—having such power—by examining whether, in this special case in which one Party had made a grant to the other Party regarding its marginal sea, as was duly observed by the Panamanian Commissioner in his dissenting opinion,[190]) the passage of the David through the Canal Zone Waters was not innocent in accordance with the criterion, as laid down at the Hague Codification Conference 1930, that those waters were used by the David "for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests" [191]) of the United States. Moreover, the David was arrested in a civil suit arising out of an *earlier* and extraterritorial cause of action.[192]) The Commission might have paid regard to the reasonable words of Philip Marshall Brown: "In conclusion it may be asserted that the problem of the marginal sea is to be viewed neither as one of ownership, of sovereignty, of dominium, of imperium, of servitudes, or of other like juristic concepts. It is not one of establishing an arbitrary three-mile limit applicable to all contingencies. It is to be regarded as a question of the primordial right of every nation to exercise a 'protective jurisdiction' over its coastal waters in matters affecting its own safety and welfare. The validity of the principle of 'control from land' should be maintained irrespective of the precise manner in which it may be applied. Nations will naturally strive to exercise their right of jurisdiction in a manner that will not adversely affect the legitimate interests of other nations. If by any chance they should abuse the right, they must expect, as in all other fields of international relations, to make proper redress. If any nation, on the other hand, under the cloak of vindicating the principle of freedom of the seas, should abet its nationals in dubious transactions resulting in the violation of the laws of another nation, it would be guilty of an unfriendly act which is not merely to be deplored but to be vigorously resented at times. In view of the fact,

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190) "Moreover, I believe that the right of passage which pursuant to international law exists in favor of all nations should be applied a fortiori when treating of the nation which made the grant in terms which implied a conveyance of relative sovereingty, not absolute, and in circumstances in which the right invoked is vital to the State making the grant, as it cut in two its own territory and left itself obliged to cross territorial waters of the State receiving the grant in order to carry on its coastwise trade.", Report p. 819. Cf. now the General Treaty of friendship and co-operation between Panama and the United States of America, signed at Washington on March 2, 1936 (A.J.I.L. Off. Doc. 1940 p. 139).

191) Article 3 of Annex I to the Report.

192) Cf. the quoted article 16 of the Harvard Research 1929 (p. 168). Following Prof. Borchard, the question was "whether the arrest of a passing ship, not for an offense it has then committed, but as a means of obtaining forcible jurisdiction in a pending litigation between the owner and a private plaintiff, is a proper or improper impairment of the right of innocent passage.", loc. cit. p. 104.

however, that this right of 'protective jurisdiction', like the freedom of the seas, is of mutual and vital concern to all nations, it is not to be expected that it will either be exercised rashly or challenged in a captious spirit." [193])

Reference: Annuaire de l'Institut de Droit international 1889/92-133, 1892/4-104, 1894/5-125, 281, 328, 1912-375, 1913-403, 1919-62, 1925-146, 518, 1927-1-55, 1927-2-967, 1928-627, 755; Th. Baty: The three-mile limit, A.J.I.L. 22 (1928) - 503/37; E. M. Borchard: Jurisdiction over the littoral bed of the sea, A.J.I.L. 35 (1941) - 515/9; G. Crafton Wilson: Les eaux adjacentes au territoire des Etats, Recueil des Cours 1 (1923) - 127/76; H. G. Crocker: The extent of the marginal sea, Washington 1919; P. Th. Fenn: Origins of the theory of territorial waters, A.J.I.L. 20 (1926) - 465/82; G. Gidel: La mer territoriale et la zone contiguë, Paris 1934; Hague Codification Conference 1930 (Bases of discussion, Actes de la Conférence); A. de Lapradelle: Le droit de l'Etat sur la mer territoriale, R.G.D.I.P. 5 (1898) - 264/84, 309/47; Ph. Marshall Brown: The law of territorial waters, A.J.I.L. 21 (1927) - 101/5; W. E. Masterson: Jurisdiction in marginal sea, New York 1929; F. de Martens: Le tribunal d'arbitrage de Paris et la mer territoriale, R.G.D.I.P. 1 (1894) - 32/43; Ch. B. V. Meyer: The extent of jurisdiction in coastal waters, Leiden 1937; Proceedings of the American Society of International Law 1912-132, 1923-15, 1928-93; J. W. Salmond: Territorial waters, Law Quarterly Review 34 (1918) - 235/52; B. M. Telders: De oorsprong van het leerstuk der territoriale zee, De Gids 1937-301/20; F. Temple Grey: Territorial waters, Law Quarterly Review 42 (1926) - 350/67; C. G. Tenekidès: Le conflit des limites de la mer territoriale entre l'Etat riverain et un Etat tiers, Journal Clunet 64 (1937) - 673/98; L. E. Visser: De territoriale zee, Amersfoort 1894.

III. The inland waters

Let us finally examine what conflict of state jurisdictions may arise when a private vessel enters the inland waters [194]) of a foreign State. The first question which arises is: is the entry of private vessels into ports and bays of a foreign State free in time of peace,[195]) *i.e.*, is that State, in the exercise of its territorial jurisdiction over its inland waters, obliged, by virtue of a general rule of international law, to admit foreign private vessels into its ports and bays, or not? If so, the personal jurisdiction of the State of the flag prevails over the territorial jurisdiction of the coastal State; if not, the latter jurisdiction prevails over the former. In a draft measure of the Institut de Droit international regarding the legal status of vessels in foreign ports, it was held that the admittance of ports "est ouvert" to foreign vessels. Mr. Richard Kleen amended that draft by saying that such an admittance "est censé ouvert". The final 'Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers', adopted by the Institut on August 23, 1898, held in article 3:

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[193]) The marginal sea, A.J.I.L. 17 (1923) - 94/5.

[194]) "The inland waters of a State are the waters inside its marginal sea, as well as the waters within its land territory.", Draft Convention of the Harvard Research Committee on Territorial Waters, 1929, article 3, A.J.I.L. Off. Doc. Special Number April 1929 p. 262.

[195]) The law of war does not come up for discussion in this study, except military occupation, Chapter III, § 9.

> En règle générale, l'accès des ports et des autres portions de la mer spécifiés dans l'article ler, *est présumé ouvert* *) aux navires étrangers.
> Exceptionnellement, pour des raisons dont il est seul juge, un Etat peut déclarer ses ports ou quelques-uns d'entre eux fermés, — alors même que des traités en garantiraient, d'une manière générale, le libre accès, — lorsque la sûreté de l'Etat ou un intérêt public sanitaire justifié le commande.
> L'entrée des ports peut encore être refusée à une nation en particulier, par mesure de justes représailles. [196])

This legal presumption [197]) does not mean that the coastal State is *obliged* to admit foreign vessels into its inland waters.

In 1910, at the same Institut, Prof. A. de Lapradelle stated that private vessels have a *right* to enter foreign ports. He said:

> Ainsi la libre navigation de la mer comporte, en temps de paix, pour les navires marchands le libre accès des eaux étrangères, avec le *droit* *) d'utiliser, pour se réparer ou se ravitailler, les ressources locales. ... Sauf exception tirée des nécessités de la défense et de la sécurité de l'Etat côtier, c'est jusqu'aux baies, rades et ports, que s'étend ce *droit* *) d'escale, sans lequel la liberté des mers ne serait plus qu'une décevante illusion. [198])

Prof. Westlake rightly refuted that statement by saying:

> Je veux encore dire un mot du principe nouveau émis par M. de Lapradelle: de la liberté de la navigation il tire le droit d'entrer dans les ports neutres. Je réponds que la liberté de navigation n'est pas un principe dont on puisse tirer des conséquences. Elle est elle-même une conséquence. Le principe, c'est l'absence de souveraineté dans la haute mer. C'est de ce principe que résulte la liberté de navigation, pour cette raison que nul ne peut entraver en haute mer la liberté de naviguer. Il n'y a donc aucune conséquence à en tirer au point de vue de l'entrée dans les ports neutres. [199])

On December 9, 1923, a Convention and Statute on the international régime of maritime ports was signed at Geneva, which no more established a right of private vessels to enter foreign ports.[200])

Draft No. 12 of the American Institue of International Law held in article 5:

> The entry of merchant vessels into the ports and bays of an American Republic shall be free in time of peace, except for reasons of security or of hygiene. [201])

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*) My italics.

[196]) Annuaire de l'Institut 1898 p. 274.

[197]) Cf. Code Civil Français article 1349.

[198]) Rapport sur l'hospitalité neutre dans la guerre maritime, Annuaire de l'Institut 1910 p. 111, 113.

[199]) Annuaire 1910 p. 406.

[200]) A.J.I.L. Off. Doc. 1928 p. 69. See also L.N.O.J. 1927 p. 1514/6. Prof. Gidel wrote about the Statute: "Le Statut de Genève n'a pas établi le principe d'ouverture des ports; tout au moins ne l'a-t-il établi que dans des limites très étroites, à savoir: a) entre les Etats contractants; b) sous condition de réciprocité; c) sous réserve de la liberté des Etats contractants d'exclure tel ou tel port de ce régime.", Les eaux intérieures, p. 49.

[201]) A.J.I.L. Off. Doc. Special Number October 1926 p. 323

In 1927, the Institut de Droit international discussed a new 'Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix'. In his Report, Prof. Gidel wrote:

> Les Résolutions de 1898 déclarent que l'accès des ports est "présumé" ouvert aux navires étrangers. Cela signifie que, à défaut d'indications contraires, les navires étrangers doivent pouvoir compter sur l'ouverture des ports et la liberté d'accès aux mouillages. Mais cela ne signifie pas que les Etats riverains aient *l'obligation* *) de principe d'ouvrir leurs ports aux navires étrangers. Bien au contraire. De l'alinéa premier de l'article 3 de 1898 on peut en effet déduire qu'il appartient à chaque Etat riverain, par le moyen d'une notification formelle, de fermer l'accès de ses ports aux navires étrangers. Convient-il de maintenir la règle admise en 1898? Ne faut-il pas au contraire poser comme principe *l'obligation* *) pour les Etats d'ouvrir leurs ports et mouillages aux navires étrangers? C'est dans ce dernier sens que se sont prononcés tous ceux des membres de la 10e Commission. ... Lorsqu'un port est habituellement ouvert, il ne peut être fermé du jour au lendemain, même en cas de nécessité, sans que l'auteur de la fermeture expose sa responsabilité pécuniaire internationale. Mais d'une part cette fermeture, même intempestive, est licite; d'autre part, cette fermeture n'a pas à être justifiée par l'Etat qui l'ordonne, car cet Etat n'a pas manqué, en l'établissant, à une règle de droit international général. ... La règle que l'Institut poserait ne serait pas une règle conventionnelle, mais une règle générale, expression d'un droit que notre Compagnie estimerait devoir s'imposer dans les relations internationales indépendamment de toute Convention. [202])

After many discussions,[203]) the following article 3 was adopted:

> En règle générale, l'accès des ports et des autres portions de la mer spécifiées dans l'article ler, *est ouvert* *) aux navires étrangers.
> Exceptionnellement et pour un terme aussi limité que possible, un Etat peut suspendre cet accès par des mesures particulières ou générales qu'il serait obligé de prendre, en cas d'événements graves intéressant la sûreté de l'Etat ou la santé publique. Cette faculté n'est pas exclue par l'existence de dispositions conventionnelles garantissant, d'une manière générale, le libre accès desdits ports ou lieux de mouillage. L'entrée des ports peut encore être refusée à un pavillon en particulier, par mesure de représailles. [204])

So, the Institute established a general rule as the expression of a *right* to enter foreign ports, which rule the Institute, following the words of the Reporter, "estimerait devoir s'imposer dans les relations internationales indépendamment de toute Convention." Thus, it was not the establishment of an accepted rule of international law. Some years later, the same Reporter, Prof. Gidel, wrote in his book on Les eaux intérieures:

> Nous pouvons donc conclure que, en ce qui concerne la question de principe de l'ouverture ou de la fermeture des ports, le droit international général n'a pas subi de modification par rapport à ce qu'il était au début du 20e siècle et que le Statut de Genève du 9 décembre 1923 n'a pu formuler

*) My italics.
202) Annuaire de l'Institut 1927-1-202, 211, 212.
203) Annuaire 1928-526/34.
204) Ibidem p. 736/7. If this article is compared with article 3 of the Règlement of 1898, it appears, inter alia, that the words "pour des raisons dont il est seul juge", and "justes" (représailles) were omitted in the new article of 1928.

> le principe de l'ouverture qu'à titre de règle conventionnelle et en la laissant exposée, non seulement à certaines dérogations nécessaires, mais encore à des limitations d'application dépendant de l'appréciation des Etats contractants.[205])

Speaking of the Règlement of 1928, he said that "on ne saurait se dissimuler que la solution progressive—et nettement dans le sens de la doctrine—à laquelle l'Institut de Droit international s'est rangé, est en avance sur la pratique actuelle."[206]) Indeed, it seems impossible to state that a coastal State is obliged, by virtue of a general rule of international law, to admit foreign private vessels into its inland waters. Only a few arbitrations, which hold incidentally that a coastal State, in the exercise of its territorial jurisdiction, may close its ports, are available. In the Orinoco Steamship Company case between U.S.A. and Venezuela under Convention of February 17, 1903, the Umpire, Ch. A. H. Barge, held:

> And whereas the right to open and close, as a sovereign on its own territory, certain harbors, ports, and rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan government, much less this right can be denied when used in defense not only of some fiscal rights, but in defense of the very existence of the government; and whereas the temporary closing of the Orinoco River (the so-called "blockade") in reality was only a prohibition to navigate that river in order to prevent communication with the revolutionists in Ciudad Bolívar and on the shores of the river, this lawful act by itself could never give a right to claims for damages to the ships that used to navigate the river.[207])

In the Poggioli case between Italy and Venezuela under Convention of February 13, 1903, the Umpire, J. H. Ralston, assumed that

> its was within its (*viz* the government) police power to close it (*viz* the port of Buena Vista), and no contract existing between the Poggiolis and the government, by virtue of which damages could be claimed for the closing of the port, the power of the government must be regarded as plenary and the reasons for its exercise beyond question.[208])

Two other arbitrations deal with the closure of ports in time of war. In a dispute between the Argentine Republic and Great Britain, the arbitrator, J. J. Perez, President of the Republic of Chile, observed in his award given on August 1, 1870:

> that the nation which in a state of war resolves to close its ports to foreign commerce is the sole judge[209]) in determining the conditions under which the entry to them may be permitted, and to decide whether those who claim to enter have complied or not complied with those conditions; that it is a principle of universal jurisprudence that he who uses his right offends no one; by the force of these reasons, I am of opinion that the government of the Argentine Confederation is not obliged to indemnify the losses suffered by the six vessels which were refused entry into the port of

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205) P. 50.
206) Ibidem p. 41/2.
207) Ralston-D. p. 95/6, Survey No. 258.
208) Ibidem p. 870, Survey No. 257.
209) Cf. note 204 p. 158.

Buenos Ayres in virtue of the decree of the 13th of February 1845, issued by the said government.[210])

In article 3 of both the above quoted Règlement of the Institut de Droit international of 1898 and of 1928 it was stated that, exceptionally, a State may close its ports even if a treaty guarantees free entry to them. That statement was tacitly confirmed in the Portendick case between France and Great Britain. The latter had ceded to the former, by treaty of Versailles signed on September 3, 1783, the Portendick territory in Senegal (article 9),[211]) but reserved the free entry of the bay of Portendick to British merchants engaged in the gum trade on that coast (article 11).[212]) France, having to fight against tribes of the Senegal region, closed, in 1835, the port of Portendick. Great Britain claimed damage suffered by its subjects navigating that port. Since the dispute could not be settled diplomatically, France and Great Britain mutually accepted, in a declaration signed at Paris, November 14, 1842, the arbitration of Prussia on the claims of the British subjects. It should be noted that both Parties expressly reserved the question of the validity of the measures adopted by France on the coast of Portendick. It was stipulated:

the British Government has proposed that the affair should be submitted to the arbitration of His Majesty the King of Prussia; and the French Government being desirous to give a proof of the sentiments of justice by which it is animated, and placing entire confidence in the wisdom and perfect impartiality of His Majesty the King of Prussia, has agreed to this proposition, declaring, nevertheless, that whatsoever may be the nature or form of the decision pronounced by the arbiter, that decision will not, in its eyes, be regarded as prejudicing in any way, even by induction, the principles which it has invariably professed in the matter of blockades and maritime law, nor as affecting any of the rights belonging to the sovereignty which it has always claimed to hold, in virtue of the treaties, over the coast of Portendic. In like manner the British Government declares that the decision of the arbiter, whatever it may be, will not, in its eyes, even by induction, be considered as prejudicing any rights it has claimed or any principle it has asserted. The two Governments, therefore, have agreed to submit to the examination of His Majesty the King of Prussia the whole of the claims as to this affair which have been presented by British subjects, and to request His Majesty to be pleased to pronounce as arbiter upon the question as to whether, in consequence of the measures and circumstances which preceded, accompanied, or followed the establishment and the notification of the blockade of the coast of Portendic in 1834, 1835, and real injury was unduly inflicted on such and such British subjects, while they were pursuing on the said coast a regular and lawful trade, and as to whether France is equitably bound to pay to such class of the said claimants any compensation by reason of such injury.[213])

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[210]) Moore 5-4925, Survey No. 77.

[211]) De Martens R. 3-519.

[212]) "... Quant à la traite de la gomme, les Anglois auront la liberté de la faire, depuis l'embouchure de la rivière de St. Jean, jusqu'à la baye et fort de Portendic inclusivement. Bien entendu, qu'ils ne pourront faire, dans la dite rivière St. Jean, sur la côte, ainsi que dans la baye de Portendic, aucun établissement permanent de quelque nature qu'il puisse être.", article 11.

[213]) Moore 5-4936.

The arbitrator, King Frederic William of Prussia, declared in his award given on November 30, 1843:

> Quant aux réclamations auquelles ont donné lieu les procédés du brick de guerre français le Dunois, à l'égard des bâtiments marchands anglais le Governor Temple et l'Industry;
>
> Nous sommes d'avis:
>
> Que le gouvernement français devra indemniser les sujets de Sa Majesté Britannique des pertes qu'ils ont essuyées par suite des dits procédés, à l'exception toutefois de celles auxquelles se rapporte la réclamation qui a été élevée relativement à l'adjoint du subrécargue du navire anglais le Matchless;
>
> Quant aux pertes occasionnées par la mesure dont le bâtiment marchand anglais l'Elira a été l'objet de la part des bâtiments de guerre français, qui l'ont renvoyé de Portendick sans lui permettre d'y prendre auparavant le chargement de gomme qui lui était dû en échange des marchandises déjà délivrées aux Maures, vendeurs de la gomme;
>
> Nous sommes d'avis:
>
> Que la France est équitablement tenue de payer une indemnité à raison de ces pertes;
>
> Quant aux autres réclamations relatives à la mise en état de blocus par le gouvernment français de la côte de Portendick;
>
> Nous sommes d'avis:
>
> Que la France devra indemniser les réclamants des dommages et préjudices auxquels ils n'auraient pas été exposés si le dit gouvernement, en envoyant au Gouverneur du Sénégal l'ordre d'établir le blocus, avait simultanément notifié cette mesure au gouvernement anglais; que la France, au contraire, malgré l'omission de cette notification officielle du blocus, ne doit aucune indemnité pour les pertes essuyées à la suite d'entreprises commerciales auxquelles les réclamants se sont livrés après que, par autres voies, ils ont positivement eu connaissance de la formation du blocus de Portendick, ou qu'ils auraient pû, du moins, en être informés par suite de la nouvelle authentique parvenue à cet égard au gouvernement britannique de la part de quelque autorité anglaise en Afrique.[214])

Apart from the fact that the arbitrator was not called upon to decide on the validity of the closure of the port, the decision has only a relative value, since it is a decision given in equity, and unreasoned.[215])

It may be added that France, in 1923, when it had not yet recognized the government of the Union of Socialist Soviet Republics, closed its ports, except those of Dunkirk, le Havre and Marseilles to vessels of the Union.[216])

So it seems, that the question of free entry or otherwise of vessels into maritime ports for commercial purposes is a political rather than a juridical question. The Judicial Committee of the Privy Council

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[214]) Moore 5-4937/8, Survey No. 38.

[215]) See the note on this award from P. Fauchille in the Recueil des Arbitrages internationaux edited by A. de Lapradelle and N. Politis, vol. I p. 532 et seq. It may be doubted, moreover, whether the failing of diplomatic notification engages the international responsibility of the blockading State. Cf., in the affirmative sense, Annuaire de l'Institut 1900 p. 254, and D. Anzilotti: Teoria generale della responsabilità dello Stato nel diritto internazionale, Firenze, 1902 p. 114.

[216]) Cf. P. Fauchille: Traité de Droit international public, Paris 1925, I, 2-1021 note 1, and G. Gidel: Les eaux intérieures p. 46.

rightly laid down in a prize case on April 7, 1916 that "there was no obligation to admit the 'Belgia' to the Alexander dock, admission being a matter of courtesy and not of right." [217]) As a matter of fact, maritime ports are generally open to foreign private vessels, as it is in accordance with international courtesy as well as in the interest of coastal States themselves, but if, for state reasons, ports are closed, then the international responsibility of the coastal State cannot be said to be engaged, since no general rule of international law prohibits the taking of such a measure. In the arbitral awards quoted—except in the Portendick case—no damages were awarded for the closure of ports. If it is contended by the State of the flag that there is an 'abus de droit' when the coastal State closes its maritime ports, that question must be settled in each case separately, the burden of proof lying on the State alleging such an abus.[218])

It may be concluded that no general rule of international law limits the exercise of a coastal State's territorial jurisdiction with regard to the admittance of foreign private vessels into its maritime ports, that territorial jurisdiction prevailing over the personal jurisdiction of the State of the flag.

As to the sojourn of private vessels in foreign inland waters, no decision of an international tribunal seems to be available. Only a few observations may be made here. Since a coastal State enjoys territorial jurisdiction over its marginal sea and inland waters, its maritime ports are subject to that jurisdiction. In the above quoted Règlement of August 23, 1898, adopted by the Institut de Droit international, it was held in article 1:

> Les dispositions du présent Règlement sont applicables non seulement aux ports, mais encore aux anses et rades fermées ou foraines, aux baies et havres qui peuvent être assimilés à ces anses et rades.

And in article 2:

> Lesdits ports, havres, anses, rades et baies, non seulement sont placés sous un droit de souveraineté des Etats dont ils bordent le territoire, mais encore font partie du territoire de ces Etats. [219])

The Règlement of 1928 held in article 2:

> Lesdits ports et mouillages sont placés sous la souveraineté de l'Etat riverain. [220])

[217]) Law Times Report, July 22, 1916, vol. 114 (1916) - 957.

[218]) In a session of the Institut de Droit international in 1928, Mr. A. Alvarez said: "La véritable garantie contre un abus de droit de fermeture se trouve dans l'intérêt même de l'Etat. On est assuré que l'Etat ne prononcera la fermeture de ses ports que dans des circonstances tout à fait exceptionnelles.", Annuaire 1928 p. 530. Cf. N. Politis: Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, Recueil des Cours 6 (1925) - 94/101.

[219]) Annuaire de l'Institut 1898 p. 273.

[220]) Annuaire 1928 p. 736.

Whereas the first Règlement speaks of 'un droit de souveraineté', the second one speaks of 'la souveraineté'. The latter definition is more correct than the former: a State enjoys but one territorial jurisdiction, the exercise of which may vary according to whether it concerns the marginal sea, the inland waters, or the land-territory.

When a private vessel sojourns in foreign inland waters, it is subject to the territorial jurisdiction of the foreign coastal State,[221]) which question need not be regulated by convention.[222]) The coastal State may exercise its territorial jurisdiction over such vessels.[223]) Whether and in how far that jurisdiction will be exercised, is a matter of policy, in the present state of international law not limited by a general rule of that law. In a note by the Netherlands Minister to the Secretary of State of the United States, June 1, 1923, it was said:

> The Royal (Dutch) Government readily admits the jurisdictional power of a nation on foreign ships entering its territorial waters, but is of the opinion that international comity and the exigencies of international intercourse require that the exercise of this power virtually is limited to matters which involve or might involve the peace or dignity of the country or the public order or safety of the port at which the vessel has arrived.[224])

[221]) "...Merchant vessels which enter and remain in the jurisdictional waters of a republic shall be subject to its regulations." "Merchant vessels within the territorial waters of a nation shall be subject to the administrative and criminal laws and procedure of the said nation.", articles 6 and 8 of Draft No. 12 elaborated by the American Institute of International Law, A.J.I.L. Off. Doc. Special Number October 1926 p. 323/4; "Les navires de commerce étrangers dans un port y sont placés sous la protection de l'autorité territoriale. Ils sont soumis en règle générale et sauf les dérogations consacrées par les articles suivants, aux lois de police et à toutes les dispositions réglementaires en vigueur dans le port où ils sont reçus...", article 29 of the above-quoted Règlement 1928 of the Institut de Droit international, Annuaire 1928 p. 746/7. See also articles 33 and 42, p. 748 and 751. Cf. Hague Codification Conference 1930, Bases of Discussion on Territorial Waters, p. 97/102, and Actes de la Conférence p. 96/9.

[222]) "The State should have the right both to seize a vessel and everything on board and to arrest persons who are on board. This rule necessarily follows from the fact that a vessel, while staying in a port, is subject in every way to the dominion of the State in whose territory the port is situated. The question need not be regulated by a convention; this State would remain intact even if—as in the case of the Preliminary Draft—no mention of it were made in any convention.", Hague Codification Conference 1930, Bases of Discussion on Territorial Waters, p. 100, reply of the Government of the Netherlands.

[223]) "In the absence of special agreement to the contrary, a State may exercise jurisdiction over a vessel of another State which is in one of its ports, but in the absence of a request by the master or officer in charge for the aid of local authorities a State will not ordinarily exercise jurisdiction in matters relating solely to the internal economy of the vessel.", Harvard Research on Territorial Waters 1929, article 18, A.J.I.L. Off. Doc. Special Number April 1929 p. 307.

[224]) Department of State Press Release, February 16, 1927, p. 4. Cf. A. H. Charteris: The legal position of merchantmen in foreign ports and national waters, British Yearbook 1920/1 p. 45 et seq. He wrote inter alia: "As regards state practice in questions not covered by express treaty, the general principle that merchantmen have no legal right to immunity from the local jurisdiction of a foreign power into whose ports or harbours they enter is well established and recognized. The conventional limitations on the exercise of the local jurisdiction established by treaty depend on policy rather than on legal right, and cannot, of course, be pleaded against a State which is not a party to them." (p. 84).

The fact that the territorial jurisdiction is not exercised, in general or by virtue of special conventions, over such vessels, does not mean that the State of the flag may claim immunities as of right for its vessels.[225]) Thus, in case of sojourn as well, the territorial jurisdiction of the coastal State prevails [226]) over the personal jurisdiction of the State of the flag.[227])

Finally, we should examine briefly whether the exercise of the coastal State's territorial jurisdiction over its inland waters is limited by a general rule of international law in cases, in which the entry and sojourn of a foreign private vessel into and in those waters is occasioned by *vis major, i.e.,* when such a vessel, being in distress, is forced to enter a maritime port (the so-called relâche forcée). The question whether a vessel may be said to be 'in distress' is one of fact. In the case of the Alliance between U.S.A. and Venezuela under Convention of February 17, 1903, it was stated that the Alliance arrived at the bar of Maracaibo "in great distress". Upon her arrival in port she bore with her the following pass from the commander of the fortress of San Carlos: "June 21, 1897. Allowed to go to Maracaibo, having made forcible arrival on account of *lack of coal and provisions.* The commander in chief of the port, Manuel Parejo." [228]) In the North Atlantic Coast Fisheries Arbitration between Great Britain and U.S.A., the Permanent Court of Arbitration said

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225) In a comment on the just quoted article 18 of the Harvard draft convention it was said: "Foreign merchant vessels enter ports with the consent of the local sovereign and thereby submit themselves to the will of the littoral State. ... In view of the firm position always taken by the American and British Governments, supported as it is by the practice of other States, it seems impossible to assert that a customary rule of international law has developed whereby vessels in port may claim immunities as of right. The fact that the exercise of jurisdiction has commonly been withheld when the affair concerned only the internal economy of vessel, is not to be considered evidence of the recognition of a legal principle.", ibidem p. 307/8.

226) "Il y a vraiment une concurrence de souverainetés sur les citoyens à l'étranger comme sur les navires marchands dans les eaux territoriales étrangères, concurrence entre la souveraineté de l'Etat auquel appartiennent citoyens et navires, et celle de l'Etat dans le territoire duquel se trouvent les uns et les autres. Dans le conflit entre les deux souverainetés, la personnelle et la territoriale, cette dernière a la suprématie en principe, et, en principe également, on peut dire que la première ne peut s'exercer efficacement sans le consentement exprès ou tacite de la seconde.", P. Fedozzi: La condition juridique des navires de commerce, Recueil des Cours 10 (1925) - 57.

227) "L'Etat riverain a le droit: 1. De régler les conditions d'entrée et de séjour auxquelles devront se conformer les navires qui fréquentent les surfaces maritimes mentionnées à l'article 1er. ...", Règlement 1928 of the Institut de Droit international, article 7, Annuaire 1928 p. 738. See also article 5 of the Règlement of 1898, Annuaire 1898 p. 274, and the Convention and Statute on the international régime of maritime ports, Geneva, December 9, 1923, A.J.I.L. Off. Doc. 1928 p. 69. Cf about different national systems: L. van Praag: Juridiction et droit international public, The Hague 1915 nos. 260/9, p. 509/36.

228) Ralston-D. p. 32, Survey No. 258.

that, following the provision in the first article of the treaty of October 20, 1818, concluded between both parties, American fishermen were admitted to enter certain bays or harbors of Great Britain "for shelter, repairs, wood and water". "The enumerated purposes", the Court added, "for which entry is permitted all relate to the exigencies in which those who pursue their perilous calling on the sea may be involved." [229]) In the Rebecca case before the General Claims Commission U.S.A. and Mexico under Convention of September 8, 1923, it was stated that merchant vessels "forced into a port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers", or "in defense of a charge of attempted breech of blockade" are, at least to a certain extent, exempted from the operation of local laws. The Commission added that the floundering of a ship in distress may result "either from the weather or from other causes affecting management of the vessel". As to the degree of necessity prompting vessels to seek refuge, the Commission observed:

> While recognizing the general principle of immunity of vessels in distress, domestic courts and international courts have frequently given consideration to the question as to the degree of necessity prompting vessels to seek refuge. It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able tot come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws. [230])

It may be argued, on these lines, that the entry of a vessel into a maritime port occasioned by *vis major* can be considered as a question of fact. Hence, it seems to be irrelevant to speak of a "right" of entry, or to base such a right on the "right to navigate the ocean". [231])

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[229]) September 7, 1910, A.J.I.L. 4 (1910) - 976/7, Survey No. 291.

[230]) G.P.O. 1929 p. 177, 178, Survey No. 354.

[231]) In the Enterprise case between Great Britain and U.S.A. under Convention of February 8, 1853, the American Commissioner, N. G. Upham, said: "It is contended that a vessel impelled by stress of weather, or other unavoidable necessity, has a right to seek shelter in any harbor, as incident to her right to navigate the ocean, until the danger is past and she can proceed again in safety. This position I propose to sustain on three grounds: by authority; by the concession of the British Government in similar cases; and by its evident necessity as parcel of

Although, in theory, a coastal State is not obliged to admit foreign private vessels in distress into its inland waters, in practice no State will prohibit such entry. Article 5, § 1 of the already quoted Règlement 1928 of the Institut de Droit international provides:

> En cas de relâche forcée, l'entrée d'un port ne peut être refusée au navire en détresse, alors même que ce port serait fermé par application des dispositions ci-dessus.[232])

As to the sojourn of a private vessel in foreign inland waters, it has been said that, in general, such a vessel is subject to the territorial jurisdiction of the coastal State. Is there an exception to this rule in case of distress? It is important not to confuse two matters. Even in case of distress, territorial jurisdiction *belongs* to the coastal State. In the above quoted Enterprise case, the British Commissioner E. Hornby, was of opinion that

> when a vessel is in a foreign port under such circumstances as entitle it to exemption from the application of the local law, the exemption cannot be put on the same ground as the immunity from interference of a vessel on the high seas, for there in time of peace it is absolute. There is no right on the part of a foreign court even to inquire into the legality of anything occurring in the vessel of another country while at sea; but within the territories of a country the local tribunals are paramount, and have the right to summon all within the limits of their jurisdiction, and to inquire into the legality of their acts and determine upon them according to the law which may be applicable to the particular case. It appears to me, therefore, that it cannot with correctness be said "that a vessel forced by stress of weather into a friendly port is under the exclusive jurisdiction of the State to which she belongs in the same way as if she were at sea". She has been brought within another jurisdiction against her will, it is true, but equally against the will and without fault on the part of the foreign power; she brings with her (by the law of nations) immunity from the operation of the local laws for some purposes, but not for all, and the extent of that immunity is the proper subject of investigation and adjudication by the local laws.[233])

Article 5, § 2 of the quoted Règlement 1928 of the Institut de Droit international provides:

> Le navire en relâche doit se conformer aux conditions qui lui sont imposées par l'autorité territoriale; néanmoins, ces conditions ne peuvent

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the free right to navigate the ocean, and therefore a necessary incident of such right.", Moore 4-4354, Survey No. 47. In the Creole case, under the same Convention, the Umpire, J. Bates, held: "The Creole was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.", Moore 4-4377. Commenting this decision, Prof. L. Strisower wrote: Le droit de refuge "est un droit accessoire, nécessaire pour jouir du droit de libre navigation sur l'océan, et qui procède de ce même droit. ... Ce droit n'est pas une conséquence nécessaire du droit de libre navigation, mais ... une conséquence naturelle, justifiée par l'intérêt de la navigation légitime.", Lapradelle-P. vol. I, p. 716, 717.

[232]) Annuaire de l'Institut 1928 p. 737. Cf. article 6, § 1 of the above-quoted Règlement 1898, Annuaire 1898 p. 274.

[233]) Moore 4-4364/5.

pas être de nature à paralyser par leur rigueur excessive l'exercice du droit de relâche forcée.[234])

Prof. P. Fedozzi wrote:

Les navires en relâche forcée ne constituent pas une catégorie à part jouissant d'un traitement juridique particulier et (que), sauf pour ce qui regarde les droits de navigation et de port, ils sont sujets au droit commun propre aux navires marchands dans les eaux territoriales étrangères.[235])

As to the *exercise* of this jurisdiction, it was held in the Maria Luz case between Japan and Peru that, if the coastal State exercises that jurisdiction "in good faith in virtue of its own laws and customs, without infringing the general prescriptions of the law of nations, or the stipulations of particular treaties", its international responsibility is not engaged.[236]) The same opinion was upheld in the Catherine Augusta case between Denmark and U.S.A., January 22, 1890.[237]) It was held in the above quoted Alliance case that the vessel arrived at the bar of Maracaibo in great distress, and that, under those conditions, "the exemption of the Alliance from territorial jurisdiction is clear." The Commission added that the laws of Venezuela did not impose upon the authorities of the port any duty contrary to the principles of civilized jurisprudence or the dictates of humanity and hospitality. However, in the present case, "there was no probable cause under the law of the country for the action of the port authorities and the subsequent judicial proceedings. The liability of the government of Venezuela for the ascertainable loss or injuries resulting from the seizure and detention of the Alliance is, both upon reason and authority, established."[238]) In the Rebecca case, the Commission observed:

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[234]) Annuaire de l'Institut 1928 p. 737. Cf. article 6, § 2 of the above-quoted Règlement 1898, Annuaire 1898 p. 274.

[235]) La condition juridique des navires de commerce, Recueil des Cours 1C (1925) - 43.

[236]) May 17 (29), 1875, Moore 5-5035, Survey No. 104.

[237]) Moore 2-1205/6, Survey No. 154. The arbitrator, Sir Edmund Monson, said that "the argument of the United States contends that, as it is indubitable that a vessel injured by the elements has a *right* (my italics) to put into a friendly port for repairs, and a further *right* (my italics) to land her cargo in order to effect such repairs, and as it is equally indubitable that a peaceful vessel may not, under ordinary circumstances, be fired into and the lives of those on board imperilled, the mere statement of the case, with regard to the facts of which there is no material divergence in the evidence presented by the respective parties, establishes, under the principles of international law, an indubitable ground upon which the claim for indemnity may safely be permitted to rest." However, the arbitrator did not examine that point. As opposed thereto, its was held in the above-quoted Rebecca case that "a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation cannot justify a disregard of local laws.", loc. cit. p. 178.

[238]) Ralston-D. p. 33.

> Recognition has also been given—perhaps it may be said in a more concrete and emphatic manner—to the immunity of a ship whose presence in territorial waters is due to a superior force. The principles with respect to the status of a vessel in "distress" find recognition both in domestic laws and in international law. For numerous, interesting precedents of both domestic courts and international courts, see Moore, Digest, Vol. II, p. 339 et seq; Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 194, et seq.
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> Domestic courts have frequently considered pleas of distress in connection with charges of infringement of customs laws. Interesting cases in which pleas of distress were raised came before American courts in the cases of vessels charged with violation of the interesting American so-called "non-intercourse" acts forbidding trade with French and British possessions. 1. Stat. 565; 2. Stat. 308. In these cases it was endeavored in behalf of the vessels to seek immunity from prosecution under these laws by alleging that the vessels had entered forbidden ports as a result of vis major. A Mexican law of 1880 which was cited in the instant case appears to recognize in very comprehensive terms the principles of immunity from local jurisdiction which have so frequently been invoked. Legislación Mexicana, Dublán & Lozano, vol. 14, p. 619, et seq.
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> The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers. It has also been asserted in defense of a charge of attempted breech of blockade. It was asserted by as early a writer as Vattel. The Law of Nations, p. 128.[239])

Prof. Ph. C. Jessup wrote:

> There is one condition under which a foreign vessel in territorial waters may claim as of right an entire immunity from the local jurisdiction. The condition is that such presence in territorial waters be due to force majeure. If a ship is driven in by storm, carried in by mutineers, or seeks refuge for vital repairs or provisioning, international customary law declares that the local State shall not take advantage of its necessity.[240])

It may be doubted, however, whether vessels in distress may claim immunities as of *right*. The Commission itself observed that, by virtue of the enlightened principle of *comity*, and "at least to a certain extent", merchant vessels are exempted from the operation of local laws. It does not appear from decisions of international tribunals that the coastal State might not exercise its territorial jurisdiction; rather that exercise should be in accordance with principles of comity,[241]) hospitality,[242]) and humanity.[243]) In this respect, too, the Permanent Court of Arbitration examined, in the North Atlantic Coast Fisheries Arbitration, the question whether a vessel in distress,

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[239]) G.P.O. 1929 p. 177.

[240]) The law of territorial waters and maritime jurisdiction, New York 1927, p. 194.

[241]) See the Rebecca case.

[242]) Cf. the Enterprise case, decision of the Umpire: "The conduct of the authorities at Bermuda was a violation of the laws of nations, and of those laws of hospitality which should prompt every nation to afford protection and succor to the vessels of a friendly neighbor that may enter their ports in distress.", Moore 4-4373.

[243]) See the Alliance case and the North Atlantic Coast Fisheries Arbitration, hereafter.

sojourning in a foreign maritime port, has to fulfil administrative formalities. The Court decided:

> the provision in the first article of the Treaty of October 20th, 1818, admitting American fishermen to enter certain bays or harbors for shelter, repairs, wood and water, and for no other purpose whatever, is an exercise in large measure of those duties of hospitality and humanity which all civilized nations impose upon themselves and expect the performance of from others. The enumerated purposes for which entry is permitted all relate to the exigencies in which those who pursue their perilous calling on the sea may be involved. The proviso which appears in the first article of the said Treaty immediately after the so-called renunciation clause, was doubtless due to a recognition by Great Britain of what was expected from the humanity and civilization of the then leading commercial nation of the world. To impose restrictions making the exercise of such privileges conditional upon the payment of light, harbor or other dues, or entering and reporting at custom-houses, or any similar conditions would be inconsistent with the grounds upon which such privileges rest and therefore is not permissible. And it is decided and awarded that such restrictions are not permissible.
>
> It seems reasonable, however, in order that these privileges accorded by Great Britain on these grounds of hospitality and humanity should not be abused, that the American fishermen entering such bays for any of the four purposes aforesaid and remaining more than 48 hours therein, should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, at a custom-house or to a customs-official, if reasonably convenient opportunity therefore is afforded.[244])

First, the Court stated, in a matter regulated by convention, that the coastal State, in accordance with its duties of hospitality and humanity, should permit the entry of vessels in distress into inland waters; it did not deny that such a vessel is subject to the local laws of the coastal State.

Secondly, as to the exercise of that State's territorial jurisdiction, it was held that

a) a vessel in distress has not to pay "light, harbor or other duties", which would be inconsistent with the grounds upon which privileges, enjoyed by that vessel, rested. That statement, however, seems to go further in favour of the vessel than was hitherto admitted in practice. So, the arbitrator in the Alliance case quoted the Gertrude case (3 Story's Rep., 68), wherein Mr. Justice Ware said:

> It can only be a people, who have made but little progress in civilization, that would not permit foreign vessels in distress, to seek safety in their ports, except under the charge of paying import duties on their cargoes, or under penalty of confiscation, where the cargo consisted of prohibited goods.[245])

Moreover, in his note on the Creole case, Prof. Strisower, surveying state practice on that point, conceived some doubts as to whether vessels in distress are exempted from paying local duties.[246])

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[244]) A.J.I.L. 4 (1910) - 976/7.
[245]) Ralston-D. p. 32.
[246]) Lapradelle-P. vol. I, p. 714: Article 6 of the Règlement 1928 of the Institut

b) The vessel in distress is not obliged to enter herself and report at custom-houses. Why could not such a vessel fulfil those formalities from the moment that she is safe after her arrival into port? The Court itself fixed, as a correction, an arbitrary delay [247]) of 48 hours for remaining in the foreign inland waters.

It may be concluded that the coastal State exercising its territorial jurisdiction over its inland waters has to take into account its duties of hospitality and humanity, which duties could be compared with corresponding privileges for the State of the flag exercising its personal jurisdiction over its private vessels in those waters.[248])

Reference: Annuaire de l'Institut de Droit international 1896-15, 1897-186, 1898-36, 231, 1927-1-191, 1928-401, 516, 736; A. H. Charteris: The legal position of merchantmen in foreign ports and national waters, British Yearbook 1920/1-45; P. Fedozzi: La condition juridique des navires de commerce, Recueil des Cours 10 (1925) - 5; L. J. D. Féraud-Giraud: Régime des navires étrangers dans les ports, et plus particulièrement dans les ports français, Journal Clunet 24 (1897) - 53; G. Gidel: Le droit international public de la mer, vol. II, Les eaux intérieures, Chateauroux 1932; Ch. N. Gregory: Jurisdiction over foreign ships in territorial waters, Michigan Law Review 2 (1904) - 333; Ph. C. Jessup: The law of territorial

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de Droit international provides: "Les autorités territoriales doivent aide et assistance aux navires étrangers naufragés sur leurs côtes; elles doivent assurer le respect de la propriété privée, aviser le consulat des naufragés, assister les agents de ce consulat dans leur action, dès qu'ils interviennent. L'action des autorités consulaires de l'Etat du pavillon du navire naufragé ne peut s'exercer que dans la mesure où elle est compatible avec la législation en vigueur dans l'Etat territorial et, s'il y a lieu, conformément aux conventions. Il est à désirer que les Etats n'exigent que le remboursement des frais utilement exposés.", Annuaire de l'Institut 1928 p. 737/8. It is clear that a State may give up the payment of such duties if it sees fit to do (about Italy, see G. Gidel: Les eaux intérieures p. 52, note 1), or by virtue of conventional provisions. See e.g. a declaration of France and Sardaigne, signed at Paris, June 12, 1838: "... Tout navire de commerce sarde entrant en relâche forcée dans un port de France ou des possessions françaises du nord de l'Afrique y sera exempt de tout droit de port ou de navigation perçu ou à percevoir au profit de l'Etat, si les causes qui ont nécessité la relâche sont réelles et évidentes, pourvu qu'il ne se livre dans le port de relâche à aucune opération de commerce en chargeant ou en déchargeant des marchandises; bien entendu, toutefois, que les déchargements et rechargements motivés par l'obligation de réparer le navire ne seront point considérés comme opérations de commerce donnant ouverture au payement des droits, et pourvu que le navire ne prolonge pas son séjour dans le port au delà du temps nécessaire d'après les causes qui auront donné lieu à la relâche.", de Clercq, vol. 4 p. 419. Cf. this sojourn with the sojourn of 48 hours in the award of the North Atlantic Coast Fisheries Arbitration of 1910.

[247]) Commenting this award, Prof. J. Basdevant said that this fixing might be considered as "un acte arbitraire, basé non sur des motifs de droit, mais sur des considérations de convenance, d'opportunité.", R.G.D.I.P. 19 (1912) - 546.

[248]) It is curious that the doctrine of the 'relâche forcée' occupies but a little place in doctrine. Cf. G. Gidel: Les eaux intérieures, p. 51/2; P. Pradier-Fodéré: Traité de droit international public européen et américain, vol. 5, Paris 1891, p. 426 et seq., etc. As to Dutch authors, see inter alia: W. A. Reiger: Over den volkenregtelijken regel 'schip is territoir', Groningen 1865 p. 283/5; L. E. Visser: De territoriale zee, Amersfoort 1894 p. 302, note 2; L. van Praag: Juridiction et droit international public, The Hague 1915, no. 270, p. 536/7, etc.

waters and maritime jurisdiction, New York 1927; R. Laun: Le régime international des ports, Recueil des Cours 15 (1926) - 5; F. K. Nielsen: The lack of uniformity in the law and practice of States with regard to merchant vessels, A.J.I.L. 13 (1919) - 1; Pitman B. Potter: Jurisdiction over alien merchant vessels, Wisconsin Law Review 1924-340, 417; A. Porter Morse: De la compétence de la juridiction locale à l'égard des navires de commerce étrangers se trouvant dans les ports nationaux, Journal Clunet 18 (1891) - 751, 1088; R. Quadri: Le navi private nel diritto internazionale, Milano 1939; M. Rostworowski: Le régime juridique des navires de commerce dans les ports étrangers, Annales de l'Ecole libre des sciences politiques, 1894-696, 1895-33.

CHAPTER III

GOVERNING JURISDICTION

§ 7. NATURE OF GOVERNING JURISDICTION

Territory and population entitle a State to a territorial and to a personal jurisdiction. The coherence between these elements of a State is assured by a political organization, which is essential for the existence of a State. In a dissenting opinion before the Permanent Court of International Justice in the case of the Lighthouses on Crete and Samos, between France and Greece, S. P. Séfériadès enumerated some attributes of sovereignty "without which no sovereignty can be described as such." They are: "the right of free political organization, the right of autonomy in the conduct of social affairs, prisons, public worship, public education, administrative machinery, systems of taxation, communications, organization of the police, the right of civil and criminal legislation, the right of jurisdiction, the obligation of military service, freedom of trade, the right of the flag, the right to conclude treaties and the right of representation." [1]) This third essential element entitles a State to a third jurisdiction, which might be called "governing" jurisdiction. By virtue of this jurisdiction, a State may, first, organize its public services on its territory, having chosen its own constitution,[2]) its own Head of the State,[3]) its own

[1]) 8-10-1937, Series A/B No. 71, p. 136. The P.C.I.J. gave another example in the case concerning the payment of various Serbian Loans issued in France, by saying: "it is indeed a generally accepted principle that a State is entitled to regulate its own currency.", 12-7-1929, Series A. Nos. 20/1, Judgment No. 14 p. 44 (idem Judgment No. 15 p. 122).

[2]) "Qu'en effet, la constitution de l'Etat n'est, au sens le plus général du mot, que le mode suivant lequel l'Etat est organisé ou, d'après une autre définition, l'ensemble des règles écrites ou non écrites qui déterminent les attributions des pouvoirs politiques et les rapports de ceux qui gouvernent avec ceux qui sont gouvernés; qu'il est clair que ces attributions et ces rapports sont susceptibles de se modifier, et qu'en cas de substitution d'un Gouvernement à un autre par la voie révolutionnaire, ils devront être le plus souvent modifiés pour être mis en harmonie avec les circonstances et les besoins nouveaux; que le même principe qui consacre, dans les conditions plus haut exprimées, l'institution du gouvernement nouveau, autorise ce gouvernement à déterminer le mode d'exercice du pouvoir dont il est investi.", Chile-France, arb., 5-7-1901, Descamps-R. 1901 p. 396, Survey No. 172.

[3]) "Qu'en dehors des cas d'anarchie pure, la permanence de l'existence de l'Etat suppose nécessairement la présence d'un pouvoir qui agit en son nom et qui le représente; que cette nécessité est si évidente, qu'elle a été reconnue dès le moyen-age par les jurisconsultes qui voient dans le souverain la personnification

Government.[4]) The late Prof. Léon Duguit of the University of Bordeaux especially advanced the theory of a State as a co-operation of public services [5]) organized and controlled by governors. A public service, he said, "c'est toute activité dont l'accomplissement doit être assuré, réglé et contrôlé par les gouvernants, parce que l'accomplissement de cette activité est indispensable à la réalisation et au développement de l'interdépendance sociale, et qu'elle est de telle nature qu'elle ne peut être réalisée complètement que par l'intervention de la force gouvernante. Cette activité est d'une importance telle pour la collectivité qu'elle ne peut pas être interrompue un seul instant. ... Le service public est le fondement et la limite du pouvoir gouvernemental." [6]) As to the institution of public services he argued:

> Jèze, dans un chapitre d'ailleurs très intéressant de son livre Principes généraux du droit administratif, 1914, écrit que "pour résoudre la question de savoir si dans tel cas donné le procédé du service public est effectivement employé, il faut rechercher uniquement l'intention des gouvernants". En un mot, d'après cet auteur, le service public est une création artificielle du législateur qui seul peut l'instituer et peut donner discrétionnairement ce caractère à une activité quelconque. Cette proposition se rattache directement à une conception contre laquelle je me suis élevé énergiquement à plusieurs reprises, conception d'après laquelle le droit est une pure création de l'Etat. Assurément, si une loi positive attribue expressément le caractère de service public à une activité déterminée, le juge sera obligé d'appliquer la disposition législative. Mais il n'en résultera pas que, dans la réalité, il y ait un service public; et celle-ci l'emportera tôt ou tard sur la décision

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de l'Etat et deduisent de là l'obligation du prince de reconnaître les engagements pris au nom de l'Etat par le prince qui l'a précédé; qu'elle a trouvé son expression dans la maxime du droit français d'après laquelle le roi ne meurt pas; que Grotius l'a proclamée à son tour ('civitates esse immortales') en enseignant que l'obligation des dettes contractées par l'Etat persiste indépendamment de tout changement dans la forme du Gouvernement du pays (Grotius II, cap. IX).", Chile-France, arb., loc. cit. note 2 supra, p. 395.

[4]) "Que les jurisconsultes modernes ont parfois varié sur l'explication du principe en vertu duquel le pouvoir de représenter l'Etat se transmet d'un Gouvernement à un autre, les uns la cherchant dans l'idée d'une prescription qui s'établit au profit de l'usurpateur, d'autres dans la présomption, s'il s'agit d'un prince légitime déchu, d'une renonciation à l'exercice de ses droits en faveur des personnes qui lui ont succédé, d'autres dans l'hypothèse d'une consécration de l'autorité nouvelle par l'effet du consentement exprès ou tacite de la nation; mais que les plus considérables sont unanimes à professer le respect de ses conséquences, telles qu'elles ont été formulées pour la première fois d'une façon méthodique et complète, dans divers ouvrages, par le publiciste H. A. Zachariae, à l'occasion des contestations qui s'étaient élevées en Allemagne après la dissolution du Royaume de Westphalie sur la validité des actes accomplis par le roi Jérôme; qu'ils n'en restreignent pas l'application au cas où le régime nouveau s'est maintenu pendant un lapse de temps prolongé, mais considèrent uniquement le point de savoir si ce régime présentait des caractères de stabilité et d'autorité tels qu'on pût envisager ses organes comme détenant en fait le pouvoir vacant par la chute du pouvoir antérieur; qu'ainsi ils font dépendre la validité des actes d'un gouvernement, même transitoire et usurpateur, de conditions identiques à celles auxquelles les puissances étrangères subordonnent la reconnaissance d'un Chef d'Etat qui leur annonce son avènement.", Chile-France, loc. cit. p. 395.

[5]) Cf. M. Oliva y Blay: Los servicios publicos, moderno concepto de los mismos, Revista de derecho internacional 28 (1935) - 210/39.

[6]) Traité de droit constitutionnel, third edition, vol. I p. 61, 62.

> arbitraire du législateur. D'autre part, j'estime qu'ici, comme dans tout domaine social, le juriste manque à sa mission s'il n'indique pas au législateur quel est le droit. Enfin pratiquement, si le juriste s'abstient de déterminer théoriquement ce qui est matière de service public, il sera bien souvent impossible de dire si, dans un pays donné, telle activité est un service public, le législateur ne s'étant point expliqué sur ce point. Cela est l'origine de controverses sans fin que Jèze n'a pas su éviter plus que Michoud. [7])

After his death, Prof. Gaston Jèze wrote in a special number of the Archives de Philosophie du Droit et de Sociologie juridique on 'L'oeuvre de Léon Duguit' as follows:

> Chose étrange pour un réaliste, Duguit s'en remet à "la conscience juridique moderne" du juriste, pour dire aux gouvernants quelle sorte d'activité doit être érigée en service public. Quelle admirable confiance dans la sagacité des juristes et dans leur infaillibilité! L'observation des faits ne permet pas de ratifier le jugement de Duguit. Les faits ne donnent aucun renseignement sur la "conscience juridique moderne". C'est une figure de rhétorique, dépourvue de signification précise. ... Voici un exemple: c'est le cas des théâtres de l'Opéra, de l'Opéra-comique, de la Comédie française, ce que l'on appelle les "théâtres nationaux". L'activité de l'Etat en matière de théâtres nationaux est-elle un service public au sens précis du terme dans le droit administratif français actuel? Appliquons à ce cas particulier les formules de Duguit sur le service public, que j'ai reproduites plus haut. On n'arrivera à aucune réponse. Je renonce pour ma part à rechercher ce qu'exige "la conscience juridique moderne" en matière de théâtres.
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> Pourtant, on ne pouvait pas laisser les procès sans solution, pour le motif que le critérium de Duguit ne fonctionnait pas. Le Conseil d'Etat a déclaré: de l'ensemble des circonstances de fait et des règles de droit régissant les théâtres nationaux, il résulte que l'intention du législateur a été de faire des théâtres nationaux un service public. Cela suffit. Et le Conseil d'Etat a appliqué les règles du service public. [8])

It follows that a State organizes its public services as it sees fit fit to do, this being, in principle, unless there be a special (conventional or customary) rule to the contrary, a matter of constitutional law, not of international law.[9]) So, no conflict of state jurisdictions will arise concerning the organization of those services within the boundaries of a given State. Nevertheless, in the case of formation and transformation of a State, it may be disputed by another State whether governing jurisdiction belongs to such a State. That question will be examined in § 8, *infra.*

In the second place, a State may, or rather has to, assure the functioning of its public services. The Central American Court of Justice held that every State is obliged "to provide laws and institu-

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[7]) Ibidem p. 74. Cf. Marc Réglade: Perspectives qu'ouvrent les doctrines objectivistes du Doyen Duguit pour un renouvellement de l'étude du droit international public, R.G.D.I.P. 37 (1930) - 381/419.

[8]) 'L'influence de Léon Duguit sur le droit administratif Français', vol. 1/2, 1932, p. 149/50.

[9]) "Certes, un Etat, en vertu de sa souveraineté, peut régler en toute liberté sa vie intérieure, mais à condition de ne pas contrarier le droit des gens. Cette matière a donc trait à un des aspects des rapports entre le droit public interne et le droit international.", Hungary-Czechoslovakia, M.A.T., 19-2-1934, diss. op. A. Alvarez, R.G.P.C. 1934-2-19.

tions for its internal administration, which shall render it practically capable of repressing within its territory acts which are injurious to the other members of the international commonwealth, and to be responsible, therefore, for every defect arising from deficiency in the laws." [10]) As such, the exercise of the governing jurisdiction is, like the exercise of state jurisdictions in general, a consequence of the independence of States. "Sovereignty", said Prof. Max Huber as arbitrator in the quoted Palmas case, "in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to *exercise* *) therein, to the exclusion of any other State the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." [11]) While the independence of States may be considered as a general principle of international law, "restrictions upon the independence of States cannot therefore be presumed", as was held by the Permanent Court of International Justice in the Lotus case.[12]) And, since the members of the international community are juridically equal,[13]) States have to respect the independence of other States and their subjects, though this is never expressly stipulated, as was held in the above quoted Basel arbitration: "Indem ... die Verpflichtung des einen Nachbarstaates, die wirklichen Rechte der Angehörigen des andern zu an-

[10]) Honduras-Salvador, Guatemala, 19-12-1908, A.J.I.L. 3 (1909) - 734, Survey App. No. III.

*) My italics.

[11]) A.J.I.L. 22 (1928) - 875, Survey No. 366 (see p. 2). Cf. the P.C.I.J. Adv. Op. No. 5 concerning the status of Eastern Carelia, 23-7-1923, p. 27; Judgment No. 9, Lotus case, 7-9-1927, Series A. No. 10 p. 18; Adv. Op. No. 20 concerning customs régime between Germany and Austria, 5-9-1931, Series A/B No. 41 p. 45, 57/8 (diss. op. D. Anzilotti), 77 (diss. op. of seven judges).

[12]) Series A. No. 10 p. 18. Cf. in the same sense: Great Britain-U.S.A., P.C.A., 7-9-1910, A.J.I.L. 4 (1910) - 964, Survey No. 291; Commissioner of Controlled Revenues-Germany arb., 23-6-1926. A.J.I.L. 21 (1927) - 330, Survey No. 373; France-Switzerland, P.C.I.J., Judgment 7-6-1932, Series A/B No. 46, p. 167; Sweden-U.S.A., P.C.A., 18-7-1932, A.J.I.L. 26 (1932) - 846, Survey No. 395; China-Radio Corporation of America, arb., 13-4-1935, A.J.I.L. 30 (1936) - 540, Survey No. 386, etc.

[13]) U.S.A.-Venezuela, arb., 26-3-1895, diss. op. J. Andrade, Moore 2-1732, Survey No. 169; Great Britain-U.S.A., arb., C. 18-8-1910, Report Nielsen p. 530, Survey No. 303; Salvador-Nicaragua, C.A.C.J., 9-3-1917, A.J.I.L. 11 (1917) - 719, Survey App. No. III; Norway-U.S.A., arb., 13-10-1922, A.J.I.L. 17 (1923) - 392, Survey No. 339, etc. "Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, 'to assume, among the Powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them'.", American Institute of International Law, Draft No. 7, article 3, A.J.I.L. Off. Doc. Special Number October 1926, p. 312.

erkennen und zu schützen, sich unter civilisirten Staaten von selbst versteht, und nicht durch besondere Anerkennungen und Garantieen oder Verträge für die einzelnen Rechtsverhältnisse festgesetzt und bedungen zu werden pflegt." [14]) In his dissenting opinion, Prof. D. Anzilotti said in Advisory Opinion No. 20 of the Permanent Court of International Justice that "according to ordinary international law, each country must respect the independence of other countries." [15]) Therefore, the public services of a State should function without interfering with the governing jurisdiction of other States. The Mixed Claims Commission Costa Rica-U.S.A. under Convention of July 2, 1860, held:

> It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its sujects residing abroad a government, in all matters depending upon the judiciary power, must confine itself to secure for them free access to the local tribunals, besides an equality of treatment with the natives according to the conventional law established by treaties. Only a formal denial of justice, the dishonesty or prevaricatio of a judge legally proved, ... may justify a government in extending further its protection. Any other interference with the internal affairs of a foreign country, when not authorized by a public treaty, must be regarded either as the result of political considerations totally extraneous to the present subject, or as the effect of influences, wrongfully exercised, which have never been approved by publicists, or as the abuse of force, and in neither case could it be accepted as a precedent by the international jurisprudence. [16])

Mr. N. Zuloaga, Venezuelan Commissioner in the Mixed Claims Commission Italy-Venezuela, under Convention of February 13, 1903, said:

> This Commission has not, in my opinion, the right te enter into a general discussion as to the merits of the policy of the Venezuelan Government. That would be an act of intervention into its national life not warranted by the principles of international law. Venezuela is a sovereign State, recognized as such by all civilized nations, and is not accountable to any foreign power concerning the motives of its political action. [17])

The Central American Court of Justice held in a case between Nicaragua and Salvador that

> the function of sovereignty in a State is neither unrestricted nor unlimited. It extends as far as the sovereign rights of other States. ... To invoke the attributes of sovereignty in justification of acts that may result in injury or danger to another country is to ignore the principle of the independence of States which imposes upon them mutual respect and requires them to abstain from any act that might involve injury, even though merely potential, to the fundamental rights of the other international entities which, as in the case of individuals, possess the right to live and develop themselves without injury to each other. [18])

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[14]) C. 26-3-1833, ed. Liestal, I p. 728, Survey No. 30; see p. 88.
[15]) 5-9-1932, Series A/B No. 41 p. 59.
[16]) Moore 3-2317, Survey No. 65.
[17]) Ralston-D. p. 677, Survey No. 257.
[18]) 9-3-1917, A.J.I.L. 11 (1917) - 718/9, Survey App. No. III.

In a Resolution of the Institut de Droit international concerning the 'Droits et devoirs des Puissances étrangères au cas de mouvement insurrectionnel envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection', it was said that

> tout tierce Puissance, en paix avec une nation indépendante, est tenue de ne pas entraver les mesures que cette nation prend pour le rétablissement de sa tranquillité intérieure; elle est astreinte à ne fournir aux insurgés ni armes, ni munitions, ni effets militaires, ni subsides. Il est spécialement interdit à toute tierce Puissance de laisser s'organiser dans ses domaines des expéditions militaires hostiles aux gouvernements établis et reconnus.[19])

Article 2 of Draft No. 7 of the American Institute of International Law provides:

> Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.[20])

The question what conflict arises when public services of a particular State function outside the national territory will be examined in § 9 in connection with the consular and diplomatic services.

Finally, a State may defend the existence and the functioning of its public services, which matter need not be regulated by conventional rules.[21]) This applies especially to the right of a State to make war, which right "is vested in the sovereignty", as was said by the Umpire, J. V. L. Findlay, of the Mixed Commission U.S.A.-Venezuela under Convention of December 5, 1885; he added that "treaties and municipal laws which recognize this principle are only declaratory or expository of the law itself, which is founded in international necessity."[22]) Profs. Anzilotti and Huber observed in their dissenting opinion in the Wimbledon case before the Permanent Court of International Justice that

> it must be stated that a State may enter into engagements affecting its freedom of action as regards wars between third States. But engagements of this kind, having regard to the gravity of the consequences which may ensue, can never be assumed; they must always result from provisions expressly contemplating the situations arising out of a war. The right of a State to adopt the course which it considers best suited to the exigencies

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[19]) Annuaire de l'Institut 1900 p. 227.

[20]) A.J.I L. Off. Doc. Special Number October 1926 p. 312.

[21]) "Self-preservation and self-defense are sacred rights of nations as well as of individuals, and nothing in a treaty should be taken to have impaired the right of a nation to make prudent preparations for them by husbanding its means of war, when that event seems probable, unless the terms of the stipulation will admit of no other construction.", Great Britain-U.S.A., arb., C. 8-5-1871, diss. op. Frazer, Moore 4-4386, Survey No. 93. Cf. France-Nicaragua, arb., 29-7-1880, Moore 5-4871, Survey No. 115, and U.S.A.-Venezuela, arb., C. 5-12-1885, op. J. Andrade, Moore 3-2961, Survey No 142.

[22]) Moore 3-2746/7, Survey No. 142.

> of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation. This consideration applies with particular force in the case of perpetual provisions without reciprocity which affect the interests of third States. [23])

The question what conflict arises when the army and the navy of a given State operate outside the national territory and the territorial waters will be examined in § 9.

It may be concluded from the above that the Allied Powers, in a Resolution at Cannes, January 6, 1922, rightly held that "les nations ne peuvent pas revendiquer le droit de se dicter mutuellement les principes suivant lesquels elles entendent organiser à l'intérieur leur régime de propriété, leur économie et leur gouvernement. Il appartient à chaque pays de choisir pour lui-même le système qu'il préfère à cet égard." [24])

Thus, the governing jurisdiction of a State is, in principle, [25]) exclusive with regard to other States just as are its territorial and its personal jurisdictions.

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[23]) Judgment No. 1, 17-8-1923, Series A. p. 37.

[24]) Paul Fauchille: Traité de droit international public, Paris 1922, vol. I, 1-437 note.

[25]) It is clear that States may, by special (conventional) regulations, organize some public services in collaboration with each other, such as, for instance, with respect to international communications or in boundary zones, giving rise to mixed jurisdictions or to the creation of international institutions. Cf. Paul Negulesco: Principes du droit international administratif, Recueil des Cours 51 (1935) - 583/690; M. Dendrias: Les principaux services administratifs internationaux, Recueil des Cours 63 (1938) - 247/365; J. Gascon y Marin; Les transformations du droit administratif international, Recueil des Cours 34 (1930) - 5; A. Rapisardi Mirabelli: Il diritto internazionale amministrativo, Padova 1939; Karl Neumeyer: Internationales Verwaltungsrecht; Clyde Eagleton: International Government, etc.

§ 8. ATTRIBUTION OF GOVERNING JURISDICTION

When a nation is definitively constituted as a sovereign State and as an independent member of the international community, no conflict with other States will arise as to whether that State is entitled to governing jurisdiction. In the case of formation and transformation of a State, however, it may be that another State questions whether that State has acquired, or lost (as the case may be), governing jurisdiction. Both these possibilities will be dealt with hereafter.

A. Formation of States

Three international instances may be quoted illustrating a conflict of state jurisdictions between a State in formation and another State. 1. The first instance concerns the formation of Finland as an independent State, in 1917, with special reference to the Aaland Islands. These islands had always been inhabited by a Swedish population. In 1809, Sweden saw herself compelled to cede to Russia the eastern portion of what was then the Kingdom of Sweden. Finland and the Aaland Islands, which were part of Finland, became a Grand Duchy of Russia. After the Russian revolution of March 1917, the Bolshevik manifesto of November 15, 1917, proclaimed the right of self-determination of all the peoples not of Russian race to decide their own future. On that date, Finland declared her independence. Next month, the Aaland Islanders were preparing to hold a plebiscite in favour of their reunion with Sweden. Thus, whereas the population of the mainland wished to form an independent State, the inhabitants of the Aaland Islands wished to reunite with Sweden. A dispute ensued between Sweden and Finland about the political status of the Aaland Islands, which dispute was brought by Great Britain, by virtue of article 11 of the Covenant of the League of Nations, before the Council of that League. The point of view of the Swedish Government was expounded in a letter to the Secretary-general, Sir Eric Drummond, dated July 7, 1920, in which it was contended, *inter alia,* that "there exists between Sweden and Finland a serious difference of opinion as to the right of the population of the Aaland Islands to determine its own political status. As this difference had been referred, on the initiative of the British Government, to the Council of the League of Nations, the Swedish Government

hopes that the Council may be able to arrive at a solution which approves and supports the point of view the Swedish Government has put forward. This point of view may be formulated as follows: The Aaland population shall be allowed to determine immediately by a plebiscite whether the archipelago shall remain under Finnish sovereignty or be incorporated with the Kingdom of Sweden." [1]) Finland, in her turn, contended that "the Aaland Islands are a continuation of the Finnish mainland, from which they are not geologically distinguished;" that "from the administrative point of view the Islands have always formed part of the department of Abo, whose capital, the town of the same name, was the ancient capital of Finland"; that "the commercial relations of the Aaland Islands have always been much more considerable with Finland than with Sweden"; that "from the political point of view, the Aalanders have constantly proclaimed their Finnish nationality"; that "from the strategic point of view, the importance of the Aaland Islands is greater for Finland than for Sweden"; that "if it is essential to the military security of Finland to retain Aaland Islands, it is equally so from the point of view of the economic security of the country"; that "the demand for a plebiscite is unjustifiable, for it is undeniable:

1) that the separation of the Islands would prejudice the very conditions of existence of the Finnish Republic, and

2) that it cannot be shown that the position of the Aalanders would be that of an oppressed people if they continued to live in the future, as in the past, under Finnish laws.

In 1918 and 1919, Finland, as she existed as the Grand Duchy under Russian sovereignty, was recognized as independent by the Powers, and the latest recognitions are subsequent to the Aaland partition which the Swedish Government is supporting. The Finnish Government cannot admit to be well-founded pretensions which aim at a change in the status quo, since the principle of self-determination cannot apply to the present case." [2])

In a letter dated July 9, 1920, the Finnish Government observed, moreover, that "the difference of opinion which, owing to exceptional circumstances, has arisen between the population of the Aaland Islands and the Government of Finland is not so much a crisis of an international, as of a domestic nature, which the definitely annexationist interpretation by a neighbouring Power, anxious to aggrandize itself at the expense of others, cannot transform into an international question; if the peace of the world is disturbed, it will not be the

[1]) L.N.O.J. Special Supplement No. 1, August 1920, p. 23.
[2]) Enclosure I to a letter, dated July 7, 1920, addressed to Sir Eric, loc. cit. p. 4/5.

fault of Finland, who only asks that the status quo shall be maintained. The Government of Finland, having given the most liberal solution to the Aaland question, and accorded the widest autonomy to this archipelago, cannot understand how in these circumstances there can be any question, as far as it is concerned, of a threat of war; nor on the other hand, how an internal question relative to the protection of ethnical minorities could, by the desire of a third Party, be transformed into an international question. The Government of Finland would most respectfully point out to the Council of the League of Nations, with reference to article 15, paragraph 8, of the Covenant, that this "dispute arises out of a matter which by international law is solely within the domestic jurisdiction" of Finland." [3]) At the Seventh Session of the Council of the League of Nations, held in London from 9 to 12 July 1920, the Representative of Sweden replied to these arguments. He declared that the recognition of the Finnish independence by Sweden, which took place on January 4, 1918, did not imply the recognition of frontiers, and was given solely for the purpose of supporting the new Finnish independence. It did not involve further 'de iure' consequences. He did not agree with the claim made by Finland that the question arose out of a matter which by international law was solely within the domestic jurisdiction of Finland. He pointed out that the question, even if it originated from internal circumstances, which he did not admit, might have external consequences and thereby become of an international character. The Representative of Finland made all reservations with regard to this declaration and gave further details concerning the recognition by various Powers of the Republic of Finland.[4])

The Council, in considering the question, was of opinion that before endeavouring to effect a settlement of the dispute in the interest of international peace, and of the good understanding between nations, a decision must be arrived at on the claim made by Finland that the case of the Aaland Islands arose out of a matter which by international law was solely within the domestic jurisdiction of Finland. This preliminary question which was connected with that of the applicability of the 8th paragraph of article 15 of the Covenant would have been placed by the Council before the Permanent Court of International Justice for its advisory opinion, had that body already been established. The Council decided that this particular question should now be submitted for an advisory opinion to a Commission of three international jurists, the Council reserving its further action in the

[3]) Ibidem p. 13/4.
[4]) L.N.O.J., July-August 1920, Number 5, p. 248/9.

case. At the same time, the Council decided to ask for an opinion from the Commission on the question of the present state of the international military agreement concerning the Aaland Islands. The Council decided unanimously, the Representatives of Finland and Sweden agreeing to this, upon the following Resolution: "That a Commission of three international jurists shall be appointed to give to the Council on the following questions an advisory opinion with the least possible delay.

> "1) Whether, within the meaning of paragraph 8 of Article 15 of the Covenant, the case presented by Sweden to the Council with reference to the Aaland Islands deals with a question that should, according to international law, be entirely left to the domestic jurisdiction of Finland.
> 2) The present position with regard to international obligations concerning the demilitarisation of the Aaland Islands."[5])

The following jurists were appointed as members of the Commission: Prof. F. Larnaude, President (Dean of the Faculty of Law of the University of Paris), Prof. A. A. H. Struycken (Netherlands), and Prof. M. Huber (Switzerland).[6]) On September 5, 1920, the Commission rendered its opinion, which may be assimilated to an Advisory Opinion of the Permanent Court of International Justice. The Commission laid down, first, three general principles.

Whereas, on the one hand, Sweden had contended that the Aaland Islands dispute was an international question, and, on the other hand, Finland had argued that it was a domestic question, the Commission, first, stated, that "the legal nature of a question cannot be dependent upon the fact that a member of the League of Nations, which may or may not be a party to the dispute, chooses to submit it to the Council. A question is either of an international nature or belongs to the domestic jurisdiction of a State, according to its intrinsic and special characteristics." [7]) After examination of the whole case, the Commission was of opinion that "from whatever standpoint the question of the Aaland Islands be regarded, it is clear that it oversteps considerably the bounds of a question of pure domestic law." [8])

Secondly, it was held that the recognition of the principle of self-determination of peoples, as upheld by Sweden, but contested by Finland, "in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the law of nations." [9])

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[5]) Declaration by Mr. Balfour on behalf of the Council, loc. cit. p. 249.
[6]) See Survey App. No. VI.
[7]) L.N.O.J., Special Supplement No. 3, 1920, p. 4. See in the same sense, P.C.I.J., Adv. Op. No. 4, February 7, 1923, p. 25.
[8]) Loc. cit. p. 14.
[9]) Loc. cit. p. 5. "The principle recognizing the rights of peoples to determine their political fate may be applied in various ways; the most important of these are, on the one hand the formation of an independent State, and on the other hand

Thirdly, with regard to the question whether the right of disposing of national territory may belong to national groups, as was urged by Sweden in favour of the Aaland Islanders, the Commission observed:

> in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which international law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term "State", but would also endanger the interests of the international community. If this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the national group wishes to be attached, nor by any other State. [10])

The Commission made, however, one reservation:

> It must, however, be observed that all that has been said concerning the attributes of the sovereignty of a State, generally speaking, only applies to a nation which is definitively constituted as a sovereign State and an independent member of the international community, and so long as it continues to possess these characteristics. From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law. This amounts to a statement that if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.
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> This transition from a de facto situation to a normal situation de iure cannot be considered as one confined entirely within the domestic jurisdiction of a State. It tends to lead to readjustments between the members of the international community and to alterations in their territorial and legal

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the right of choice between two existing States. This principle, however, must be brought into line with that of the protection of minorities; both have a common object—to assure to some national group the maintenance and free development of its social, ethnical or religious characteristics. ... The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace.", loc. cit. p. 6.

[10]) Loc. cit. p. 5.

> status; consequently, this transition interests the community of States very deeply both from political and legal standpoints.[11])

A dispute between two States concerning the right of disposing of national territory is therefore a *domestic* question, if it concerns a State which is definitively constituted; that dispute becomes an *international* question, if it concerns a State which is not definitively constituted. That may be the case of a State in formation. In that respect, the Commission argued that the formation of a State is a matter of fact and lies outside the domain of law:

> the extent and nature of the political changes, which take place as facts and outside the domain of law, are necessarily limited by the results actually produced. These results alone form the basis of the new legal entity which is about to be formed, and it is they which will determine its essential characteristics. If one part of a State actually separates itself from that State, the separation is necessarily limited in its effect to the population of the territory which has taken part in the act of separation. Though the political projects leading to the separation may be manifested in different ways in different parts of the territory, nevertheless these projects all have an equal value as a foundation for the new legal order, though of course only in so far as those who adopt them are able to maintain them. It may even be said that if a separation occurs from a political organism which is more or less autonomous, and which is itself de facto in process of political transformation, this organism cannot at the very moment when it transforms itself outside the domain of positive law invoke the principles of this law in order to force upon a national group a political status which the latter refuses to accept.[12])

Considering now the formation of Finland, the Commission was of opinion that the internal situation of that country was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist:

> In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil

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[11]) Loc. cit. p. 5/6. "La formation des Etats nouveaux entraîne donc toujours une révolution dans le droit des gens.", Th. Funck-Brentano et Albert Sorel: Précis du droit des gens, 2nd ed., Paris 1887, p.204/5.

[12]) Loc. cit. p. 9/10. "La naissance d'un nouvel Etat est toujours un fait historique qui ne dépend pas de certaines conditions juridiques. Les règles de droit ne sauraient régir l'évolution historique qui produit des transformations dans la vie des peuples. C'est là une thèse qui paraît être généralement adoptée par la doctrine du droit public. S'il en est ainsi, on ne peut pas annuler ou invalider l'existence d'un nouvel Etat pour cette raison qu'il doit cette existence à un acte ou à un événement contraire au droit.", Rafaël Erich: La naissance et la reconnaissance des Etats, Recueil des Cours 13 (1926) - 442. In a comment on the Aaland Islands question, Prof. Fernand de Visscher said that the formation of a State is a historic process beginning on a territory whereupon a political organization either existed or did not exist, R.D.I.L.C. 48 (1921) - 52/4.

> war between the inhabitants and between the Red and White Finnish troops. [13])

Since Finland lacked some elements essential to the existence of a State, and, therefore, it may be added, could not exercise her territorial, personal, and governing jurisdiction in an effective manner,[14]) the Commission concluded that it was difficult to say "at what exact date [15]) the Finnish Republic, in the legal sense of the term, actually became a definitively constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troups." [16]) Even the fact that Finland had been recognized by other States, as the Representative of Finland argued before the Council of the League of Nations, did not suffice, in the eyes of the Commission, to prove that Finland, from that time onwards, had become a sovereign State:

> the experience of the last war shows that the same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times; further, neither were such recognitions given with the same object as in normal times. In many cases they were only recognitions of peoples or nations, sometimes, even, mere recognitions of governments. The precise determination of the territorial status of these States was usually left to the great diplomatic reconstruction of Europe which would follow the conclusion of peace, just as, in some cases, were certain peculiarities of their political constitution and legislation, especially concerning the protection of minorities, which were thus reserved for international settlement. The special nature of some recognitions which were accorded during this disturbed period is also traceable to the way in which certain governments regarded such recognition. [17])

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[13]) Loc. cit. p. 8.

[14]) "... un nouvel Etat désirant être reconnu doit être à même de présenter une organisation stable bien que, peut-être, encore peu développée. Il doit prouver qu'il a vraiment obtenu ce degré de stabilité intérieure qui lui a permis d'établir des autorités reconnues par le peuple lui-même.", Erich loc. cit. p. 476; "Un Etat est formé lorsqu'un ordre de contrainte relativement souverain, c'est-à-dire dépendant exclusivement du droit des gens, se crée et devient efficace sur un territoire donné et vis-à-vis d'une population donnée." "C'est cette règle de l'effectivité que consacre le droit international qui définit aussi la naissance d'un Etat nouveau.", Hans Kelsen: La naissance de l'Etat et la formation de sa nationalité, R.D.I. 1929-2-614, 615.

[15]) "Il n'est pas toujours facile de déterminer avec certitude et exactitude la date de la naissance d'un nouvel Etat. Nous avons déjà fait observer que la proclamation d'indépendance ne constitue pas un critère infaillible pour la fixation de cette date puisque pareille proclamation peut avoir lieu bien qu'une ou quelques-unes des conditions de la reconnaissance fassent encore défaut.", Erich loc. cit. p. 499; "Le processus ainsi caractérisé de l'activité d'un nouvel ordre, de l'efficacité du pouvoir étatique, ne peut naturellement se produire en un seul instant. ... Dès lors, on ne pourra indiquer le moment de la naissance d'un Etat nouveau comme de celle d'un homme, par un jour déterminé.", Kelsen loc. cit. p. 616.

[16]) Loc. cit. p. 9.

[17]) Loc. cit. p. 8. "Recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or by definite international settlements relating

As to the first question, submitted by the Council of the League of Nations, the Commission concluded:

> The dispute between Sweden and Finland does not refer to a definitive established political situation, depending exclusively upon the territorial sovereignty of a State.
>
> On the contrary, the dispute arose from a de facto situation caused by the political transformation of the Aaland Islands, which transformation was caused by and originated in the separatist movement among the inhabitants, who quoted the principle of national self-determination, and certain military events which accompanied and followed the separation of Finland from the Russian Empire at a time when Finland had not yet acquired the character of a definitively constituted State.
>
> It follows from the above that the dispute does not refer to a question which is left by international law to the domestic jurisdiction of Finland.
>
> The Council of the League of Nations, therefore, is competent, under § 4 of article 15, to make any recommendations which it deems just and proper in the case. [18])

It appears from this case that governing jurisdiction did not yet belong to Finland, though recognized by other States, owing to a lack of a 'stable political organization'. Had Finland been definitively constituted as a sovereign State and as an independent member of the international community, she might have prohibited, in the exercise of her governing jurisdiction, the Aaland plebiscite, that being a matter which 'is left by international law to the domestic jurisdiction' of Finland.[19])

2. The second instance concerns the formation of Poland after the war of 1914-1918. On May 25, 1926, the Permanent Court of International Justice pronounced judgment No. 7 concerning certain German interests in Polish Upper Silesia. In this dispute, both Parties, namely Germany and Poland, discussed before the Court, it may be incidentally, the question whether Poland was entitled to rely on the Armistice Convention of November 11, 1918, and the Protocol of Spa of July 16, 1920 (signed by the Allied Powers with respect to the appointment of sums paid by Germany on account of reparations), in relation to the Polish Law of July 14, 1920. It may be interesting, for the subject under consideration, to quote some statements made on both sides, and the decision of the Court on that point. The Agent for Germany, Dr. E. Kaufmann, Professor at Bonn, observed in the German Case:

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to its territory.", Report of the Commission, loc. cit. p. 18. See the reply of Sweden before the Council, p. 204.

[18]) Loc. cit. p. 14.

[19]) On June 24, 1921, the Council of the League of Nations adopted a Resolution, in conformity with an opinion given by a Commission of Rapporteurs (Baron Beyens (Belgium), Mr. Calonder (Switzerland), and Mr. Ferraris (Italy)), holding that "the sovereignty of the Aaland Islands is recognized to belong to Finland" (L.N.O.J., Special Supplement No. 5, July 1921, p. 24/6). The Report of this Commission, however, was based on political, not on juridical considerations (Cf. L.N.O.J. September 1921 p. 691, et seq.).

Le Gouvernement allemand estime que le Gouvernement polonais n'est pas autorisé à se prévaloir des Conventions d'armistice, et que, du reste, les stipulations invoquées par le Gouvernement polonais n'ont pas l'importance que lui attribue ce Gouvernement.

a) La Convention d'armistice du 11 novembre 1918 a été conclue „entre le maréchal Foch, commandant des armées alliées, stipulant au nom des Puissances alliées et associées, assisté de l'amiral Weymiss", et quatre délégués de l'Allemagne, „munis de pouvoirs réguliers et agissant avec l'agrément du chancelier allemand". Un Etat polonais n'existait pas encore à cette date. ... La Pologne ne saurait être envisagée comme Partie contractante de la Convention d'armistice mettant fin à cette guerre. ... Du reste, si même on voulait affirmer que la Pologne aurait déjà existé comme Etat à l'époque du 11 novembre 1918, elle n'était reconnue par les Parties contractantes de l'Armistice ni comme tel ni comme l'une des Puissances alliées ou associées mentionnées comme contractantes dans le préambule. La de facto-réception de la Pologne dans le cercle des Puissances alliées et associées n'est intervenue qu'au 18 janvier 1919 lors de l'ouverture de la Conférence de la Paix. La de jure-reconnaissance de la Pologne a été prononcée par les Etats-Unis le 30 janvier 1919, par la France le 24 février 1919, par la Grande-Bretagne le 25 février 1919, par l'Italie le 27 février 1919, par la Belgique le 6 mars 1919. La reconnaissance comme Puissance alliée et associée par l'Allemagne, l'autre Partie contractante de la Convention d'armistice, n'est intervenue que lors de l'examen des pleins pouvoirs des Puissances alliées et associées, à savoir le 18 mai 1919.

b) En ce qui concerne le "Protocole de clôture des travaux de la Sous-Commission financière de la Commission internationale d'armistice à Spa", en date du 1er décembre 1918, il a été dressé entre des délégués "dûment accrédités par leurs Gouvernements respectifs, français, belge et allemand"; le Protocole a été fait en "triple" exemplaire et signé pour l'Allemagne, la France et la Belgique. Ce protocole ne constitue que la fixation de certains principes, établis par une Sous-Commission, pour "assurer ... l'exécution des alinéas 3 et suivants de l'article 19 de la Convention d'armistice". L'Allemagne ne s'est engagée auxdits principes d'exécution que vis-à-vis de la France et de la Belgique. Il paraît évident que, même si la Pologne avait existé à cette date en tant qu'Etat et en tant que Puissance alliée, elle ne serait pas en mesure d'invoquer le Protocole en question.

c) Du reste, qu'elle que soit la situation internationale de la Pologne à l'époque et à l'égard de l'armistice, les droits découlant de l'article XIX ne peuvent être réclamés que par l'ensemble des Puissances alliées et associées, Partie contractante de la Convention d'armistice, et représenté, conformément à l'article XXXIV, alinéa 3, par la Commission d'armistice internationale permanente. ...

d) Enfin, ce n'est que pendant la durée de l'armistice, c'est-à-dire jusqu'à l'entrée en vigueur du Traité de paix, que les clauses d'armistice pouvaient être invoquées. Dans tous les cas où le Traité de Versailles a voulu consacrer que ladite Convention resterait en vigueur à côté du Traité de paix même, il le dit expressément. ...

e) Mais, abstraction faite de ce que la Pologne n'est pas légitimée à invoquer les clauses d'armistice, et notamment le Protocole de Spa, le contenu des dispositions invoquées ne justifie nullement les conclusions qu'elle en dégage. ...[20])

The Agent for Poland, M. Mrozowski, President of the Supreme Court of Warsaw, urged in the Polish Counter-Case:

Nous en venons donc à la conclusion que les assertions contenues dans le Mémoire allemand, selon lesquelles la Pologne n'a pas le droit de se prévaloir de la Convention d'armistice, puisqu'elle n'était pas partie à la conclusion de cet acte, ne sont pas bien fondées et notamment:

1) au moment de la conclusion de l'armistice du 11 novembre 1918, l'armée

[20]) P.C.I.J., Series C., No.11, vol. I, p. 370/3.

polonaise était reconnue comme Partie belligérante, comme armée autonome alliée, sous un commandement polonais; le commandement de cette armée possédait donc la capacité d'accomplir des actes juridiques dans le domaine du droit de guerre, par conséquent, de conclure des conventions de guerre et, en particulier, des conventions d'armistice; de désigner des plénipotentiaires chargés d'agir en son nom dans cette même sphère juridique.

2) Le caractère juridique de la Pologne comme Puissance alliée et associée pendant les Conventions additionnelles à l'armistice du 16 janvier 1919 et du 16 février 1919 est hors de doute, étant donné son admission en ce caractère aux Conférences de la Paix du 15 janvier 1919.

3) Pendant la durée de l'armistice, c'est-à-dire jusqu'à l'entrée en vigueur du Traité de Paix, soit jusqu'au 10 janvier 1920, la Pologne s'est considérée et a été considérée par les Puissances alliées et associées comme liée par les stipulations de la Convention d'armistice, ce que prouve l'attitude de la Pologne à l'égard de l'évacuation par l'armée allemande des territoires de l'Est, ainsi qu'à l'égard des territoires polonais appartenant au Reich allemand.

4) Cette situation internationale de la Pologne, en qualité de Puissance alliée et associée, bénéficiant des clauses de l'armistice et s'y conformant, a été reconnue par le Reich allemand, d'abord par l'attitude des organes de cet Etat (facta concludentia), puis confirmée le 18 mai 1919 par l'échange des pleins pouvoirs des délégations à la Conférence de la Paix.

5) Enfin, il faut ajouter que, selon la doctrine bien reconnue en droit des gens, la reconnaissance d'un nouvel Etat possède le caractère purement déclaratif, et, par conséquent, entraîne l'effet rétroactif (voir Fauchille: Traité, I,1, p. 307: "Ne créant pas une situation nouvelle, il s'ensuit qu'elle (la reconnaissance) produit ses effets rétroactivement; ceux-ci remontent au jour où la formation de l'Etat a été un fait accompli"). Vu que l'émancipation de fait de la Pologne s'effectua dans les premiers jours du mois de novembre 1918, quelle que soit la situation internationale de la Pologne à l'époque et à l'égard de l'armistice, dès sa reconnaissance en qualité d'Etat indépendant et de Puissance alliée et associée, elle devait bénéficier de toutes les stipulations faites par l'Allemagne en faveur de ces Puissances, et, entre autres, de la Convention d'armistice. [21])

In the German Reply it was said:

L'assertion du Contre-Mémoire que l'Etat polonais existait déjà à la date du 11 novembre 1918 comme Puissance alliée et associée est complètement erronée et nullement prouvée par les faits et documents invoqués en sa faveur. Des faits décisifs n'ont pas été allégués, à la lumière desquels les documents cités — du reste prouvant déjà comme tels le contraire de la thèse polonaise — sont plutôt des appuis importants pour la thèse allemande. Dans la présente Réplique, il est impossible d'exposer amplement et dans tous les détails la naissance de l'Etat polonais. Ce sujet est traité dans un livre de M. Roth, qui se trouve à l'impression et qui sera transmis aussitôt que possible à la Cour. Pour le moment, il suffit d'alléguer ce qui suit.

a) Il faut nettement distinguer entre la naissance d'une puissance publique territoriale à Varsovie et dans la Pologne du Congrès, et, d'autre part, le Comité national à Paris et l'armée polonaise en France, qui, tous deux, n'exerçaient aucun pouvoir territorial, condition essentielle d'un Etat, même d'un Etat se trouvant dans le stade de naissance.

b) En ce qui concerne les événements dans la Pologne du Congrès, il est connu et notoire que l'assertion du Contre-Mémoire, portant que, dans ces régions, un pouvoir public s'était formé avant le 11 novembre 1918, est inexacte. Ce n'est qu'après cette date et à la suite de l'armistice que l'occupation allemande s'écroula et qu'un pouvoir territorial commença à s'établir après le départ du Gouvernement général (cf. Roth, Die politische Entwicklung Kongresspolens, pp. 130 et suiv.; Entstehung des polnischen Staates, pp. 29 et suiv.).

. . . . . .

g) Enfin et avant tout, le Contre-Mémoire passe sous silence le fait

[21]) Ibidem vol. II, p. 622/3.

décisif que le Gouvernement de M. Pilsudski à Varsovie avait été reconnu par le Reich et que ce dernier y avait envoyé, déjà le 21 novembre, un ministre plénipotentiaire dont les lettres accréditives soulignaient "que le Gouvernement allemand est animé du désir de vouer tous les soins pour établir entre le Reich et l'Etat polonais des relations pacifiques et amicales". Et le Ministre des Affaires étrangères répondit: "Je suis enchanté de pouvoir saluer en vous le premier représentant de la République allemande, avec laquelle le Gouvernement polonais désire garder les relations les plus cordiales, comme avec son voisin occidental le plus proche." (Roth, Entstehung des polnischen Staates, p. 32). Le Gouvernement de Varsovie n'était donc, même vers la fin du mois de novembre, en aucun sens celui d'une Puissance alliée ou associée en état de guerre avec l'Allemagne, qui aurait pu conclure un armistice avec elle.

.....

Dans ces conditions, il n'y a aucun doute sur l'appréciation de la thèse que la "Pologne" était le 11 novembre 1918 Puissance alliée et associée, reconnue comme telle par les Alliés et par l'Allemagne. Il paraît superflu de se répandre sur la situation juridique de l'armée polonaise "autonome" (non souveraine!); cette situation, du reste, ressort nettement des documents produits dans les annexes 1 à 4, ainsi que de documents non produits qui sont analysés dans l'ouvrage de Roth (cf. pp. 45 à 49). Du reste, quoi qu'il en soit de la reconnaissance par les Alliés de cette armée "autonome", elle n'a jamais été reconnue comme belligérante par l'Allemagne, le seul fait qui importerait. Voir, pour la reconnaissance comme nation et la reconnaissance d'une armée comme co-belligérante, Fauchille, Traité vol. I, p. 313.[22])

In the Polish Rejoinder it was observed:

Nous trouvons à la page 19 de la Réplique, sous le paragraphe 2, le passage suivent: „L'assertion du Contre-Mémoire, que l'Etat polonais existait déjà à la date du 11 novembre 1918 comme Puissance alliée et associée..." Cette constatation de la Réplique est aussi peu précise que possible, ce qui ressort suffisamment de la phrase suivante, se trouvant à la page 9 du Contre-Mémoire:

> „En signant l'armistice du 11 novembre 1918, le maréchal Foch... agissait aussi au nom de la Pologne qui, il est vrai, ne possédait pas encore à ce moment, dans toute leur plénitude, les droits d'une Puissance alliée et associée, mais possédait le caractère de partie belligérante, ce qui était suffisant pour avoir la capacité d'être sujet de la Convention d'armistice."

La Réplique modifie de la façon tout à fait arbitraire le véritable sens de l'argument du Contre-Mémoire (page 12, sous le paragraphe 1, du Contre Mémoire). Le Gouvernement polonais voulait souligner sous ce point, que la naissance de l'Etat polonais de jure était précédée par certaines étapes préparatoires, dont la première était celle de la reconnaissance par les Alliés de l'armée polonaise en France comme une armée alliée, autonome et belligérante, en d'autres termes, comme partie belligérante.

La reconnaissance comme partie belligérante confère en même temps la capacité d'exercer une activité légale en ce qui concerne le droit de guerre, impliquant la capacité de conclure des conventions se référant à la guerre, comme des conventions de suspension d'armes, d'armistice, etc. Le fait même n'est pas du tout isolé dans le droit des gens moderne, comme ceci était relevé dans le Contre-Mémoire. Le droit des gens moderne admet de plus en plus cette idée que ce ne sont pas seulement les Etats qui sont des sujets du droit international, mais aussi des unions d'Etats, des institutions internationales et même des particuliers.

Les nouveaux arguments à l'appui de cette thèse peuvent être trouvés dans les recherches des savants français qui, au cours de la guerre mondiale, menée au nom de l'émancipation des peuples opprimés, ont créé la théorie d'après laquelle la Nation précède dans le droit des gens la naissance de l'État.

[22]) Ibidem p. 817/8, 820.

C'est M. A. Geouffre de Lapradelle, professeur distingué à l'Université de Paris, qui est le véritable auteur de cette théorie. D'après cette théorie, en droit international la Nation préexiste à l'Etat. Elle en est la substructure. Du moment que les populations affirment leur volonté d'avoir une patrie commune et qu'elles soient ou non distinctes de race et de langue, elles constituent, avant même de former un Etat, une Nation qui peut être reconnue et investie de tous les attributs de la souveraineté.

La reconnaissance de l'armée polonaise, ainsi que de l'armée tchécoslovaque, comme partie belligérante, résultait d'une volonté consciente de la part des Alliés d'accorder aux nations polonaise et tchécoslovaque les droits politiques dans le domaine du droit des gens.

. . . . . .

Contrairement aux affirmations de la Réplique (p. 22), nous considérons que l'invitation adressée à la Pologne de se faire représenter à la Conférence interalliée des préliminaires de paix, tenue à Paris au mois de janvier 1919, équivaut à la reconnaissance de la Pologne comme "une Puissance alliée et associée", car ce n'est que comme telle qu'elle a pu prendre part à ladite Conférence. Cette invitation de la Pologne à la Conférence interalliée constitue une des formes de sa reconnaissance internationale en qualité d'Etat souverain. On sait que la reconnaissance d'un Etat possède le caractère purement déclaratif, et, par conséquent, entraine l'effet rétroactif, remontant jusqu'au moment où un Etat est né de fait. Dans le Contre-Mémoire, ainsi que dans la présente Duplique, nous avons démontré que l'Etat polonais est entré en exercice de souveraineté territoriale dans l'ancien Royaume du Congrès et dans la Galicie occidentale déjà à la fin du mois d'octobre et dans les premiers jours du mois de novembre 1918; c'est à ce moment-là que remonte la reconnaissance de la Pologne: 1) comme Etat souverain, 2) comme "une Puissance alliée et associée".

C'est ainsi que tous les actes juridiques qui se rapportent à l'ensemble des Puissances alliées et associées, se rapportent à partir de ce moment-là aussi à l'Etat polonais, et parmi ces actes, entre autres, aussi la Convention d'armistice du 11 novembre 1918. Cette considération seule rend sans objet les objections, soulevées par la Réplique, qui prétendent que la Pologne ne pouvait pas être partie même à la Convention supplémentaire du 16 février 1919, étant donné que cette dernière Convention était conclue par des délégués plénipotentiaires, "munis des pouvoirs en vertu desquels a été signée la Convention d'armistice du 11 novembre 1918". Cette expression ne peut signifier rien d'autre que ce que les délégués, qui ont signé la Convention, ont agi au nom de l'ensemble des Puissances alliées et associées, cette formule englobant aussi la Pologne, vu toute l'argumentation présentée plus haut.[23])

In his first Speech, Prof. Kaufmann said:

A la date du 11 novembre 1918, la Pologne n'existait ni comme Etat, ni comme Puissance alliée et associée. Pour ces deux motifs, elle n'est, en aucun sens, Partie contractante de la Convention d'armistice, rôle qui suppose tant son existence comme Etat indépendant que l'état de guerre existant entre elle et l'Allemagne, donc deux choses: l'existence d'un fait reconnu et une qualification juridique déterminée.

L'armée polonaise n'était ni l'armée d'un Etat, ni une armée belligérante, en ce sens qu'elle aurait pu conclure une convention d'armistice. L'armée polonaise n'était qu'une partie autonome de l'armée française; cette situation juridique a toujours été fortement soulignée dès sa création.

. . . . . .

En ce qui concerne le Comité national polonais à Paris, il n'était qu'une organisation officielle destinée à recueillir et à corroborer certains groupes polonais, à propager dans les pays alliés et associés l'idée d'un futur Etat polonais, ami des Puissances alliées et associées.

. . . . . .

L'Etat polonais est donc né de l'émancipation croissante du pouvoir des Puissances occupantes par le Conseil de Régence, institué sous réserve de

[23]) Ibidem p. 944/5, 950.

leurs pouvoirs d'occupation par les Puissances centrales, ainsi que du transfert de ces pouvoirs en voie de formation à M. Pilsudski, par ledit Conseil, le 14 novembre 1918.

.....

La reconnaissance par l'Allemagne de la Pologne comme Puissance alliée et associée ne s'est opérée que le 18 mai 1919, lors de l'examen des pleins pouvoirs des délégués à la Conférence de la Paix.

.....

En ce qui concerne la nature juridique des reconnaissances des comités nationaux et des armées nationales, j'ai l'honneur de me référer en ce qui concerne leur appréciation à Blocicewski, passage cité dans la lettre de Roth, pages 164-165; Anzilotti Corso, pages 70 et 101, et article du Dr. Mantio Udina sur l'extinction de l'Empire austro-hongrois, dans le Foro delle nove Provincie, vol. 4, fascicules 4 à 7, ainsi qu'à la Consultation juridique concernant l'affaire des Iles d'Aaland, donnée par MM. Larnaude, Struycken et Max Huber.

La Duplique cherche à écarter ces faits incontestables en alléguant que la reconnaissance internationale d'Etat n'a qu'une portée déclarative et que par conséquent elle aurait produit des effets rétroactifs en ce sens que, en raison de la reconnaissance de la Pologne par les Etats alliés vers la mi-janvier 1919, elle serait devenue a posteriori co-contractante de l'armistice. Cette construction paraît inadmissible. Il est vrai que certains auteurs soutiennent la portée purement déclarative des reconnaissances d'Etat; mais, quoi qu'il en soit, cette théorie affirme uniquement et tout au plus que le fait de la naissance d'un Etat, comme tel, date de l'événement qui est reconnu ultérieurement; mais il est impossible de soutenir que, par la reconnaissance, l'Etat dont l'existence est reconnue plus tard entre, a posteriori, dans des rapports juridiques, créés non seulement avant sa reconnaissance mais même avant sa naissance, et que l'Etat devient ainsi a posteriori titulaire de droits internationaux acquis par d'autres antérieurement auxdits faits. Ainsi, la Pologne n'est en aucune façon devenue a posteriori co-contractante de l'armistice.

.....

Enfin, notons que la Pologne n'a été reconnue — même après la conclusion de la paix — par aucune Puissance alliée comme Etat qui s'était trouvé en état de guerre avec l'Allemagne, lorsqu'il s'agissait du point de savoir si certaines dispositions du Traité de Versailles qui se rapportent à l'état de belligérance qui a existé entre l'Allemagne et les autres signataires du Traité de Versailles s'appliquent ou non à la Pologne. Si la thèse polonaise relative à l'effet rétroactif était exacte, des conséquences diverses se seraient imposées. Les Puissances alliées elles-mêmes et la Commission des Réparations ont constaté à maintes reprises que la Pologne n'était pas partie belligérante et que de ce fait elle n'a aucun droit aux réparations de guerre visées à la Partie VIII du Traité de Versailles. Cette constatation est d'autant plus importante que la Tchécoslovaquie a été reconnue comme telle par les Alliés et par la Commission des Réparations dès le 28 octobre 1918, — sans que je veuille entrer en discussion sur le point de savoir si cette reconnaissance de la Tchécoslovaquie à partir de cette date est exacte ou non. [24])

In his first Speech, M. Mrozowski said:

L'objection que la Pologne n'était pas un Etat allié au moment de la signature de l'armistice est abondamment traitée et refutée par le Contre-Mémoire et la Duplique. Je m'y réfère. Les difficultés rencontrées par la Pologne avant d'être reconnue comme Etat indépendant sont très intéressantes au point de vue de la formation de l'Etat, mais elles n'ont aucune importance pour la solution de la question qui nous occupe.

Le fait qu'une armée polonaise était parmi les autres armées alliées sous le commandement suprême du maréchal Foch, et que l'armistice conclu par celui-ci était appliqué à l'armée polonaise, est incontestable. L'armistice,

[24]) Ibidem vol. I, p. 126, 127, 129, 130/1, 132. See also p. 227.

qui a duré plus d'une année, a engendré plusieurs actes et protocoles, dont le Protocole du 16 février 1919 mentionne particulièrement le territoire polonais. Toutes ces conventions, actes et protocoles, constituent un tout obligatoire pour toutes les armées et toutes les Puissances alliées.

La Pologne, après avoir subi une occupation de guerre par les Puissances centrales dont elle s'est libérée avec les armistices, a été reconnue comme Etat indépendant et a pris part, en qualité de Puissance alliée et associée, à la Conférence de la Paix et au Traité de Versailles. Ces faits démontrent que la Pologne peut, d'une part, se prévaloir des dispositions de l'armistice et que, d'autre part, elle doit les appliquer.[25])

On this divergence of opinion, the Court decided as follows:

The Parties have argued at length in regard to this very question whether Poland is entitled to adduce the above-mentioned agreements, a question the importance of which is obvious, having regard more especially to the first clause of the Protocol of Spa, and which must be decided.

In this connection it should in the first place be noted that, in the Court's opinion, Poland is not a contracting Party either to the Armistice Convention or to the Protocol of Spa. At the time of the conclusion of those two Conventions, Poland was not recognized as a belligerent by Germany; it is, however, only on the basis of such recognition that an armistice could have been concluded between those two Powers. The principal Allied Powers had, it is true, recognized Polish armed forces as an autonomous, allied and co-belligerent (or belligerent) army. This army was placed under the supreme political authority of the Polish National Committee with headquarters in Paris. Without considering the question what was at this moment the political importance on this Committee, the Court observes that these facts cannot be relied on as against Germany, which had no share in the transaction. On the other hand, Poland, as it was becoming consituted in the Russian territories occupied by the Central Powers, was undoubtedly not at war with Germany; it is precisely the absence of a state of war between Poland and Germany which explains the fact that Poland, which appears in the Treaty of Versailles as an Allied Power, is not entitled to benefit by article 232 of the Treaty, which bestows on these Powers a right to reparation. This fact is confirmed, inter alia, by the agreement between the Allied Powers, signed at Spa on July 16th, 1920, the provisions of which agreement regarding the apportionment of sums paid by Germany on account of reparations are declared to be inapplicable to Poland. The agreement provides that rights to reparation of prejudice sustained by Poland, in her capacity as an integral part of the former Russian Empire, remain reserved in accordance with article 116 of the Treaty of Versailles. It must be noted that this reservation does not imply that Poland in fact possesses rights of such a nature under the article in question; the article only reserves the rights of Russia and does not mention States formed on part of former Russian territory.

In the Court's opinion, there has been no subsequent tacit adherence or accession on the part of Poland to the Armistice Convention or Protocol of Spa. It has been argued that this was brought about as a result of the declarations of de iure recognition of Poland made by the Allied Powers and by Germany during the peace negociations or in the Peace Treaty; but the instruments in question make no provision for a right on the part of other States to adhere to them. It is, however, just as imposible to presume the existence of such a right — at all events in the case of an instrument of the nature of the Armistice Convention — as to presume that the provisions of these instruments can ipso facto be extended to apply to third States. A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States. In these circumstances, its is not necessary to consider the question whether Poland, assuming that she could be regarded as a Party to the agreements in question, could rely on them, in spite of the fact that she is not entitled

[25]) Ibidem p. 176.

> to reparations under article 232 of the Treaty of Versailles; nor—supposing that this possibility existed—the question whether she could assert her rights by her own individual action and without having recourse to the intervention of interallied organizations. [26])

On this point, the English judge, Lord Finlay, filed a separate opinion holding that

> it was common knowledge that if the Allies succeeded, the independence of Poland would be one of the terms of peace. All Parties to the Armistice must have contracted with this present to their minds, and it must have been intended that Poland, whose army had been fighting on the side of the Allies as an autonomous army, should be bound by the terms of the Armistice and, when she came into existence as a recognized State, have the benefit of them. This would be a ius quaesitum, a right acquired for the new State as soon as it should come into existence. In business it is a matter of every-day practice through the machinery of trusts or otherwise to make contracts on behalf of companies not yet incorporated which take effect upon incorporation, and in my view the Allied States made the Armistice on behalf of Poland, which was about to become a State, as well as on their own behalf. [27])

The very question, which the Court had to decide, was whether Poland was entitled to rely on the Armistice Convention and the Protocol of Spa; in other words, whether governing jurisdiction belonged to Poland, by virtue of which jurisdiction she might conclude treaties, the 'right to conclude treaties' being, as has been seen in § 7 with reference to the dissenting opinion of Mr. Séfériadès, one of the attributes of sovereignty, "without which no sovereignty can be described as such." [28]) This right, then, belongs to sovereign States. Germany had contended that Poland, at the time of the signing of the Armistice Convention, did not exist as a sovereign State, whereas Poland had stated the contrary. The Court noted in the first place, that, in her opinion, Poland was *not* a contracting Party either to the Armistice Convention or to the Protocol of Spa. This negative statement, however, is irrelevant to the question under consideration, namely whether Poland was *entitled* to adduce the above-mentioned agreements. The Court added that "at the time of the conclusion of those two Conventions, Poland was not recognized as a belligerent by Germany; it is, however, only on the basis of such recognition that an armistice could have been concluded between those two Powers." But the Court said nothing about the question whether "Poland" really *existed,* at that moment, as a sovereign State, which *could* be recognized as a belligerent Power by Germany. Then the Court held that „the principal Allied Powers had, it is true, recognized Polish armed forces as an autonomous, allied and co-belligerent

[26]) P.C.I.J. Series A No. 7, p. 27/9.
[27]) Ibidem p. 84.
[28]) P. 172.

(or belligerent) army. This army was placed under the supreme political authority of the Polish National Committee with headquarters in Paris". The Court did not state, however, whether that army could be regarded as a public service of Poland, nor whether, as had been urged by the Agent for Poland before the Court, the commander of that army could conclude an armistice convention, nor did the Court consider the question "what was at this moment the political importance of this Committee." On the other hand, the Court said that Poland, "as it was becoming constituted in the Russian territories occupied by the Central Powers, was undoubtedly *not* at war with Germany." This statement is, again, a negative one, although it is declared here that Poland was a State in formation. It may be asked, in that respect, first, at what moment was Poland definitively constituted as a sovereign State and as an independent member of the international community; secondly, if Poland, at the time of the signing of the Armistice Convention, was not yet definitively constituted as an independent State, could she, as such, be at war with Germany? Finally, the Court stated, negatively again, that "there has been *no* subsequent tacit adherence or accession on the part of Poland to the Armistice Convention or Protocol of Spa." It may be asked: could a State in formation adhere to such instruments? The conclusion appears to be that this decision cannot be regarded as a very important one for the question of formation of States.[29])

3. It is interesting to compare this case with the next one, the merits of which touch the same question. On March 30, 1925, the Deutsche Continental Gas-Gesellschaft made an application to the German-Polish Mixed Arbitral Tribunal. Prof. E. Kaufmann, in the name of the Applicant, asked the Tribunal to order the Polish State:

> à payer à la demanderesse le prix équitable, prévu aux articles 92, al. 4, 297 b, al. 2, pour la liquidation achevée de son droit à la possession et à la jouissance de ses biens, prix qui est chiffré préalablement à 14.175.000 Mk. — or, avec intérêts à calculer dès l'écoulement de chaque trimestre, ou qui serait à évaluer par des experts neutres, à nommer par le Tribunal; Dire pour droit que, la liquidation et la séquestration de biens allemands étant illicite dans la partie ci-devant russe de la Pologne, la demanderesse a droit à la réparation prévue à l'art. 305, et que cette réparation comprend la restauration des droits lésés et l'indemnisation pécuniaire pour tous les

[29]) Cf. Erich loc. cit. p. 500/2. Whereas the Court declared, in general, that "a treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States.", Lord Finlay was of opinion that, in the case of the Armistice Convention, there was a ***pactum in favorem tertii***, which did not yet exist, in analogy to private law. It may be doubted, however, whether an institution of private law may be transmitted, as such, into international law (cf. the Conclusions, *infra*). This question should not be confused with that of the retroactive effect of recognition, which question will be dealt with briefly later.

dommages subis en outre; et réserver à la demanderesse d'évaluer ultérieurement le montant desdits dommages. [30])

In his particulars he asked the Tribunal:

1) Se déclarer compétent en vertu des articles 305, 92 al. 4, et 297 b.
2) Dire et juger que la liquidation des biens de la société demanderesse effectuée par le décret du Comité de liquidation en date du 14 décembre 1923 n'étant pas conforme aux articles 297 b [31]) et 92 al. 4, [32]) la demanderesse a droit à la réparation prévue à l'art. 305 [33]) et qui sera déterminée par le Tribunal Arbitral Mixte. [34])

On August 1, 1929, the Tribunal, composed of Paul Lachenal, President, Viktor Bruns, Arbitrator for Germany, who filed a dissenting opinion, and Jan Namitkiewicz, Arbitrator for Poland, gave its decision. The Tribunal examined three principal arguments put forward by the Company: one relative to article 92, al. 4, and two regarding article 297. As to article 92, the Applicant, said the Tribunal,

voit dans cet article l'expression de la volonté du Traité de limiter aux territoires cédés par l'Allemagne l'exercice du droit de liquidation concédé à la Pologne. D'après elle, l'article 92 al. 4 ... représente une lex specialis se suffisant à elle-même et contenant tout ce qui concerne le droit de liquidation au profit de la Pologne. [35])

The Tribunal rejected this argument, holding that article 94 "ne se suffit pas. ... Le droit mentionné à l'article 92 al. 4, c'est un droit de liquidation "par application de l'article 297"." [36])

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[30]) Recueil T.A.M., vol. 9, p. 338.

[31]) "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty. The liquidations shall be carried out in accordance with the laws of the Allied or Associated States concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State. German nationals who acquire ipso facto the nationality of an Allied or Associated Power in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.", A.J.I.L. Off. Doc. 1919-306.

[32]) "In all the German territory transferred in accordance with the present Treaty and recognized as forming definitively part of Poland, the property, rights and interests of German nationals shall not be liquidated under Article 297 by the Polish Government except in accordance with the following provisions: ..." (p. 201).

[33]) "Whenever a competent court has given or gives a decision in a case covered by Sections III, IV, V or VII, and such decision is inconsistent with the provisions of such Sections, the party who is prejudiced by the decision shall be entitled to obtain redress which shall be fixed by the Mixed Arbitral Tribunal. At the request of the national of an Allied or Associated Power, the redress may, whenever possible, be effected by the Mixed Arbitral Tribunal directing the replacement of the parties in the position occupied by them before the judgment was given by the German Court." (p. 328).

[34]) T.A.M. vol. 9, p. 339.

[35]) Loc. cit. p. 340.

[36]) Loc. cit. p. 341.

As to article 297, the Applicant, first, argued that Poland was not an enemy of Germany:

> La requérante fait observer en premier lieu qu'aux termes de la phrase par laquelle il débute, l'article 297 a trait à la question des biens, droits et intérêts privés "en pays ennemi". La Pologne, ajoute-t-elle, n'a jamais été, comme telle, en guerre avec l'Allemagne. Elle n'a jamais été, à l'égard des biens allemands, un "pays enemi" auquel l'article 297 eût pu être applicable et c'est précisément la raison pour laquelle il était nécessaire de stipuler spécialement à l'article 92 le droit de liquidation du gouvernement polonais dans les territoires cédés par l'Allemagne. [37])

The Tribunal stated that

> le Traité de Versailles est expressément un Traité de Paix entre l'Allemagne et les autres Puissances signataires, parmi lesquelles figure la Pologne. Dans le préambule, le Traité déclare, sans en excepter la Pologne, que les Puissances alliées et associées "sont également désireuses que la guerre, dans laquelle elles ont été successivement entraînées, directement ou indirectement, et qui a son origine dans la déclaration de guerre adressée le 28 juillet 1914 par l'Autriche-Hongrie à la Serbie, dans les déclarations de guerre adressées par l'Allemagne le ler août 1914 à la Russie et le 3 août 1914 à la France, et dans l'invasion de la Belgique, fasse place à une Paix solide, juste et durable." Le préambule ajoute "qu'a dater de la mise en vigueur du présent Traité, l'état de guerre prendra fin. Dès ce moment et sous réserve des dispositions du présent Traité, les relations officielles des Puissances alliées et associées avec l'Allemagne et l'un ou l'autre des Etats allemands seront reprises." Il est donc certain, au point de vue de la conception "Etats ennemies" ou "biens ennemies", que les Puissances signataires du Traité de Versailles ont rangé la Pologne sans aucune réserve quelconque parmi les Puissances qui étaient ennemies de l'Allemagne et qui mettent fin à l'état de guerre en signant avec elle un Traité de Paix. Il n'est donc pas possible de s'attacher aux seuls termes "en pays ennemi" figurant au début de l'article 297 pour admettre, par une argumentation théoriquement possible, mais manifestement contraire à la manière dont les Puissances signataires envisageaient la situation, que l'article 297 n'est pas applicable à la Pologne. Le contraire résulte d'emblée du fait incontestable que certaines dispositions de l'article 297 sont notoirement applicables à la Pologne, ainsi entre autres les lettres d et e dudit article. [38])

In his dissenting opinion, Prof. Bruns declared:

> Le terme "ennemi" a un sens technique en droit des gens. Sont qualifiés d'ennemis les Etats se trouvant en état de guerre. Vu que la Pologne n'a jamais été en état de guerre avec l'Allemagne, ni son territoire, ni ses propres ressortissants, ni leurs biens ne peuvent être qualifiés d'ennemis par rapport à l'Allemagne. Le fait a été constaté d'une manière irréfutée et irréfutable par la Cour permanente de justice internationale de La Haye dans son arrêt no. 7, p. 28 (...). On ne saurait opposer à l'argumentation que je viens d'exposer le préambule au Traité de Versailles. Quand celui-ci parle d'un traité de paix et du fait que les Puissances Alliées et Associées, parmi lesquelles se range la Pologne, ont le désir que la guerre, dans laquelle elles ont été successivement entraînées, directement ou indirectement, fasse place à la paix, le Traité ne dit pas et ne peut pas dire que toutes les Puissances Alliées et Associées se soient trouvées. jusqu'à la conclusion du Traité de Versailles, en état de guerre avec l'Allemagne. On voit figurer parmi les Puissances signataires la Bolivie, l'Equateur, le Pérou, l'Uruguay, qui, bien qu'ayant rompu les relations diplomatiques existantes, ne se sont jamais trouvé en état de guerre avec l'Allemagne. ...Le Traité de Versailles en

[37]) Loc. cit. p. 342.
[38]) Loc. cit. p. 342.

tant que Traité de Paix met fin à l'état de guerre uniquement entre l'Allemagne et les Etats qui jusqu'à la date de sa conclusion s'étaient réellement trouvés en guerre avec elle. Du reste, il est évident que le passage du préambule, également cité par l'arrêt et portant qu'à partir de la mise en vigueur du Traité les relations officielles des Puissances Alliées et Associées avec l'Allemagne seraient reprises, ne peut pas s'appliquer aux relations de l'Allemagne avec la Pologne; cela résulte du fait que le gouvernement polonais, dès novembre 1918, avait reçu un ministre plénipotentiaire allemand à Varsovie. [39])

The Applicant's second argument was that Poland, on January 10, 1920, the date of the coming into force of the Treaty of Versailles, did not have a delimited territory. The Tribunal held:

De l'avis de la requérante, le droit de liquidation ainsi consacré ne peut s'appliquer à la Pologne (en dehors de l'article 92 al. 4), par la raison qu'au 10 janvier 1920 cet Etat ne possédait juridiquement aucun territoire en dehors de celui (régi par ledit article 92 al. 4) que, de par le Traité même, elle recevait de l'Allemagne. La raison, c'est qu'au 10 janvier 1920 le territoire soi-disant polonais, sur lequel la mesure incriminée avait été prise (territoire autre que celui que cédait l'Allemagne), était encore russe juridiquement, que la Russie ne l'avait pas cédé à la Pologne et qu'à supposer même une cession de principe déjà acquise, les frontières de ce territoire n'étaient pas encore déterminées, puisqu'elles ne l'ont été qu'ultérieurement.

... L'argumentation de la requérante se ramène donc à la thèse très précise qu'en rédigeant l'article 297 b, les Puissances signataires considéraient la Pologne comme un Etat n'ayant, le 10 janvier 1920, aucun autre territoire que celui que, ce jour même, elle acquérait de l'Allemagne et auquel elles consacraient spécialement l'Article 92 al. 4.

... Il est admis, entre autres, par des auteurs allemands, tels que le Dr. Paul Roth, dans son étude sur la naissance de l'Etat polonais, qu'en novembre 1918 et en tous cas fin 1918, l'Etat polonais existait de facto. Il disposait d'un territoire comprenant, dans ses grandes lignes, la Pologne du Congrès et la Galicie occidentale. Il possédait un gouvernement indépendant, dont la puissance publique s'affirmait lentement, mais toujours davantage. A la même époque, novembre 1918, l'Allemagne accréditait à Varsovie un ministre en mission extraordinaire, qui remettait au chef de l'Etat polonais ses lettres de créance. Aux yeux de l'auteur allemand, cité plus haut, cette mission, quelle qu'en ait été la brièveté, représentait, de la part de l'Allemagne, la reconnaissance de iure du nouvel Etat polonais. Il paraît inutile de s'arrêter ici à la distinction, parfois très subtile, entre reconnaissance de facto et reconnaissance de iure. Il suffira de se référer encore aux constatations qui vont suivre, en rappelant que, selon l'opinion admise à juste titre par la grande majorité des auteurs en droit international, la reconnaissance d'un Etat est, non pas constitutive, mais simplement déclarative. L'Etat existe de par lui-même et la reconnaissance n'est que la constatation de cette existence, reconnue par les Etats de qui elle émane. Au cours des premiers mois de l'année 1919, le nouvel Etat polonais a été officiellement reconnu par nombre de Puissances. Dès le 15 janvier 1919, la Pologne était admise aux négociations de la Conférence de la Paix. Les pleins pouvoirs de sa délégation ont été, sans réserve, reconnus, admis et acceptés comme réguliers et valables par la délégation qui négociait au nom de l'Allemagne et représentait cet Etat. Enfin, le Traité de paix a été signé le 28 juin 1919 par l'Allemagne et la Pologne. Il paraît incontestable que la signature d'un Traité de ce genre, sans réserves quelconques, implique la reconnaissance complète de l'Etat avec lequel ce Traité est signé et que la reconnaissance expresse figurant à l'article 87 n'est que la confirmation de celle qui résultait implicitement des faits qui viennent d'être rappelés. Dès lors, c'est déjà avant le 10 janvier 1920 que l'existence de l'Etat polonais était officiellement reconnue, entre autres de l'Allemagne. De même, les principales Puissances

[39]) Z. f. a. ö. R. u. V. 2 (1931) - 2-28/9.

alliées et associées signaient avec la Pologne, à la date du Traité de Paix, le Traité dit des minorités, traité qui, par son importance, impliquait forcément la reconnaissance officielle et complète de l'Etat avec lequel il était conclu. Or, un Etat n'existe qu'à la condition de posséder un territoire, une collectivité d'hommes habitant ce territoire, une puissance publique s'exerçant sur cette collectivité et ce territoire. Ces conditions sont reconnues indispensables et l'on ne peut concevoir un Etat sans elles. Il est donc impossible d'admettre que les Puissances qui, en 1919, reconnaissaient l'existence de l'Etat polonais et signaient avec lui des traités de l'importance de ceux qui sont ici mentionnés, aient considéré que cet Etat polonais n'avait pas de territoire (puisqu'aussi bien les territoires visés aux articles 87 et suivants ne pouvaient devenir polonais que le jour de l'entrée en vigueur du Traité). La reconnaissance de la Pologne n'était pas un fait futur; elle résultait de la signature même du Traité et des négociations qui l'avaient précédée. Dès lors, il est d'emblée infiniment improbable qu'au moment où les Puissances signataires, la Pologne comprise, arrêtaient les termes de l'article 297, elles considéraient que cette Pologne n'avait pas de territoire et que, par conséquent, l'article 297 ne la concernait pas, tout au moins en ce qui concerne la lettre b. Il paraît certain que, si tel avait vraiment été leur avis, elles n'eussent pas manqué de l'exprimer, au lieu de rédiger dans ses termes tout généraux, embrassant toutes les Puissances alliées et associées, l'article 297, dont, on l'a vu plus haut, certaines dispositions sont notoirement applicables à la Pologne.

... La conclusion qui s'impose ainsi peut-elle être écartée par le fait qu'aussi longtemps que, par un Traité international la Russie n'avait pas formellement et juridiquement renoncé aux territoires polonais qui lui avaient appartenu et qui de iure lui appartenaient encore, il n'était pas licite en droit international de les reconnaître comme appartenant à la Pologne? Ici se pose la question de savoir si, en droit international, des Puissances peuvent valablement reconnaître un nouvel Etat avant même que celui dont son territoire faisait partie précédemment ait cédé ce territoire, ait reconnu lui-même le nouvel Etat. Les précédents consacrent l'affirmative, tout au moins à partir du moment où le nouvel Etat s'est affirmé suffisamment pour que les Puissances tierces puissent constater en lui l'existence des trois éléments mentionnés plus haut. Il suffit de rappeler que, dès 1831, les Grandes Puissances ont reconnu l'Etat belge, alors que ce n'est qu'en 1839 que ce dernier a été reconnu par les Pays-Bas et que les Pays-Bas ont cédé juridiquement le territoire formant l'Etat belge. En ce qui concerne la Pologne, le doute est d'autant moins possible que, dès 1918, et par deux manifestations de volontés officielles et successives, le pouvoir représentant l'Etat russe avait déclaré que la Russie proclamait le droit des peuples de disposer d'eux-mêmes, souscrivait à l'indépendance de l'Etat polonais et lui reconnaissait tous les territoires dont la population est composée en majorité de Polonais.

... La requérante a exprimé l'avis que l'Etat polonais ne pouvait pas être considéré comme ayant eu de iure le territoire désigné comme Pologne du Congrès aussi longtemps que les frontières de ce territoire n'avaient pas été fixées. Mais, quelle que soit l'importance de la délimitation des frontières, on ne saurait aller jusqu'à soutenir qu'aussi longtemps que cette délimitation n'a pas été arrêtée juridiquement, l'Etat en cause ne peut être considéré comme ayant eu un territoire quelconque. Ici, également, la pratique du droit international et les précédents historiques démontrent le contraire. Pour qu'un Etat existe et puisse être reconnu comme tel avec un territoire sans lequel il ne pourrait ni exister, ni être reconnu, il suffit que ce territoire ait une consistance suffisamment certaine (alors même que les frontières n'en seraient pas encore exactement délimitées), et que, sur ce territoire, il exerce en réalité la puissance publique nationale de façon indépendante.

Nombreux sont les exemples de cas dans lesquels des Etats ont existé sans contestation, ont été reconnus et se sont reconnus mutuellement à une époque où la frontière entre eux n'était pas encore exactement fixée.

... Pour revenir à l'exemple de la Belgique cité plus haut, il est incontestable qu'en droit c'est par le Traité de 1839 que les frontières du côté

des Pays-Bas en ont été juridiquement fixées. Bien plus, à vouloir prendre à lettre ce traité de 1839, qui stipulait que "le territoire belge se composera des provinces du Brabant méridional, Liège, Namur", etc. etc., telles qu'elles ont fait partie du Royaume-Uni des Pays-Bas, il semblerait que ce n'est qu'a partir dudit traité que la Belgique à réellement possédé ces territoires. Il n'est pas besoin de dire que tel n'a pas été l'avis des Puissances signataires du traité de 1831 et qu'elles n'ont pas songé un instant à considérer la Belgique comme un Etat sans territoire jusqu'en 1839. Preuve en soit des traités conclus dans cette période avec la Belgique et qui devaient être appliqués sur territoire belge, ainsi, entre autres, la Convention de la Prusse avec la Belgique sur l'extradition réciproque des malfaiteurs, le 28 juillet 1836, ainsi la convention de navigation entre la Sardaigne et la Belgique, du 10 octobre 1838.

...En résumé, il ne paraît pas possible d'admettre qu'en rédigeant et signant l'article 297, les Hautes Parties Contractantes aient eu l'idée que la Pologne du Congrès et, en particulier, Varsovie, la capitale, n'étaient pas territoire polonais et que, par conséquent, l'article 297, dans les termes si généraux où il est conçu, ne s'appliquait pas à la Pologne dite du "Congrès". [40])

Prof. Bruns made the following observations:

Le mot „territoire" est un terme juridique de droit international qui signifie la partie de la superficie de la terre qui est reconnue par les autres membres de la communauté internationale comme appartenant à un Etat déterminé. Le statut territorial de l'Etat repose sur des actes individuels passés avec les autres Etats, ayant pour but d'établir son droit de souveraineté. Quand dans un texte international se trouve ce terme de territoire, il est à présumer qu'il vise non la partie de la surface de la terre dominée en fait par un gouvernement, mais un territoire dans le sens légal, c'est-à-dire, la partie de la terre qui est légalement reconnue comme appartenant à un Etat. Cette présomption s'impose dans l'interprétation de l'article 297, et cela d'autant plus que cet article cite à côté du territoire des Puissances Alliées et Associées, les territoires "qui leur ont été cédés en vertu du présent traité." Il faut en conclure que le terme de territoire employé à l'article 297 ne vise que le territoire reconnu comme appartenant de iure à ces Etats; il résulte même du contexte qu'il ne peut s'agir que des territoires d'avant-guerre des Etats Alliés et Associés et qu'on n'a tenu compte ni d'une modification légale intervenue ou à intervenir en vertu d'autres traités, ni des situations de fait créées par une occupation militaire ou par une domination de fait.

...La Pologne ne possédant pas de territoire d'avant-guerre, l'article 297 b lui est resté inapplicable et il n'y avait aucune raison pour l'exclure expressément, comme le veut l'arrêt, des avantages que cette disposition a conférés aux Puissances Alliées et Associées.

...Il est inutile de dire que la reconnaissance de la Pologne par les Puissances Alliées et Associées n'était pas à même de lui conférer le droit de souveraineté sur une partie du territoire russe. Les Puissances Alliées et Associées ne pouvaient pas disposer de ce territoire: „nemo plus iuris transferre potest quam ipse habet". Il n'a jamais été contesté qu'un Etat ne peut disposer du territoire d'un autre Etat. Cette règle a été reconnue par la décision de la Cour permanente d'arbitrage rendue le 23 janvier 1925,[41]) entre les Etats-Unis et l'Etat Néerlandais dans l'affaire de l'Ile de Palmas, dans laquelle l'Arbitre unique, M. Huber, dit: „It is evident that Spain could not transfer more rights than she herself possessed..."

L'arrêt du Tribunal adopte l'opinion que la reconnaissance d'un Etat est un acte simplement déclaratif par ce qu'un Etat existe de par lui-même. Il me semble que sur ce point le Tribunal suit la consultation de M. Politis.

[40]) T.A.M. vol. 9, p. 343/7.

[41]) The award was made, not on January 23, 1925, date of the conclusion of the special agreement, but on April 4, 1928; see Survey No. 366.

Mais cette opinion est erronnée. La naissance d'un Etat est un simple fait. La reconnaissance d'un Etat, par contre, est un acte juridique du droit international public, qui crée une nouvelle règle de droit. Cette règle présuppose un état de fait. La reconnaissance d'un nouvel Etat signifie que les Etats qui le reconnaissent lui confèrent la qualité de personne juridique; ils l'admettent comme membre dans la communauté internationale. Une règle de droit ne peut créer ni une personne physique, ni un Etat; elle ne peut que conférer à la personne ou à l'organisation qui existe une qualité juridique déterminée. La simple reconnaissance ne suffit pas pour créer cette nouvelle personne, ce nouveau membre de la communauté internationale, surtout quand il s'agit d'un organisme qui s'est créé sur le territoire d'un autre Etat. Cette nouvelle personne juridique n'existe pas ipso facto; il faut la créer par de nouvelles règles de droit en délimitant son territoire, en fixant la nationalité de ses membres. Dans le cas de la Pologne, il fallait attribuer la qualité de ressortissants polonais aux personnes qui jusque-là possédaient la nationalité allemande, autrichienne ou russe, et délimiter le territoire polonais en enlevant ce territoire à ses anciens souverains. Pour créer ces nouvelles règles de droit international, il fallait abolir ou modifier l'ancien statut des Etats allemands, autrichien et russe. Il va sans dire que dans un tel cas la simple reconnaissance exprimée dans une Note diplomatique ou contenue dans une invitation à une conférence internationale ne suffit point. Par cette simple démarche, on ne reconnaît que la qualité d'un gouvernement de fait pour conclure les contrats qui contiendront la constitution de nouvel Etat comme personne juridique, en délimitant son territoire et en fixant la nationalité de ses habitants.

La pratique des Etats confirme ce qui vient d'être exposé. Je n'ai qu'à citer le rapport de la Commission des Juristes dans l'affaire des Iles d'Aland qui, après avoir énuméré les reconnaissances des différents gouvernements, constate que ces faits à eux seuls ne sauraient suffire pour faire admettre que dès ce moment la Finlande ait réalisé toutes les conditions d'un Etat souverain, c'est-à-dire d'une personne juridique.

En reconnaissant le gouvernement qui exerce la souveraineté de fait, on lui attribue la qualité de représenter un organisme, auquel les anciens Etats vont accorder la qualité de personne juridique. La constitution non du nouvel Etat, mais de sa personnalité juridique s'effectuera par des traités internationaux.

...Alors, malgré la reconnaissance des Principales Puissances Allées et Associées comme Etat, la Pologne n'exerce sa souveraineté sur les parties de l'ancien Empire russe qu'en fait.

...Si l'on voulait suivre la théorie adoptée par le Tribunal, ce serait par l'occupation militaire qu'on acquerrait, en droit international, le droit de souveraineté sur un territoire et sur ses habitants. Cette thèse n'a pas besoin d'être refutée; je me borne à citer la décision du Conseil de la Société des Nations du 23 février 1921 qui dit que la Galicie est hors des frontières de la Pologne et que la Pologne n'est de facto que l'occupante militaire de la Galicie dont les Puissances de l'Entente sont les souverains (art. 91 du Traité de Saint-Germain).

...On voit que, dans la pratique internationale, on se garde bien de confondre la souveraineté de fait avec le droit de souveraineté.

...La reconnaissance dont parle l'arrêt ne peut donc, en droit international public, conférer à la Pologne le droit de souveraineté ni sur le territoire, ni sur les habitants. La Pologne n'acquiert le droit de souveraineté sur un territoire que par cession de l'Etat dont ce territoire faisait précédemment partie. Cette acquisition ne peut être opposée à des tierces puissances qu'après la reconnaissance de cet acte de transfert de souveraineté. Or, si le Traité de Versailles parle sans réserve du territoire d'un Etat, il ne vise que le territoire d'avant guerre de cet Etat.

...Personne ne conteste que les autres membres de la communauté internationale puissent reconnaître un nouvel Etat et son territoire avant même que celui dont le territoire en question faisait partie jusqu'alors, ait cédé ce territoire. La reconnaissance prononcée dans ces conditions est

valable, mais elle ne transfert pas le droit de souveraineté sur ce territoire. Une telle reconnaissance signifie que l'Etat reconnaissant veut considérer l'Etat reconnu comme souverain de droit des territoires qu'il détient en fait. Mais cette reconnaissance ne produit aucun effet ni sur l'Etat qui continue de conserver la souveraineté de droit sur le territoire en question, ni pour les rapports des autres Etats avec l'Etat reconnu. Toutefois, cette reconnaissance constitue une violation des obligations entre l'Etat démembré et les Etats qui reconnaissent l'indépendance du nouvel Etat, violation d'autant plus grave qu'elle porte atteinte aux règles fondamentales du respect de l'indépendance et de l'intégrité des Etats. Mais la seule question qui se pose est de savoir s'il est admis d'interpréter un traité international de telle manière qu'on impute aux Etats signataires une violation de droit international. A cette question, la réponse ne peut être que négative; il suffit de renvoyer aux considérations de la décision citée de la Cour permanente d'arbitrage du 23 janvier 1925, où il est dit expressément: "It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers."

...Les Puissances Alliées et Associées pouvaient reconnaître le territoire anciennement russe comme appartenant en droit à la Pologne, mais elles auraient par là violé les droits de la Russie, et même si cela avait été l'intention des Puissances Alliées, cette intention n'a pas trouvé son expression dans le texte du Traité de Versailles. C'est pourquoi le Tribunal eut dû l'interpréter en suivant la règle du droit commun international. Le Tribunal ne l'a pas fait. En interprétant l'article 297 du Traité de Versailles, le Tribunal s'est basé sur la simple intention d'une des Parties pour résoudre la contradiction manifeste, qui existe entre les articles 297 et 92. En étendant le droit de liquidation de la Pologne aux biens situés dans le territoire anciennement russe, il étend également l'engagement de l'Allemagne de tolérer une expropriation défendue par le droit commun.[42])

From this decision, three general points should be deduced:

1. Recognition of a new State bears a declarative, not a constitutive character. A State exists "de par lui-même", and recognition is but the statement of that existence. According to Prof. Bruns, this opinion is erroneous. He draws a distinction between "souveraineté de fait" and "droit de souveraineté". If such a distinction were not drawn, he says, a "droit de souveraineté" would be acquired in a case of military occupation, but that is inconceivable. Indeed, military occupation does not give rise to a "droit de souveraineté", but his argument is otiose since it is generally recognized that the occupied State continues to be vested with its state jurisdictions, which are, however, *exercised* by the occupying State.[43]) Moreover, the formation of States in time of peace has nothing to do with military occupation in time of war.

2. A new State can be recognized by other States even before cession of that part of its new territory, which belonged to another State. The Tribunal seems to draw a distinction between the formation of a new State (with subsequent recognition by other States), and cession of the new territory, formation as such being independent of cession. Prof. Bruns affirms that States may recognize a new State

[42]) Z. f. a. ö. R. u. V. 2 (1931) - 2-30/40.
[43]) See § 9.

even before cession, as mentioned, but, he says, this recognition does not transfer a "droit de souveraineté" (the majority of the Tribunal did no more draw that conclusion); he seems to be of opinion that a new State is definitively constituted after cession of the new territory, although he says that "la naissance d'un Etat est un simple fait", but "la reconnaissance d'un Etat, par contre, est un acte juridique du droit international public . . . et signifie que les Etats qui le reconnaissent lui confèrent la qualité de personne juridique." He did not refute the quoted precedent of Belgium in 1831, 1839.
3. A State can be said to be definitively constituted, even if its new loundaries are not yet definitively fixed, provided that it exercises its state jurisdictions effectively. Prof. Bruns did not refute that statement.[44])

As to the formation of the Polish State, in particular, it is interesting to compare this decision with the incidental considerations of the Permanent Court of International Justice above mentioned. The Tribunal held that Poland, being a contracting Party to the Treaty of Versailles, could be regarded, as such, as an "enemy of Germany"; the Court held, however, that Poland, at the time of the conclusion of the Armistice Convention and the Protocol of Spa, to which Conventions she was not a contracting Party, was not recognized as a belligerent by Germany. The Tribunal held that Poland was entitled to invoke the Treaty of Versailles (article 297b); the Court was of opinion that Poland was "not entitled to reparations under article 232 of the Treaty of Versailles." Since Poland was a Party to that Treaty, on what ground could the Court hold that, on the one hand, "a treaty only creates law as between the States which are parties to it", and, on the other hand, that "it is precisely the absence of a state of war between Poland and Germany which explains the fact that Poland, which appears in the Treaty of Versailles as an Allied Power" (and as a contracting Party), "is not entitled to benefit by article 232 of the Treaty"?

It appears from these decisions that the formation of a State is a historic process beginning on a territory, on which, in wholly or in part, a political organization of a given State may or may not have been in existence,[45]) a process of events lying outside the domain of positive law. The effective functioning of a stable political organization seems to be the most important factor for the definitive constitution of a new State; the exact date, however, on which a new

[44]) Cf. H. Herz: Le problème de la naissance de l'Etat et la décision du T.A.M. germano-polonais du 1er août 1929, R.D.I.L.C. 63 (1936) - 564/90, who upheldsalso the decision of the majority of the Tribunal.
[45]) Cf. Fernand de Visscher: La question des Iles d'Aland, R.D.I.L.C. 48 (1921)-52.

State can be said to be vested with governing jurisdiction is rather uncertain: it depends on the degree of the effective functioning of public services. Hence, a State cannot be created by treaty alone. Hans Kelsen wrote:

> La règle de l'efficacité—règle de droit international—a en outre pour conséquence que la naissance d'un Etat, par le seul fait d'un traité, est impossible. ...Un traité subséquent, par lequel l'ancien Etat cède ce territoire au nouvel Etat, peut reconnaître cet état de droit ou produire d'autres effets juridiques. Mais ce traité de cession n'a nullement pour signification de faire entrer l'Etat nouveau en possession de son territoire, donc de le créer juridiquement. Il peut d'autant moins avoir cette signification qu'un traité conclu avec un Etat qui, juridiquement, n'existe pas encore, est une chose absolument inconcevable. Dans la sphère où les traités internationaux se concluent, seul peut être sujet d'un acte de volonté un Etat de iure et non de facto. Ce dernier n'entre point dans la sphère du droit. A supposer même qu'il existe, son existence est extra juridique et n'implique point la capacité de contracter. Pour pouvoir conclure des traités, il faut être déjà en possession de la personnalité juridique internationale, autrement dit: il faut exister dans la sphère du droit des gens. L'idée d'un traité avec un être qui ne deviendra sujet de droit capable de contracter que par ce traité, être qui n'a pas encore d'existence dans le domaine du droit, est une petitio principii, et de la pire sorte.[46])

And Prof. Fedozzi was of opinion:

> Questa regola (della effettività), che vale a legitimare dal punto di vista internazionale non solo la nascita dello Stato, ma anche la sua estinzione per debellatio e le sue modificazioni territoriali, esclude che la nascita di uno Stato possa derivare dal solo fatto di un trattato: è l'effettività che crea lo Stato, un trattato può costituire gli elementi per il sorgere dello Stato, ma lo Stato non sorge se non quando il suo ordinamento si sia effettivamente realizzato. In qual momento del tempo ciò avvenga dipende dalle circostanze varie secondo ogni Stato.[47])

Similarly, a State cannot be created by recognition alone. In international law, recognition of a new State by other States bears no constitutive character:[48]) "un Etat existe de par lui-même".[49]) When a State in formation has given proof of being capable to assure the coherence between its new territory and population—it may be that they are not yet definitively fixed—by means of an effective political organization, like other States, it may be considered as a definitively constituted State and as a subject of international law, independent of recognition by other States.[50])

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[46]) Loc. cit. p. 618, 619/20.

[47]) Corso di diritto internazionale, Padova 1930, I-109.

[48]) In other sense, see e.g. D. Anzilotti: Cours de droit international, Paris 1929, p. 347.

[49]) "A State, whether recognized or not, protects surrounding States from the anarchic pressures of unorganized humanity.", L. L. Jaffe: Judicial aspects of foreign relations, Harvard University Press, 1933 p. 95.

[50]) "The political existence of a nation is independent of any recognition. Consequently it has the enjoyment of the fundamental rights and it is bound by the fundamental obligations mentioned in the "Declaration of the Rights and Duties of Nations".", article 2 of Draft No. 6 of the American Institute of International Law, A.J.I.L. Off. Doc. Special Number October 1926 p. 310.

No distinction seems justified, in international law, between a "de facto State" ("souveraineté de fait") and a "de iure State" ("droit de souveraineté"). Hans Kelsen wrote:

> La distinction même en de facto et de iure—qu'il s'agisse des Etats ou des gouvernements—n'a pas de sens, du point de vue de la science juridique, parce que, de son point de vue, il ne peut exister que des faits juridiques ou juridiquement relevants. Si, de ce point de vue, on affirme l'existence d'un Etat ou d'un gouvernement, ce ne peut être que l'affimation d'un fait d'ordre juridique: il s'agit donc nécessairement d'un Etat ou d'un gouvernement de iure. ... L'idée d'un Etat de facto est juridiquement inconcevable, et l'opinion très répandue suivant laquelle l'Etat existerait de facto dès qu'il réunit ses trois éléments, mais n'acquerrait d'existence juridique, et avant tout la qualité de sujet du droit international, la personnalité juridique du droit des gens, qu'en vertu de sa reconnaissance par d'autres Etats—cette opinion est inadmissible.[51])

Similarly, Prof. J. L. Brierly said that "si un Etat existe de facto, il existe aussi de iure, en ce qui concerne le droit international." [52])

If recognition does not have a constitutive character, it does not follow, that it has a declarative character.[53]) Recognition of a new State is a unilateral legal act appertaining to the domain of the domestic (constitutional) law of the recognizing State. In international law, recognition does not seem to affect the juridical personality of the new State—for it is possible, that, in an existing State, a part of the population will proclaim itself by force as a new independent State, in which event that entity cannot be regarded as a new subject of international law, so that recognition (being, in such circumstances, rather a matter of intervention with respect to the mother-state) has

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[51]) Loc. cit. p. 617.

[52]) Règles générales du droit de la paix, Recueil des Cours 58 (1936) - 60.

[53]) "La reconnaissance d'un Etat nouveau est l'acte libre par lequel un ou plusieurs Etats constatent l'existence sur un territoire déterminé d'une société humaine politiquement organisée, indépendante de tout autre Etat existant, capable d'observer les prescriptions du droit international et manifestent en conconséquence leur volonté de la considérer comme membre de la communauté internationale. La reconnaissance a un effet déclaratif. L'existence de l'Etat nouveau avec tous les effets juridiques qui s'attachent à cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs Etats.", Resolution of the Institut de Droit international, article 1, Annuaire de l'Institut 1936-2-300; "Si nous admettons cette thèse que la naissance d'un nouvel Etat n'est pas soumise à certaines conditions juridiques, on peut en conclure, dès maintenant, que la reconnaissance internationale, acte essentiellement juridique, ne constitue pas un élément indispensable dans la naissance même d'un Etat. L'Etat prend naissance indépendamment de toute reconnaissance.", R. Erich, loc. cit. p. 442; "Il ne s'en suit pas que la reconnaissance d'un Etat nouveau par les anciens Etats n'ait—comme on l'affirme parfois—qu'une valeur déclarative. Il est fort possible que cette reconnaissance produise des effets juridiques. ... Mais ce qu'on ne saurait lui reconnaître, c'est un rôle constitutif, quant à la formation juridique de l'Etat nouveau, pour fonder son existence juridique, son existence en droit international. ... En vertu du droit des gens, l'existence de l'Etat nouvellement né est, dès avant sa reconnaissance, une existence de iure.", H. Kelsen loc. cit. p. 617. Cf. L. Buza: Die juristische Natur der Anerkennung im Völkerrecht, Z. f. ö. R. 1910 p. 77.

no declarative character at all —, but only the investment and actual display of state-activities.[54]) Recognition,[55]) as well as non-recognition,[56]) has a political rather than a juridical significance.[57]) Non-recognition may reduce the exercise of state jurisdictions with regard to the non-recognizing State, it is, however, not correct to contend that a non-recognized State may not exercise its state jurisdictions. R. Erich wrote, and rightly so:

> Enfin, il y a des auteurs, comme Rivier et Fauchille, qui croient pouvoir caractériser le nature de la reconnaissance en disant qu'un Etat non reconnu a seulement la *joussance* *) de la souveraineté externe; ce n'est qu'après avoir été reconnu qu'il aurait l'*exercice* *) des attributions et fonctions inhérentes à la souveraineté, en tant qu'il s'agit des rapports extérieurs de l'Etat. Or, si l'on admet la jouissance de la souveraineté, il faut aussi admettre la personnalité de l'Etat nouveau. Quant à l'affirmation que

[54]) "Il riconoscimento ...non è atto che riguarda la personalità degli Stati, nel senso vero della parola, ma ha un ben diverso contenuto. ... In fatti, trattandosi di un atto che ha luogo solo nei rapporti di ogni singolo Stato per suo conto esclusivo verso un altro.", S. Romano: Corso di diritto internazionale, Padova 1926 p. 51 (88); "Concludendo il riconoscimento non ha a mio avviso nè valore declaratorio, nè costitutivo, non constata nè crea la personalità internazionale dello Stato. Esso non ha, come invece la dottrina quasi unanime ha pensato, alcun punto di intimo contatto con quest'ultima, la quale deve essere basata su principii completamente diversi. Il riconoscimento è un instituto generalissimo del diritto internazionale, che secondo la definizione di Erich è quell'atto unilaterale con cui uno Stato afferma, accetta o più generalmente si pronuncia in senso affermativo su uno stato di cose, sull'esistenza di un organismo, su uno statuto, su una modificazione che si è compiuta nei rapporti internazionali. Il riconoscimento di uno Stato nuovo non è che un particolare aspetto di questo generale instituto. Anche se esso sia tipico, anzi appunto per questo, non ha caratteri e valore diversi da quelli che sono propri della generale figura del riconoscimento.", P. Fedozzi, loc. cit. p. 107/8.

[55]) As to the retroactive effect of recognition, see e.g.: J. Mervyn Jones: The retroactive effect of the recognition of States and governments, British Yearbook 1935 p. 42/55; article 7 of the quoted Resolution of the Institut de Droit international, loc. cit. p. 302; Lapradelle-P. I-21, 25, II-195, 215/7. In other sense: "That it is not a principle accepted by the best recognized opinions of authors on international law, as is alleged, that the recognition of a new State relates back to a period prior to such recognition.", Chile-U.S.A., arb., C. 7-8-1892, Moore 4-4332, Survey No. 173.

[56]) Cf. P. L. Bushe-Fox: The Court of Chancery and recognition, 1804-1831, British Yearbook 1931 p. 63/75; idem: Unrecognized States, Law cases 1805-1826, British Yearbook 1932 p. 39/48; R. Hall Sharp: Non-recognition as a legal obligation, Liège 1934; F. A. Middlebush: Non-recognition as a sanction of international law, Proceedings of the American Society of international law, 1933 p. 40/64. As to state-practice, cf. *e.g.* the Texas Message of President Jackson, December 21, 1836: "The acknowledgment of a new State as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility, but more especially so when such State has forcibly separated itself from another of which it had formed an integral part, and which still claims dominion over it. A premature recognition under these circumstances, if not looked upon as justifiable cause of war, is always liable to be regarded as a proof of an unfriendly spirit to one of the contending parties."

[57]) "Who is the sovereign, de iure or de facto, of a territory is not a judicial but a political question...", Jones v. United States, U.S.S.C., 137 U.S. 202. See also Moore's Digest vol. I § 27/79. "In truth, recognition practice to-day is so diverse and of such uncertain implication, the structure of the international system itself is of a nature so shifting, that no dogmatic assertion of the exact legal effects of recognition should or could be made.", L. L. Jaffe, loc. cit. p. 122.

*) My italics.

l'Etat serait alors absolument incapable d'exercer des attributions d'un Etat souverain, elle est évidemment trop catégorique. Pareille thèse est contraire à la réalité, ainsi qu'il résulte de ce qui a été exposé ci-dessus.[58])

So it becomes clear that recognition does not involve that the recognized State is, indeed, a new subject of international law (Aaland Islands question), and that recognition can take place before cession of the new territory (M.A.T.).[59])

B. Transformation of States

Transformations of States are determined by transformation in the elements of the State. This Chapter will discuss transformation affecting the Government of a State. Before doing so, it is al important to distinguish clearly between "State", as subject of international law, and "Government", as state-organ for both domestic and international affairs. It was held by the Mixed Commission U. S.A.-Venezuela, under Convention of December 5, 1885, that "there is a well-recognized distinction between a State and a Government or the governing body. The State is a person in law, and when once admitted into the family of States, preserves its identity as an international person, until it is lost by absorption in some other State, or by the continuance of anarchy so prolonged as to render reconstitution impossible or, in a very high degree, improbable. As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, can not alter the relations of the society to the other members of the family of States as long as the State itself retains its personality. The State remains, although the governments may change; and international relations, if they are to have any permanency or stability, can only be established between States, and would

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58) Loc. cit. p. 468. "Et remarquez qu'il n'y a pas de milieu. Ou il (l'Etat nouveau) est membre de la communauté internationale et il a la jouissance et l'exercice des droits et prérogatives comme tel, ou il ne l'est pas et il ne possède aucune aptitude juridique.", R. Le Normand: La reconnaissance internationale et ses diverses applications, Paris 1899, p. 40.

59) As to the formation of the Irish Republic in 1919, Justice Meredith held in a decision of the Free State Court that "the Irish Republic may not have attained to complete independence, it may not have obtained international recognition, it may not have become even a de facto government over all the territory that it claimed as its rightful heritage; but at the very least it had advanced to such a stage of self-realization as made it something more than a mere association for the promotion of a particular political ideal, and it had at all events attained such sovereign authority in its own concerns as enabled it to enter into a treaty with the Power from which it sought to shake itself free, and to assent to a modification of the Constitution which it had adopted.", 1926 Ir. Rep. 531, 574; cf. A.J.I.L. 21 (1927) - 752.

rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis." [60]) In a recent decision of the House of Lords,[61]) the late Lord Atkin confused "State", "Government", and "Sovereignty". It seemed to him "that the recognition of a *government* [62]) as possessing all those attributes in a terrritory while not subordinate to any other government in that territory is to recognize it as *sovereign*,[62]) and for the purposes of international law as a foreign sovereign *State*."; [62]) he thought "that it was established by the Foreign Office letter that the Nationalist Government of Spain at the date of the writ was a foreign sovereign State and could not be impleaded." [63])

In international law, no conflict between States will arise concerning a normally constituted government, since it is generally recognized, as has been observed, that a State is competent to organize its public services as it sees fit to do. However, the functioning of public services in a State, assured by an *abnormally* constituted Government, may have international repercussions. It has occurred that such a State contested the validity of acts done under its abnormally constituted government as regards foreign States (*e.g.* the validity of treaties), or foreigners (*e.g.* the validity of contracts). These matters have been discussed, not only before national judges (either of the claimant State or of the respondent State), but also before international tribunals. From the latter, three important arbitral decisions will be quoted here.

1. France put forward a claim on behalf of Dreyfus Frères et Compagnie against Chile, which contested the validity of acts done under the Pierola government. Under Protocol of July 23, 1892, an Arbitral Tribunal was constituted, composed of the following Swiss: H. Hafner, A. Soldati and H. Lienhard.[64]) From the very extensive award—also on other claims—, which was given on July 5, 1901, the following parts may be quoted:

> Attendu qu'à raison d'une série de difficultés qui avaient retardé pendant plusieurs années la liquidation de leurs comptes, Dreyfus Frères et Compagnie ont proposé au Dictateur Nicolas de Pierola, le 3 avril 1880, de résoudre lui-même les questions litigieuses jusque-là pendantes devant la Cour des Comptes du Pérou; ... que le résultat de la liquidation définitive du 27 novembre 1880 a été consigné dans une convention entre Dreyfus Frères et Compagnie et le gouvernement dictatorial du Pérou, enregistrée le ler décembre 1880 ... laquelle constate que le solde qui résulte en fa-

[60]) Moore 4-3552, Survey No. 142.
[61]) Government of Republic of Spain v. S.S. Arantzazu Mendi and others, February 23, 1939, 55 The Times Law Reports 454, A.J.I.L. 33 (1939) - 583.
[62]) My italics.
[63]) Cf. Herbert W. Briggs: De facto and de iure recognition: the Arantzazu Mendi, A.J.I.L. 33 (1939) - 689/99.
[64]) Survey No. 172.

veur de la maison Dreyfus Frères et Co. au 30 juin de l'année courante s'élève à la somme de 16.908.564 soles 62 centavos, soit £ 3.214.388/11/5.; Que les demandeurs déclarent fonder leur action sur la reconnaissance de dette résultant de cette convention; qu'en ce faisant, ils placent la question sur son véritable terrain, et que tout se réduit à savoir si la convention du 1er décembre 1880 est valable et obligatoire pour le Pérou.

... Att. que le gouvernement du Pérou conteste la validité des actes du gouvernement dictatorial en se fondant en première ligne sur l'article 10 de la Constitution péruvienne de 1860 d'après lequel "sont nuls les actes de ceux qui ont usurpé les fonctions publiques et les emplois confiés sous les conditions prescrites par la Constitution et les lois"; mais que cette disposition n'a pu déployer d'effet qu'autant qu'elle était en vigueur à l'époque de la liquidation de la créance Dreyfus; qu'il n'est pas contesté que le Dictateur Pierola a promulgué, lors de son avènement, le 29 décembre 1879, des "Statuts provisoires" qui suspendaient les effects de la Constitution de 1860; qu'ainsi la question de l'applicabilité de l'article 10 de la Constitution de 1860 se réduit à savoir si la Constitution ancienne doit prévaloir sur la nouvelle; que cette question se confond avec celle de la validité même du régime dictatorial; qu'elle ne peut dès lors être résolue que par un principe supérieur à la loi positive, puisque les révolutions de l'organisme politique auxquelles les pouvoirs publics sont impuissants à résister échappent par leur force propre à l'application de cette loi, établie en vue d'un ordre de choses différent;

Att. que d'après un principe du droit des gens d'abord nié théoriquement dans un intérêt dynastique par la diplomatie des monarchies européennes, appliqué cependant en fait dans une série de cas, aujourd'hui universellement admis, la capacité d'un gouvernement pour représenter l'Etat dans les relations internationales ne dépend à aucun degré de la légitimité de son origine; en sorte que les Etats étrangers ne se refusent plus à la reconnaissance des gouvernements de facto, et que l'usurpateur qui détient en fait le pouvoir avec l'assentiment exprès ou tacite de la nation agit et conclut valablement au nom de l'Etat des traités, que le Gouvernement légitime restauré est tenu de respecter. (... authors)

Que ce principe n'est pas sans doute d'une application immédiate en l'espéce, puisqu'il s'agit de la validité, non d'un acte passé par le Dictateur Pierola avec une puissance étrangère, et sujet aux règles du droit des gens, mais d'un contrat de droit commun conclu avec un particulier étranger qui avait expressément déclaré se soumettre aux lois du Pérou et à la juridiction des tribunaux péruviens; Mais qu'il y a lieu de le considérer comme faisant règle également, au point de vue du droit public interne, pour l'appréciation des rapports contractuels formés entre un Gouvernement de fait et un particulier, à raison de sa conformité avec la notion même de l'Etat, telle que la concoit la communauté européenne à laquelle les nations sud-américaines se rattachent par leurs traditions, leur origine et le caractère de leurs institutions. (... authors).

Att., en effet, que les raisons de décider sont identiques dans les deux hypothèses; qu'en dehors des cas d'anarchie pure, la permanence de l'existence de l'Etat suppose nécessairement la présence d'un pouvoir qui agit en son nom et qui le représente; que cette nécessité est si évidente, qu'elle a été reconnue dès le moyen-âge par les jurisconsultes qui voient dans le souverain la personnification de l'Etat et déduisent de là l'obligation du prince de reconnaître les engagements pris au nom de l'Etat par le prince qui l'a précédé; qu'elle a trouvé son expression dans la maxime du droit français d'après laquelle le roi ne meurt pas; que Grotius l'a proclamée à son tour ('civitates esse immortales') en enseignant que l'obligation des dettes contractées par l'Etat persiste indépendamment de tout changement dans la forme du Gouvernement du pays (Grotius De iure belli ac pacis, lib. II, cap. IX); que les jurisconsultes modernes ont parfois varié sur l'explication du principe en vertu duquel le pouvoir de représenter l'Etat se transmet d'un Gouvernement à un autre, les uns la cherchant dans l'idée d'une prescription qui s'établit au profit de l'usurpateur, d'autres dans la présomption, s'il s'agit d'un prince légitime déchu, d'une renonciation à l'exer-

cice de ses droits en faveur des personnes qui lui ont succédé, d'autres dans l'hypothèse d'une consécration de l'autorité nouvelle par l'effet du consentement exprès ou tacite de la nation; mais que les plus considérables sont unanimes à professer le respect de ses conséquences, telles qu'elles ont été formulées pour la première fois d'une façon méthodique et complète, dans divers ouvrages, par le publiciste H. A. Zachariae, à l'occasion des contestations qui s'étaient élevées en Allemagne après la dissolution du Royaume de Westphalie sur la validité des actes accomplis par le roi Jérôme; qu'ils n'en restreignent pas l'application au cas où le régime nouveau s'est maintenu pendant un laps de temps prolongé, mais considèrent uniquement le point de savoir si ce régime présentait des caractères de stabilité et d'autorité tels qu'on pût envisager ses organes comme détenant en fait le pouvoir vacant par la chute du pouvoir antérieur; qu'ainsi ils font dépendre la validité des actes d'un gouvernement, même transitoire et usurpateur, de conditions identiques à celles auxquelles les puissances étrangères subordonnent la reconnaissance d'un Chef d'Etat qui leur annonce son avènement. (... authors).

Qu'évidemment, cette doctrine n'est d'aucune application aux conventions passées par un chef d'insurgés, "car un chef d'insurgés ne représente et ne lie pas l'Etat" (Rivier); mais qu'elle déploie tous ses effets, d'après la définition la plus généralement admise, relativement aux actes conclus par un gouvernement intermédiaire ou provisoire, qui a fait preuve de vitalité et exercé le pouvoir en fait, d'une façon incontestable, sans se trouver en conflit avec un gouvernement régulier coexistant;

Qu'il n'est pas concevable, en effet, que pendant le temps qu'un nouveau gouvernement subsiste dans des conditions semblables, les affaires intérieures de l'Etat restent en suspens, alors que les actes extérieurs sont, d'après le droit des gens, valablement accomplis; qu'il ne dépend pas plus des particuliers, indigènes ou étrangers, qui sont dans un lien de droit forcé avec le gouvernement nouveau, comme ils l'étaient avec l'ancien, de se soustraire à son autorité, s'il s'agit de rapports de droit public, que de choisir la personne de leur contractant, s'il s'agit de rapports de droits privé avec l'Etat; qu'ainsi le gouvernement qui dispose de tous les moyens d'action légale du souverain avec l'assentiment de la nation manifesté expressément par un plébiscite ou tacitement par le fait qu'elle se soumet au pouvoir nouveau sans protester (Martens § 81), s'impose à la reconnaissance de l'individu comme à celle des gouvernements étrangers; qu'une solution qui dénierait, sous prétexte d'illégitimité, leur effet légal à des contrats passés avec un gouvernement de fait à un moment où ce gouvernement étail le seul organe reconnu de la nation, impliquerait la négation même de l'idée de l'Etat.

Att. que les Représentants du Pérou invoquent dans leur premier Mémoire, l'autorité de Calvo (t. I p. 100) et de Klüber (t. I no. 259), d'après lesquels les actes du gouvernement intermédiaire seraient nuls sauf le cas où ils ont été "conformes aux préceptes de la Constitution et de l'ancienne Administration"; mais que la distinction proposée par ces deux jurisconsultes entre les actes conformes et les actes non conformes à l'ancienne Constitution, au point de vue de leur validité, ne se justifie pas; qu'elle est rejetée ou expressément ou implicitement par tous les auteurs susvisés; qu'en effet la Constitution de l'Etat n'est, au sens le plus général du mot, que le mode suivant lequel l'Etat est organisé ou, d'après une autre définition, l'ensemble des règles écrites ou non-écrites qui déterminent les attributions des pouvoirs politiques et les rapports de ceux qui gouvernent avec ceux qui sont gouvernés; qu'il est clair que ces attributions et ces rapports sont susceptibles de se modifier, et qu'en cas de substitution d'un Gouvernement à un autre par la voie révolutionnaire, ils devront être le plus souvent modifiés pour être mis en harmonie avec les circonstances et les besoins nouveaux; que le même principe qui consacre, dans les conditions plus haut exprimées, l'institution du gouvernement nouveau, autorise ce gouvernement à déterminer le mode d'exercice du pouvoir dont il est investi.

Que Klüber et Calvo admettent eux-mêmes une exception à la règle

qu'ils formulent dans le cas où l'acte non conforme à la Constitution ancienne était "d'une nécessité et d'une utilité démontrées".

.....

Att. que l'autorité de Bluntschli, également invoquée par le Gouvernement du Pérou, loin d'infirmer ce qui a été dit sur l'effet des actes d'un gouvernement intermédiaire qui a fait preuve de vitalité et exercé le pouvoir d'une façon incontestable, consacre une solution identique dans la proposition ci-après du Droit International Codifié, no. 45, rapportée par le Pérou lui-même: "Lorsque le gouvernement intermédiaire n'est pas arrivé à une existence réelle, et que par suite on ne peut accorder à ses mesures la valeur d'actes d'Etat, alors seulement le gouvernement restauré peut les passer sous silence"; Que les précédents cités par le Pérou dans ses Mémoires ne sont pas plus décisifs; que dans le cas de Manin, à Venise, de Kossuth, en Hongrie, et de Miramon, au Mexique (créance Jecker), et plus récemment de la commune de Paris en 1870-71, tout comme dans le cas de Kosciusko, et des Républiques de Rome et de Baden en 1849, il s'agissait précisément d'actes accomplis ou d'engagements pris par des Gouvernements d'insurrection encore en lutte avec le gouvernement régulier, ou dont l'autorité n'était reconnue en fait ni par la nation, ni par l'étranger, en sorte que la validité de ces actes et engagements a été contestée par une juste application des principes sus-énoncés; Que la pratique du droit public des Etats européens montre par de nombreux exemples qu'en fait la règle d'après laquelle "les actes du Gouvernement issu de la révolution doivent être considérés comme valides par le Gouvernement restauré" a été appliquée soit en matière d'aliénations du domaine public, soit en matière de constitutions de dettes (cf. Pradier-Fodéré t. I, no. 153/4);

.....

Qu'ainsi les principes du droit public général qui consacrent la validité des actes d'un gouvernement, même usurpateur et révolutionnaire, quand ce gouvernement a fait preuve de vitalité, et exercé en fait le pouvoir à l'exclusion de tout autre gouvernement, trouvent leur entière application en l'espèce; d'où il suit que la reconnaissance de dette souscrite le 1er décembre 1880 par le Gouvernement de Nicolas de Pierola doit être considérée comme valablement consentie par le représentant légal de l'Etat péruvien à l'époque, et comme obligatoire pour le Pérou, les cas d'erreur et de dol réservés.[65])

This decision was confirmed by the Permanent Court of Arbitration at The Hague in an award given on October 11, 1921, between France and Peru, in which it was held that "finally, the High Court of Justice of England (decree of February 23, 1888), the Court of Appeals of Brussels (decree of July 10, 1888), the Franco-Chilean Arbitral Court (award called Award of Lausanne of July 5, 1901), being decrees and an award of which the Arbitral Court adopts the reasons, have deemed that this Government represented and bound the nation." [66])

2. The second instance concerns claims of Great Britain against Costa Rica, which contested the validity of acts done under the Tinoco Government. Under Convention of January 12, 1922, W. H. Taft, then Chief Justice of the United States of America, was appointed as sole arbitrator.[67]) In his award given on October 18, 1923, he examined the following four arguments of Costa Rica:

a. Costa Rica contended that the Tinoco Government was not a de

[65]) Descamps-R. 1901-393/8.
[66]) A.J.I.L. 16 (1922) - 482, Survey No. 317.
[67]) Survey No. 342.

facto or de iure Government according to the rules of international law. This raises an issue of fact, the Arbitrator said, and after having summarized the historical data, he held, *inter alia:*

> Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a Government in the society of nations.
>
> .....
>
> The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law. The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition vel non of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a de facto government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government, according to the standard set by international law. [68])

b. Costa Rica contended that the contracts and obligations of the Tinoco government, set up by Great Britain on behalf of its subjects, were void, and did not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871. The Arbitrator held:

> Tot hold that a government which established itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a de facto government, which conforms to the limitations of the old constitution is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction? [69])

c. Costa Rica contended, further, that Great Britain was estopped by the fact that she had not recognized the Tinoco government during

[68]) A.J.I.L. 18 (1924) - 152, 153/4.
[69]) Loc. cit. p. 154.

its incumbency, from putting forward on behalf of her subjects that Tinoco's was a government which could confer rights binding on its successor. The arbitrator held:

> Here the executive of Great Britain takes the position that the Tinoco Government which it did not recognize, was nevertheless a de facto government that could create rights in British subjects which it now seeks to protect. Of course, as already emphasized, its failure to recognize the de facto government can be used against it as evidence to disprove the character it now attributes to that government, but this does not bar it from changing its position.
>
> .....
>
> The failure to recognize the de facto government did not lead the succeeding government to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the de facto existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith. An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him.
>
> ...There are other estoppels recognized in municipal law than those which rest on equitable considerations. They are based on public policy. It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law. [70])

d. Costa Rica contended, finally, that the subjects of Great Britain, whose claims were in dispute, were, either by contract or by the law of Costa Rica, bound to pursue their remedies before the Courts of Costa Rica and not to seek diplomatic interference on the part of their home government. For the question under consideration here, it may suffice to quote the following observations of the Arbitrator:

> However this may be, these restrictions upon each claimant would seem to be inapplicable to a case like the present where is involved the obligation of a restored government for the acts or contracts of an usurping government. The courts of the restored government are bound to administer the law of the restored government under its constitution and their decisions are necessarily affected by the limitations of that instrument. This may prevent the courts from giving full effect to international law that may be at variance with the municipal law which under the restored constitution the national courts have to administer. It is obvious that the obligations of a restored government for the acts of the usurping de facto government it succeeds cannot, from the international standpoint, be prejudiced by a constitution which, though restored to life, is for purposes of this discussion, exactly as if it were new legislation which was not in force when the obligation arose. Nor is it an answer to this, to suggest that in the case here under consideration, the restored constitution may be construed not to prevent the Costa Rican courts from giving effect to the principles of international law, already stated. It is enough that the restored constitution is the controlling factor in the exercise of any jurisdiction to be exercised by those courts, and that

[70]) Loc. cit. p. 155, 156/7.

other nations may object to a tribunal which must give consideration to legislation enacted after the fact, in reaching its decision. [71])

3. The third instance concerns a claim of the United States on behalf of George W. Hopkins against Mexico, which questioned the validity of acts done under the Huerta Administration.[72]) The case was decided by the General Claims Commission Mexico-U.S.A., under Convention of September 8, 1923,[73]) which Commission, composed of Prof. C. van Vollenhoven, Presiding Commissioner, Edwin B. Parker, Commissioner for the U.S., and G. Fernández MacGregor, Commissioner for Mexico, invoked the two foregoing decisions. The Commission held:

> Before considering the question of the validity or nullity of acts done by or contracts entered into with a government administration of this character it is necessary to state at once the impossibility of treating alike all acts done by such an administration or all transactions entered into by an individual with it. There seems to be a tendency both in jurisprudence and in litterature to do so, to declare that all acts of a given administration, the legality of which is doubtful, must have been either valid or void. Facts and practice, hower, point in a different direction.
>
> The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are government services), the sale of railroad tickets (where railroads are operated by the government), the registration of births, deaths, and marriages, even many rulings by the police and the collection of several types of taxes, go on, and must go on, without being affected by new elections, government crises, dissolutions of parliament, and even state strokes. A resident in Mexico who cleans the government bureaus or pays his school fee to the administration does not and can not take into consideration the regularity or even legality of the present administration and the present congress; his business is not one with personal rulers, not one with a specific administration, but one with the government itself in its unpersonal aspect.
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> The difficulty of distinguishing between the government itself and the administration of that government arises at the point where the voluntary dealings and relations between the individual and the government agencies assume a personal character in support of the particular agencies administering the government for the time being. To this class belong voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like. But the ordinary agencies, departments,

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[71]) Loc. cit. p. 159.

[72]) "It is put forward by the United States of America on behalf of George W. Hopkins, who was born and has ever remained an American national. The claim is based on six postal money orders aggregating 1,013.40 pesos alleged to have been purchased by the claimant from the Mexican Government at its post-offices of Mazatlan, Sinaloa, and Guaymas, Sonora, between April 27, 1914, and June 8, 1914, inclusive. It is alleged that all of these money orders were in due time presented to the Mexican authorities and payment was refused by them. The ground of the motion to dismiss is that these money orders were issued by the Huerta administration, which was illegal, that the acts of such administration did not bind Mexico, and that therefore these orders can not be made the basis of a claim before this Commission against the United Mexican States.", introduction to the opinion of the Commission rendered March 31, 1926.

[73]) Survey No. 354.

and bureaus of the government must continue to function notwithstanding its principal administrative offices may be in the hands of usurpers, and in such a case the sale and delivery to these necessary and legitimate agencies of supplies, merchandise, and the like, to enable the government itself in its unpersonal aspect to function is a very different transaction from one having for its object the support of an individual or group of individuals seeking to maintain themselves in office. The character of each transaction must be judged and determined by the facts of the particular case. A similar distinction arises in the field of international law. There are, on one side, agreements and understandings between one nation and another changing or even subverting its rulers, which are clothed with the character of a free choice, a preference, an approval, and which obviously undertake to bear the risks of such a choice. There are, on the other hand, many transactions to which this character is alien. Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, the treasury, and the foreign office—whatsoever the relation of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favor of any of the contesting groups or parties. International payments (for a postal union, etc.) will be received from such government; delegates to an international conference will often be accepted from such government. Between the two extremes here also there is a large doubtful zone, in which each case must be judged on its merits.

Facts and practice, as related to the Huerta administration in Mexico, illustrate the necessity of a cleavage in determining the validity or nullity of its acts.

In the field of international relations the distinction is apparent. Where pre-existing relations with government agencies continued under such circumstances as not to imply either approval or disapproval of the new administration or recognition of its authority these transactions must be treated as government transactions and binding on it as such rather than transactions had with a particular administration. The routine diplomatic and consular business of the nation continued to be transacted with the agencies assuming to act for the government and which were in control of the foreign office, the treasury, and the embassies, legations, and consulates abroad. Even the United States, though placing its stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept its embassy in Mexico City open for the transaction of routine business, entrusting it to a chargé d'affaires, and maintained its consulates throughout Mexico.

Such relations, so maintained, were entirely unpersonal; they constituted relations with the United Mexican States, with its Government as such, without respect to the status of the individual assuming to act for the Government.

This distinction was recognized in the decisions made by the Carranza administration as to the legality of the acts of the Huerta administration. Such acts as the registration of births, deaths, and marriages were practically undisturbed, because they were performed in the orderly functioning of the Government quite independent of the recognition or non-recognition of the individuals exercising authority. These were unpersonal acts of the Government itself as an abstract entity.

. . . It also appears that when Huerta seized the reins of government which in his capacity as provisional president he undertook to administer he did not change the Government machinery as it had been set up under President Madero, which continued to operate in all its parts in the service of the people, and the great majority of the personnel of all of the bureaus and agencies of the Government remained unchanged and continued to discharge their duties to and in the name of Mexico. At no time did the Government machinery cease to function, notwithstanding the change in the personnel of some members of its executive branch. To the extent that this machinery acted in the discharge of its usual and ordinary functions or to the extent

that it received benefits from transactions of an unusual nature, Mexico is bound.

But it by no means follows that if the contracts of the claimant Hopkins, evidenced by postal money orders, should be treated as contracts with the Huerta administration in its personal aspects, Mexico is not bound by such contracts. The question then arises, How far can an administration which seizes the reins of government by force and is illegal in its inception bind the nation? It will be borne in mind that an administration of illegal origin either operates directly on the central authority by seizing, as Huerta did, the reins of the government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation; or it comes into being through attacking the existing order from without and step by step working toward the center. The acts of an organization of the latter type become binding on the nation as of the date territory comes under its domination and control conditioned upon its ultimate success. The binding force of such acts of the Huerta administration as partook of the personal character as contradistinguished from the Government itself will depend upon real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people of Mexico. As long as the Huerta régime was in fact the master in the administration of the affairs of the Government of Mexico its illegal origin did not defeat the binding force of its executive acts (award of 1901 in the Dreyfus case between France and Chile, Descamps et Renault, Recueil international des traités du XXe siècle, an 1901, 394). Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves. Even while still in possession of the capital and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment it apparently was no longer the real master of the nation.

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From the foregoing the Commission concludes that Hopkins' contracts are unaffected by the legality or illegality of the Huerta administration as such, that they bind the Government of Mexico, that they have not been nullified by any decree issued by Carranza, and that they have not been and can not be nullified by any unilateral act of the Government of Mexico.

Has the American Government forfeited its right to espouse Hopkins' claim because in 1913 it warned its citizens against the „usurper" Huerta and never recognized his administration? The Commission holds that such warnings and such failure to recognize the Huerta administration can not affect the vested rights of an American citizen or act as an estoppel of the right of the American Government to espouse the claim of such citizen before this Commission (see the award of Honorable William H. Taft, Sole Arbitrator between Great Britain and Costa Rica, October 18, 1923, reported in 18 (1924) American Journal of International Law, at pages 155-157). The position assumed by the American Government under the administration of President Wilson was purely political and was binding, even on that administration, only so long as it was not modified. It was an executive policy, which, so long as it remained unmodified and unrevoked, would close to the American Government the avenue of diplomatic interposition and intervention with the Huerta administration. It temporarily, therefore, rendered this remedy—diplomatic interposition or intervention—unavailable to an American citizen but it did not affect a vested right of such citizen. But non-recognition of the Huerta administration by the American Government under the Wilson administration was not dependent upon Huerta's paramountcy in Mexico. It meant that, even if it were paramount, it came into power through force by methods abhorrent to the standards of modern civilization, that it was not "elected by legal and constitutional means", and hence, while the Government of Mexico continued to exist and to function, its administration was not entitled to recognition.[74])

[74]) G.P.O. 1927 p. 44/50.

The conclusion to be drawn from the above is that "the State remains, although the governments may change". This principle of the continuity of States has been confirmed, moreover, by the Mixed Claims Commission Great Britain-Mexico, under Convention of November 19, 1926, which held:

> Even when a country passes through a period of anarchy, even when an established and recognized Government is not in existence, the permanent machinery of the public service continues its activity. The Commission share the view expressed in this regard in Decision No. 39 of the General Claims Commission between Mexico and the United States of America (page 44). ... They might add that the Police continued to function, that it continued to regulate traffic in the capital, to investigate crimes and to arrest criminals, as also that the Courts continued to administer justice. This means that public authorities that were obliged to watch over and to protect life and property continued to exist, although it is not denied that the performance of those duties will often have been very difficult in those disturbed times of civil war. [75])

Mr. F. Lieber, Umpire of the Mixed Commission Mexico-U.S.A., under Convention of July 4, 1868, observed:

> The great principle settled long ago in England regarding governments de facto and de iure, concerning the individual citizen or inhabitant, comes here into play. The State or civil society or government, or whatever it be called, is a continuity, and succeeding administrations, or officers or rulers, receive and transmit the obligations of the preceding one. [76])

In his preliminary observations in the Tinoco case, Arbitrator Taft held:

> Dr. John Bassett Moore, now a member of the Permanent Court of International Justice, in his Digest of International Law, vol. I p. 249, announces the general principle which has had such universal acquiescence as to become well settled international law:
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> > "Changes in the government or the internal policy of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired. ... The principle of the continuity of States has important results. The State is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. ... The origin and organization of government are questions generally of internal discussion and decision. Foreign Powers deal with the existing de facto government, when sufficiently established to give reasonable assurance of its permanence, and the acquiescence of those who constitute the State in its ability to maintain itself, and discharge its internal duties and its external obligations. [77])

It follows that a State has an undisputed jurisdiction 1) to *organize* its public services, and 2) to *assure* the functioning of its public services by means of a normally or even abnormally constituted government. A normally constituted government binds the State; in inter-

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[75]) H.M. Stat. Off. 1933, p. 218, Survey No. 376.
[76]) Moore 3-2974, Survey No. 82.
[77]) Loc. cit. p. 149/50. He quoted also Borchard, Kent, Wheaton, Hall, and Woolsey.

national law, an abnormally constituted government binds the State, provided:

1) that it assures, in an effective manner, the functioning of public services over a major portion of the territory and a majority of the population;

2) that it is a general government, without any opposing force pretending to be a government in its place. If, at a given moment, two governments are in existence in the same state-territory, the originally constituted government is generally called the 'de iure' government,[78]) the other: the 'de facto' government.[79]) If the former succeeds in its struggle against the usurping government, it has not ceased to bind the State.[80]) If the latter becomes succesful, it will bind

[78]) "La question de savoir si un gouvernement a été, ou non, un gouvernement de iure, est du domaine exclusif du droit constitutionnel de l'Etat en question, notamment du droit constitutionnel étant en vigueur à l'époque des événements dont il s'agit de déterminer le caractère juridique, sans que puisse entrer en ligne de compte, en quoi que ce soit, ni la reconnaissance de iure dont il a pu bénéficier de la part d'un ou de plusieurs gouvernements étrangers, ni le refus éventuel, par des gouvernements postérieurs du pays, pour des motifs d'ordre politique, de la reconnaître comme gouvernement de iure.", France-Mexico, arb., C. 25-9-1924, ed. Paris p. 105, Survey No. 363.

[79]) "Par contre, la question de savoir si un gouvernement a été un gouvernement de facto, est une simple question de fait, qui ne dépend, ni du droit constitutionnel de l'Etat en question, ni du droit international, et qui, elle non plus, ne saurait être préjugée, ni par l'attitude que des gouvernements postérieurs ont prise envers un tel gouvernement, ni par la reconnaissance (ou éventuellement, le refus de reconnaissance), de facto ou même de iure, dont il a pu faire l'objet de la part d'un ou de plusieurs gouvernements étrangers, étant donné que c'est un fait notoire que la pratique internationale a souvent abusé de la reconnaissance internationale de facto, ou du refus de pareille reconnaissance, dans des buts politiques.", France-Mexico, loc. cit. p. 106; "It is doubtless true that the question whether the Páez government was or was not the de facto government of Venezuela at the time the bonds were issued is one of fact. But the decision of the political department of the United States Government on November 19, 1862, that there was no such conclusive evidence that the Páez government was fully accepted and peacefully maintained by the people of Venezuela as to entitle it to recognition must be accorded great weight as to the fact, and is in any event conclusive upon its own citizens.", U.S.A.-Venezuela, arb., C. 17-2-1903, Ralston-D. p. 150, Survey No. 258.

[80]) "Et quant aux actes des gouvernements de iure ou de facto, ou des forces révolutionnaires qui l'ont emporté dans la guerre civile, il ne peut non plus être question de responsabilité internationale de l'Etat des dommages causés par lesdits actes que dans les cas où il s'agit, soit d'actes de caractère purement contractuel tels que: prêts, achats, etc., soit de ceux qui appartiennent au domaine intermédiaire entre le droit privé et le droit public, ou d'actes juridiques émanant directement du pouvoir public de l'Etat, tels que: expropriations, réquisitions, prêts forcés, etc., soit d'actes qui rentrent dans la catégorie des délits internationaux, tels que: pillages de propriétés étrangères, destructions de biens étrangers sans nécessité militaire, confiscations de possessions étrangères, bombardements de villes non défendues, qui ont causé la mort d'étrangers, et d'autres actes délictueux, formellement qualifiés comme tels entre autres par le Règlement concernant les lois et coutumes de la guerre sur terre de 1907. Au contraire, le simple fait que, pour supprimer des émeutes ou des révolutions, le Gouvernement légitime s'est trouvé dans la nécessité impérieuse de prendre des mesures militaires nuisibles à des ressortissants étrangers, n'engendre pas de reponsabilité internationale de ce chef.", France-Mexico, loc. cit. p. 136/7.

the State from the moment that it assures, in an effective manner, the functioning of public services over a major portion of the territory and a majority of the population.[81]) Thus, first, a local unsuccessful government never binds the State.[82]) Secondly, in international law, it is irrelevant to draw any distinction between a 'de iure' government and a 'de facto' government. Prof. Borchard wrote: "From this, it perhaps necessarily follows that when a government is de facto in control, it is also de iure in control. Neither conclusion depends upon recognition, any more than does the existence of the State. Secretary of State van Buren was legally and politically sound in saying: 'So far as we are concerned, that which is the government de facto is equally so de iure.' These are terms and concepts of constitutional law; with them, international law has nothing to do. The several revolutionary governments which at various times governed England (such as that of Cromwell), France (the Directory), Russia (the Soviet), Mexico (Huerta), were de facto and hence de iure governments, the only governments, of those countries. To that fact, neither the executive nor the courts of foreign countries can be oblivious; to disregard the obvious is legally not privileged and can only create unnecessary confusion. To apply the term de iure to governments one likes and recognizes, and the term de facto to governments one dislikes and declines to recognize, involves, it is believed, fundamental misconceptions."[83]) It was held by the General Claims Commission Mexico-U.S.A., under Convention of September 8, 1923, that "from the standpoint of international law a government may be

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[81]) "The law of nations recognizes, moreover, that those States, in which revolutions are frequent, and whose governments are therefore subject to frequent changes, are liable for the acts of revolutionists, provided that the revolutionists are, because of the means of their command, the government de facto, so far as the one against which they are exercising their forces is concerned.", Germany-Venezuela, arb., C. 13-2-1903, op. Goetsch, Ralston-D. p. 527, Survey No. 256; "The revolution of 1899, led by General Cipriano Castro, proved successful, and its acts, under a well-established rule of international law, are to be regarded as the acts of a de facto government,", U.S.A.-Venezuela, C. 17-2-1903, Ralston-D. p. 8, Survey No. 258.

[82]) "The so-called empire was not a government de facto; because, lacking the element of popular support or of habitual obedience from the mass of the people, it rested alone on the assistance of foreign force, which comtemplated and extended only a temporary interference, and because another government, disputing successfully its pretensions, bore rule in Mexico as a fact, in possession of much the largest part of the territory, and sustained by the mass of the people.", Mexico-U.S.A., arb., C. 4-7-1868, Moore 3-2930, Survey No. 82; "Une responsabilité internationale du chef de dommages causés par des mouvements révolutionnaires ne saurait être reconnue, à mon avis, pour ce qui concerne les actes juridiques ou délits de forces révolutionnaires qui ont échoué, le droit international ne grevant pas, ou pas encore, l'Etat des effets juridiques de pareils actes ou délits.", France-Mexico, loc. cit. p. 136.

[83]) The unrecognized government in American Courts, A.J.I.L. 26 (1932) - 262.

regarded as de iure by virtue of the fact that it is de facto."[84]) Thirdly, recognition of an abnormally constituted government does not mean that such a government must be considered, in international law, as a de iure government, which binds the State; nor does non-recognition of such a government mean, that it cannot be regarded as a de iure government and that it does not bind the State[85]): recognition, which "is based upon the pre-existing fact, does not create the fact",[86]) may be considered rather as a political question between recognizing and recognized governments[87])—thus introducing into the international law system an element of relativism—, and recognition of an abnormally constituted government by more than one State may be regarded as presumptive evidence that the normally constituted government has become incapable of assuring the functioning of public services, whereas the abnormally constituted government has become so capable to.[88])

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[84]) G.P.O. 1929 p. 307, Survey No. 354. See in the same sense: Special Claims Commission Mexico-U.S.A., under Convention of September 10, 1923, G.P.O. p. 82, Survey No. 355.

[85]) "A new régime or government may gain control of a country and be the de facto, and from the standpoint of international law therefore the de iure government, even though other governments may not choose to 'recognize' it, as is often said, or as might probably better be said, to enter into diplomatic relations with it. And it seems to me that the same political situation may exist with respect to a state of belligerency, when the term is used to connote simply the fact of the existence of war.", Mexico-U.S.A., arb., C. 8-9-1923, diss. op. Nielsen, G.P.O. 1929 p. 31, Survey No. 354. Cf. R. Hall Sharp: Non-recognition as a legal obligation, Liège 1934; P. Stierlin: Die Rechtsstellung der nichtanerkannten Regierung im Völkerrecht, Zürich 1940 (on p. 190, note 43a, the author contends that Prof. J. H. W. Verzijl represented the French interests in the Claims Commission France-Mexico, 1924: Verzijl was President of said Commission).

[86]) Mexico-U.S.A., arb., C. 4-7-1868, op. W. H. Wadsworth, Moore 3-2876/7, Survey No. 82.

[87]) "The recognition of the government of a nation has for its object merely to enter into diplomatic relations with the said nation, or to continue the relations existing.", American Institute of International Law, Project No. 6, article 1,2, A.J.I.L. Off. Doc., Special Number October 1926 p. 310; "La reconnaissance du gouvernement nouveau d'un Etat déjà reconnu est l'acte libre par lequel un ou plusieurs Etats constatent qu'une personne ou un groupe de personnes sont en mesure d'engager l'Etat qu'elles prétendent représenter, et témoignent de leur volonté d'entretenir avec elles des relations.", Resolution of the Institut de Droit international 1936, article 10, Annuaire de l'Institut 1936-2-303.

[88]) "Every abnormally constituted government may be recognized if it is capable of maintaining order and tranquillity and is disposed to fulfil the international obligations of the nation.", American Institute of International Law, loc. cit. article 5. Cf. Moore 2-1595, 1716, 3-2873, 2938, 4-3548/64, 5-4579, etc. As to state-practice: "It has been the principle and the invariable practice of the United States to recognize that as the legal government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of people.", Mr. Livingston, Secretary of State, to Sir Charles Vaughan, April 30, 1833; "The right of one independent power to recognize the fact of the existence of a new power about to assume a position among the nations of the earth is incontestable. It is founded upon another right, that which appertains to every sovereignty, to take care of its own interests by establishing and cultivating such commercial or other relations with the

It appears from the above that a State has jurisdiction to organize and to assure the functioning of its public services even by an abnormally constituted government, be that government illegal or not recognized. Illegality points to the fundamental difference between domestic law and international law, non-recognition to the principle that state jurisdiction cannot be conferred by one State on another.

Reference: Annuaire de l'Institut de Droit international 1934-302/57; 1936-1-233/45, 1936-2-175/255, 300/5; P. Biscaretti di Ruffia: Contributo alla teoria giuridica della formazione degli Stati, Milano 1938; G. Biscottini: Sulla formazione dello Stato, R.D.D.I. 31 (1939) - 378/406; H. Dauge: Die Staaten vor der Anerkennung, Wien 1929; R. Erich: La naissance et la reconnaissance des Etats, Recueil des Cours 13 (1926) - 429/507; S. Gemma: Les gouvernements de fait, Recueil des Cours 4 (1924) - 297/413; Noël-Henry: Les gouvernements de fait devant le juge, Paris 1927; R. Horneffer: Die Entstehung des Staates, Tübingen 1933; L. Kämmerer: Entstehung und Untergang des Staates, Gross-Steinheim am Main 1927; H. Kelsen: La naissance de l'Etat et la formation de sa nationalité, R.D.I. 1929-2-613/41; F. Larnaude: Les gouvernements de fait, R.G.D.I.P. 28 (1921) - 457; J. H. van Royen: De rechtspositie en de volkenrechtelijke erkenning van nieuwe Staten en de facto-Regeeringen, The Hague 1929; J. Spiropoulos: Die de facto-Regierung im Völkerrecht, Kiel 1926; H. E. Stille: Die Rechtstellung der de facto-Regierung in der englischen und amerikanischen Rechtssprechung, Berlin 1932; E. P. Wheeler: Governments de facto, A.J.I.L. 5 (1911) - 66/83.

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new power as may be deemed expedient. Its exercise gives no just ground of umbrage or cause of war. The policy which has hitherto guided the Government of the United States in respect to new powers, has been to act on the fact of their existence, without regard to their origin, whether that has been by the subversion of a pre-existing Government, or by the violent or voluntary separation of one from another part of a common nation. In cases where an old and established nation has thought proper to change the form of its Government, the United States, conforming to the rule which has ever governed their conduct, of strictly abstaining from all interference with the domestic concerns of other States, have not stopped to inquire whether the new Government has been rightfully adopted or not. It has been sufficient for them that it is, in fact, the Government of the country, in practical operation.", Report of Mr. Clay, from the Senate Committee on Foreign Relations, in respect to the recognition of the independence of Texas, June 8, 1836; "In its intercourse with foreign nations the Government of the United States has, from its origin, always recognized de facto governments. We recognize the right of all nations to create and re-form their political institutions according to their own will and pleasure. We do not go behind the existing government to involve ourselves in the question of legitimacy. It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows.", Mr. Buchanan, Secretary of State, to Mr. Rush, March 31, 1848; "As a general rule of foreign policy, obtaining since the foundation of our Government, the recognition of a foreign Government by this is not dependent on right, but on fact.", Mr. Hunter, Acting Secretary of State, to Mr. Baker, October 3, 1879, etc.

§ 9. EXERCISE OF GOVERNING JURISDICTION

My final paragraph will examine the question what conflict of state jurisdictions arises when a State exercises its governing jurisdiction outside its national territory. Three aspects of the functioning of public services outside land- or sea-boundaries will come up for discussion, namely: the functioning of diplomatic and consular services, of public vessels outside territorial waters, and of the armed forces on foreign territory (military occupation).

A. Diplomatic and consular service

When a State, as a member of the international community, desires to entertain friendly relations with another State, diplomatic intercourse is deemed to be a normal function of both States in order to promote such relations. This function may be considered as one aspect of the exercise of a State's governing jurisdiction abroad, and so it may give rise to a conflict with the territorial jurisdiction of the friendly State, on the territory of which diplomatic and consular services will function. Since these matters are mostly regulated by treaty or agreement, and few international decisions are available, only few observations will be made on this subject.

I. As to diplomatic service: it should be remembered, first, that a State may not, in general, exercise its jurisdiction on the territory of another State.[1]) Hence, it was rightly held in Draft No. 22 of the American Institute of International Law, that "no nation may appoint an ordinary diplomatic representative to another nation without having previously obtained the approval of the latter." [2]) For that reason, the receiving State grants a so-called 'agréation' to the sending State. In a valuable Draft Convention on Diplomatic Privileges and Immunities, elaborated by the Harvard Research, it was held in article 9, that a sending State may send any person as a chief of mission, subject to agréation: "a) Before appointing a person to be a chief of mission, a sending State shall make inquiry of the receiving State as to the acceptability of the person whose appointment is contemplated; b) When such inquiry had been made, the receiving

[1]) See § 1.

[2]) Article 10, A.J.I.L. Off. Doc., Special Number, October 1926 p. 351. It is clear, that such an approval can only take place between recognized Governments.

State shall indicate, without obligation to communicate reasons, whether or not such person is acceptable; c) A sending State shall not appoint a person as chief of mission if the receiving State has indicated that such person is not acceptable." [3]) Following the comment on this article, agréation consists of two acts: "1) the inquiry (usually informal), addressed by a sending State to the receiving State as to the acceptability of a certain person to be its chief of mission, and 2) the indication, also usually informal, by the receiving State to the sending State that such person will be acceptable (agrément)." The Committee added: "To make agréation as to the chief of mission obligatory is to erect a nearly universal practice into a legal rule, in order that States may know what to expect in their mutual dealings." [4]) So, freedom of choice is subject to the limitation of agréation. Once agrément granted, the diplomatic service, "acting as the instrument of the Foreign Office, is the customary channel through which the rights of nationals are safeguarded and protected." [5]) It becomes clear, then, that the fulfilment of the state function of protecting citizens abroad by means of diplomatic and consular officers, as a public service, is of mutual interest to the sending State and to the receiving State: the good functioning of this service in the one State will, reciprocally, lead to the good functioning in the other State. "Nations should accord the diplomatic agents accredited to them every facility for the exercise of their functions." [6]) The receiving State will accord facilities by limiting the exercise of its territorial jurisdiction in favor of the exercise of the sending State's governing jurisdiction: "the necessity of diplomatic relations is the reason why States have been willing to accept limitations upon their territorial jurisdiction. And it is the reason why diplomatic immunity is consecrated by usage. It follows that it is the independence of the public minister in the discharge of his functions that States intend to secure by the law of diplomatic immunity." [7]) These limitations will consist in granting to the foreign diplomatic agent certain immunities and privileges. In the Introduction to the Harvard Draft Convention it was said that "the basis of diplomatic privileges and immunities is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of

[3]) A.J.I.L. Off. Doc. 1932 p. 71.
[4]) Loc. cit. p. 71.
[5]) E. M. Borchard: The diplomatic protection of citizens abroad or the law of international claims, New York 1915 p. 435. See about diplomatic protection, § 6, p. 117.
[6]) Article 20 of the quoted Project No. 22 of the American Institute of International Law, loc. cit. p. 353.
[7]) Montell Ogdon: Juridical bases of diplomatic immunity, Washington 1936, p. 175.

the diplomatic representative and the State which he represents, and the respect properly due to time-honoured traditions. Diplomatic intercourse is a normal function of States in the international community. On the basis of reciprocity, diplomatic privileges and immunities are the accepted means by which such normal functioning is assured." [8]) It may be argued that the diplomatic service enjoys, in international law, a territorial immunity (as to the residence of the foreign diplomatic agent), a personal immunity (with respect to civil and criminal jurisdiction), and a functional immunity (as to diplomatic correspondence, etc.).[9]) These immunities have a rather impersonal character: they are attached to the sending State for the effective exercise of its governing jurisdiction.[10]) Hence, a diplomatic agent may not waive his immunities without the consent of his Government. In a dissenting opinion before the Arbitral Tribunal Egypt-U.S.A., dated June 8, 1932, Mr. Fred. K. Nielsen observed that "by way of analogy, reference may usefully be made, I think, to immunities of diplomats under international law and immunities of consular officers occasionally stipulated by treaties. Governments insist rigidly on the observance of such immunities, and the view has been taken that a diplomat has not, himself, the power, without the consent of his Government, to waive them." [11]) In a decision of November 18, 1907, the Tribunal civil de la Seine held that

> cet ensemble de mesures destinées à assurer l'indépendance et la dignité des diplomates étrangers accrédités en France n'ont pas été créées dans leur intérêt personnel mais constituent un attribut et une garantie de l'Etat qu'ils représentent et forment en quelque sorte un tout qu'il appartient au Gouvernement étranger seul de diviser.[12])

The Oberlandesgericht Darmstadt held on December 20, 1926, that

> das Recht der Exterritorialität ist nicht im persönlichen Interesse der Mitglieder der Mission, sondern ausschlieszlich im Interesse des Absendestaates—ne impediatur legatio!—gegeben.[13])

Although the Harvard Research Committee did not distinguish between 'immunities' and 'privileges', it appears from state-practice, that a diplomatic agent enjoys—apart from the three categories of

[8]) Loc. cit. p. 26. See also article 17 of the Draft Convention and article 19 of the quoted Project No. 22. Cf. D. 50. 7. 17.

[9]) The fiction of 'extraterritoriality', and theories of 'representative character' cannot explain the character of diplomatic immunities; they are confusing terms. See Montell Ogdon, op. cit. passim.

[10]) In a Resolution of the Institut de Droit international, 1929, it was held in article 16, that "l'immunité de juridiction survit aux fonctions, mais seulement quant aux faits qui se rattachent à l'exercice de ces fonctions.", Annuaire de l'Institut 1929-2-310.

[11]) G.P.O. p. 93, Survey No. 396.

[12]) Journal Clunet 35 (1908) - 152.

[13]) Niemeyers Zeitschrift für internationales Recht, 39 (1928) - 288. See also article 26 of the Harvard Draft Convention.

immunities with an impersonal character—, also some personal privileges, such as the exemption from customs duties.[14]) Such privileges, however, are not necessarily inherent in the diplomatic function and so their granting by the receiving State is rather a question of international courtesy than of law.

It follows, on the one hand, that the fact, that a diplomatic agent is invested with a recognized public *status,* imposes upon the receiving State a special duty of vigilance,—the failure to fulfil this duty engaging the international responsibility of that State[15])—, and, on the other hand, that the inviolability of the diplomatic agent, "in the sense of a right to special protection and personal intangibility, is limited by his obligation to conform to the laws of the receiving State."[16])

II. As to consular service: this subject is regulated by internal legislation and by international conventions. It may suffice to say that, as opposed to a diplomatic agent, a consular officer is not accredited to a Government: "he is merely instructed by his own government to perform, with the permission of another government, certain functions in the territory of the latter",[17]) and that the sending State has an interest in the mission of its consuls. It was held by international tribunals:

> It is well established in the law of nations, and has been so ever since the full development of this branch of jurisprudence; that a consul is not a diplomatic agent enjoying ambassadorial privileges; but, on the other hand, it is also acknowledged that a consul ought to be treated with international regard and respect.[18])

[14]) See article 20 of the Harvard Draft Convention.

[15]) In the Bases of Discussion drawn up for the Hague Conference 1930 for the Codification of International Law by the Preparatory Committee, with regard to the responsibility of States for damage caused in their territory to the person or property of foreigners, it was observed: "The Replies (to Point V, No. I (c)) show that a State incurs responsibility if the Government fails to exercise due diligence in protecting the foreigners. The following points emerge in the replies: the degree of diligence to be attained is such as may be expected from a civilized State; the diligence required varies with the circumstances; the standard cannot be the same in a territory which has barely been settled and in the home country; the standard varies according to the persons concerned in this sense that the State has a special duty of vigilance and has therefore a greater responsibility in respect of persons invested with a recognized public status. The protection which is due is mainly protection against crime.". Basis of Discussion No. 10 held: "A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.", League of Nations, vol. III, No. C. 75. M. 69. 1929. V., p. 67.

[16]) Comment to the Harvard Draft Convention, loc. cit. p. 97.

[17]) Harvard Draft Convention on the legal Position and Functions of Consuls, loc. cit. p. 205.

[18]) Mexico-U.S.A., arb., C. 4-7-1868, Rice case, Moore 4-3248, Survey No. 82.

> Diplomatic officers are accorded under international law certain privileges and immunities which do not extend to consular officers, and we find incorporated into domestic legislation provisions designed to carry out the obligations of international law with respect to matters of this kind. ... I think that international law undoubtedly secures to a consular officer the right to perform his functions without improper interference.[19])

> It seems clearly to be proper to take some account of the argument made with respect to the special position of a consular officer. Consular officers do not enjoy immunities such as are accorded to diplomatic officers with respect to matters pertaining to exemption from judicial process and from taxation. But undoubtedly international law secures to them protection against improper interference with the performance of their functions. And it is well recognized that under international law and practice they have a right to communicate with local administrative authorities with respect to protection of their nationals (Moore V. 61, 101). Assuredly a Consul is privileged to communicate with such officials regarding the protection of himself and the property of his Government.[20])

According to the Harvard Research, "the basic principles are believed to be: 1) consuls do not enjoy a diplomatic character, and 2) the jurisdiction of the territorial sovereign is presumed." [21]) The General Claims Commission Mexico-U.S.A., under Convention of September 8, 1923, held in the Mallén case:

> The question has been raised whether consuls are entitled to a 'special protection' for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if 'special protection' means that in executing the laws of the country, especially those concerning police and penal law, the Government should realize that foreign Governments are sensitive regarding the treatment accorded their representatives, and that therefore the Government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. Many penal codes contain special provisions regarding special felonies committed as against foreign diplomats; nobody will contend that such provisions exhaust the care which the Government of their residence is bound to observe regarding their security and welfare. In this sense one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a 'special protection' should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been (see paragraph 8 of the Commission's opinion in the Roberts case, Docket No. 185, rendered November 2, 1926, and paragraphs 13 and 16 of its opinion in the Hopkins case, Docket No. 39, rendered March 31, 1926). In this second sense President Fillmore of the United

[19]) Mexico-U.S.A., arb., 8-9-1923, Mallén case, op. Nielsen, G.P.O. 1927 p. 264/5, Survey No. 354.

[20]) Idem op. Nielsen, Chapman case, G.P.O. 1931 p. 128. See also Chile-France, arb., 5-7-1901, ed. Lausanne p. 304, Survey No. 172; Germany-Great Britain, U.S.A., arb., 14-10-1902, Descamps-R. 1902 p. 642, Survey No. 229; Spain-Venezuela, arb., C. 2-4-1903, Ralston-D. p. 923, Survey No. 264; Great Britain-U.S.A., arb., C. 18-8-1910, Report Nielsen p. 622, Survey No. 303; Germany-Portugal, arb., 31-7-1928, R.D.I. 1929-1-272, Survey No. 325; France-Great Britain, P.C.A., 9-6-1931, A.J.I.L. 27 (1933) - 179, Survey No. 392; Egypt-U.S.A., arb., 8-6-1932, G.P.O. p. 63, Survey No. 396, etc.

[21]) Loc. cit. p. 214.

States, in his annual message of December 2, 1851, rightly said: „Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws.

...Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." (VI Moore, Digest 813). In this second sense it was rightly stated by the Committee of Jurists appointed by the League of Nations on the Corfu difficulties, in a report adopted on March 13, 1924: "The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf." (American Journal of International Law 18, 1924, p. 543.) In this second sense again it was rightly contended in 1925 by an American author that "if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character", similarly as commissioners employed for special international objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc., "receive a special protection, even though it does not amount to diplomatic privilege." (Eagleton in American Journal of International Law 19, 1925, pp. 303, 308.) [22])

*B. Public vessels outside territorial waters *)*

The question will be examined what conflict of state jurisdictions may arise when a public vessel of a given State leaves the territorial waters of that State and enters successively 1) the high seas, 2) the marginal sea of a foreign State, and 3) the inland waters of a foreign State. In connection with what has been said about private vessels,[23]) a public vessel may be regarded as a vessel appropriated to public and non-commercial services. In a "Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix", elaborated by the Institut de Droit international in 1928, it was said in articles 9 and 10:

Les navires effectuant un service gouvernemental et non commercial sont:
1) Les bâtiments militaires, c'est-à-dire les bâtiments employés comme éléments de la force militaire de l'Etat;
2) Les bâtiments employés à un service public civil.

Sont considérés comme bâtiments militaires:
1) Les navires de guerre, c'est-à-dire tous bâtiments sous le commandement d'un officier de la marine de l'Etat, montés par un équipage de la marine militaire et autorisés à porter le pavillon et la flamme de la marine militaire ou tous signes extérieurs distinctifs prescrits par les règlements nationaux;

[22]) G.P.O. 1927 p. 257/8, Survey No. 354. It was held by the Mixed Claims Commission Great Britain-Mexico, under Convention of November 19, 1926, that "a consul is an official agent working under the control of his Government and responsible to that Government. He is as a rule in permanent touch with the colony of his compatriots who live in the country to which he is designed, and he is, by virtue of his post as Consul, in a position to make inquiries with respect to the origin and antecedents of any compatriot whom he registers.", H. M. Stat. Off. 1931 p. 22, Survey No. 376.

*) As no dispute concerning public aircraft abroad has been brought before an international tribunal, as it seems, this matter will not be dealt with here.

[23]) See § 6, B., p. 122, et seq.

2) Les navires auxiliaires de toute sorte placés sous l'autorité directe, le contrôle immédiat et la responsabilité de la Puissance de la force militaire de laquelle ils constituent des éléments.
Font partie de cette catégorie les navires-hôpitaux militaires.[24])

Mr. E. B. Parker, the War Claims arbiter under the Settlement of War Claims Act of March 10, 1928,[25]) between Germany, Austria, Hungary, and the United States of America, said that "in the absence of any authoritative definition of a vessel of war or of a merchant vessel which can properly be read into and as a part of the governing statute, attempts at generalization may prove as confusing as they are unnecessary. ... Prior to and during the world war, the ships owned and operated by the principal navies of the world or in their possession and control were of two general classes, *viz.*, 1) fighting ships, including auxiliary cruisers (converted merchantmen), and 2) auxiliary vessels of all descriptions. All such were public ships." [26])

Since a State is competent to assure the functioning of its public services, it is clear that governing jurisdiction is vested in a State over its public vessels appropriated to public and non-commercial services. The exercise of this jurisdiction will vary according to the waters, which such a vessel is navigating.

I. The high seas

It was observed in § 6, that, on the high seas, there is an absence of state jurisdictions, and that vessels navigating those seas are subject only to the jurisdiction of the State, the flag of which they fly. Thus, on the one hand, the governing jurisdiction of a State over its public vessels on the high seas is exclusive with regard to other States: no conflict of state jurisdictions arises there with respect to the attribution of governing jurisdiction. Mr. W. E. Hall wrote rightly: "With respect to ships of war and other public ships little need be said. The fiction of territoriality is useless, but it is harmless; because it cannot cause larger privileges to be attributed to such vessels than they are acknowledged for other reasons to possess. They represent the sovereignty and independence of their State more fully than anything else can represent it on the ocean; they can only be met by their equals there; and equals cannot exercise jurisdiction over equals. The jurisdiction of their own State over them is therefore exclusive under all circumstances, and any act of interference with them on the part of a foreign State is an act of war." [27]) In time of peace, a public vessel cannot be seized, on the high seas, by another power—this

[24]) Annuaire de l'Institut, 1928 p. 739/40.
[25]) Survey No. 382.
[26]) A.J.I.L. 23 (1929) - 675.
[27]) A Treatise on International Law, 8th ed., London 1924, § 78, p. 307.

question has nothing to do with a so-called extraterritoriality of a public vessel—, but, conversely, it may not seize foreign vessels, since those vessels are, on the high seas, subject to the exclusive personal or governing jurisdiction of the State, the flag of which they fly. It may be remembered, here, that Mr. T. M. C. Asser, arbitrator in the 'James Hamilton Lewis' case between Russia and U.S.A. held that "the policy of the defendant party according to which it was permitted to a war ship of a State to pursue beyond territorial waters a vessel whose crew had rendered themselves guilty of an illegal act in territorial waters or on the territory of that State could not be regarded as conforming to international law, since the jurisdiction of a State does not extend beyond the limits of the territorial sea, unless this rule has been derogated by a special convention.",[28]) and that the Mixed Claims Commission Great Britain-U.S.A., under Convention of August 18, 1910, held that "it is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies." [29]) On the other hand, the exercise of this governing jurisdiction cannot be said to be exclusive with regard to international law: the Commission just quoted held in the „Newchwang", the "Canadienne", the "Sidra", and the "Lindisfarne" cases, that a State engages its international responsibility for damages caused by its public or government-owned vessels in collision cases.[30])

II. The marginal sea

In the absence of any international decision on the passage of public vessels through the marginal sea of a foreign State, it may suffice to say that it does not appear from state-practice that a coastal State is obliged, by virtue of a general rule of international law, to grant passage to foreign public vessels through its marginal sea. The Harvard Research Committee, in a Draft Convention on the Law of Territorial Waters, observed that "the word 'vessels' in article 14 is limited by the definition in article 22 ('the term vessel, as used in this convention, unless otherwise indicated, means a privately owned and privately operated vessel or a vessel the legal status of which is assimilated to that of such a vessel'), thus confining innocent passage to

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[28]) November 29, 1902, U.S. For. Rel. 1902, App. I p. 456, Survey No. 236. See p. 126.

[29]) Report Nielsen p. 480, Survey No. 303.

[30]) Loc. cit. p. 411, 427, 452, 483. It must be added, that these collisions did not occur on the high seas.

vessels which are privately owned and privately operated and to vessels the legal status of which is assimilated to that of such vessels. This excludes vessels of war from exercising the right of innocent passage. The sovereignty of the littoral State is restricted by the right of innocent passage because of a recognition of the freedom of the seas for the commerce of all States. There is, therefore, no reason for freedom of innocent passage of vessels of war. Furthermore, the passage of vessels of war near the shores of foreign States and the presence without prior notice of vessels of war in marginal seas might give rise to misunderstanding even when they are in transit. Such considerations seem to be the basis for the common practice of States in requesting permission for the entrance of their vessels of war into the ports of other States. A State may permit the passage of the war vessels of other States through its marginal sea, but the text relieves it from any obligation to do so. It might properly be assumed that a State does permit such passage when no action has been taken by that State regulating it." [31]) At the Hague Codification Conference 1930, it was held in article 12 of Annex I, to the Final Report, on the legal status of the territorial sea: "As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification. The coastal State has the right to regulate the conditions of such passage. Submarines shall navigate on the surface." It was observed: "To state that a coastal State will not forbid the innocent passage of foreign warships through its territorial sea is but to recognize existing practice. That practice also, without laying down any strict and absolute rule, leaves to the State the power, in exceptional cases, to prohibit the passage of foreign warships in its territorial sea. The coastal State may regulate the conditions of passage, particularly as regards the number of foreign units passing simultaneously through its territorial sea—or through any particular portion of that sea—though as a general rule no previous authorization or even notification will be required. Under no pretext, however, may there be any interference with the passage of warships through straits constituting a route for international maritime traffic between two parts of the high sea." Article 13 stipulated: "If a foreign warship passing through the territorial sea does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea." It was observed: "A special stipulation to the effect that warships must, in the

[31]) A.J.I.L. Off. Doc. Special Number 1929, p. 295.

territorial sea, respect the local laws and regulations has been thought unnecessary. Nevertheless, it seemed advisable to indicate that on non-observance of these regulations the right of free passage ceases and that consequently the warship may be required to leave the territorial sea." [32])

In his Treatise on International Law, Hall wrote:

> This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State; it may often be injurious to third States; and it may sometimes be dangerous to the proprietor of the waters used. A State has therefore always the right to refuse access to its territorial waters to the armed vessels of other States, if it wishes to do so.[33])

Ph. C. Jessup was of opinion that

> as to warships, the sound rule seems to be that they should not enjoy an absolute legal right to pass through a State's territorial waters any more than an army may cross the land territory. As Mr. Root has said: "Warships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten." [34])

And G. Gidel wrote:

> Le passage des bâtiments des marines de guerre étrangères dans la mer territoriale n'est pas un droit, mais une tolérance. C'est l'opinion qui semble préférable. Elle est mieux de nature à protéger certains Etats contre les abus auxquels ils pourraient être exposés du fait de voisins turbulents ou indiscrets.[35])

If a *right* of innocent passage by public vessels through the marginal sea of a foreign State is not recognized in international law, the *fact* that such passage is, in general, tacitly tolerated, seems to indicate that this matter is rather a question of courtesy: C. Baldoni held that

> la pratique des Etats consiste, dans la règle, non pas à refuser de façon absolue le passage dans les eaux territoriales, mais bien à le soumettre à des réglementations spéciales de caractère restrictif. Mais il n'est pas douteux que, même dans ces limites restreintes, le passage est accordé uniquement pour des motifs de courtoisie internationale et non en application d'une obligation juridique.[36])

In the same sense, Mr. Miller (U.S.A.) observed at the Hague Codification Conference 1930 that

> à mon avis, le droit de passage inoffensif, en tant que droit, ne s'étend pas aux bâtiments de guerre. On admet habituellement que le droit de

[32]) A.J.I.L. Off. Doc. 1930 p. 246/7. In other sense: Bases of discussion nos. 20 and 21.

[33]) Op. cit. p. 198, § 42.

[34]) The law of territorial waters and maritime jurisdiction, New York 1927, p. 120.

[35]) G. Gidel, op. cit. vol. III, La mer territoriale et la zone contiguë p. 284.

[36]) Les navires de guerre dans les eaux territoriales étrangères, Recueil des Cours 65 (1938) - 224/5.

> passage inoffensif est établi au premier chef en faveur du commerce, et il me semble qu'en ce qui concerne les bâtiments de guerre, il s'agit entièrement d'une question d'usages et de comitas gentium et qu'en conséquence, l'Etat riverain est fondé à déclarer que le droit de passage inoffensif n'existe pas pour les bâtiments de guerre, du moins dans une partie de ses eaux territoriales ou de sa mer territoriale, si je puis employer une des deux expressions usitées.[37])

It appears that the territorial jurisdiction of the coastal State over its marginal sea prevails over the governing jurisdiction of the flag-State; that, if passage is not granted, the international responsibility of the coastal State is not engaged; but, if the public vessel does not respect the local laws and regulations, its international responsibility may indeed be engaged.[38])

III. The inland waters

The question may be raised, finally, whether the *entry* of public vessels into ports and bays of a foreign State is free in time of peace, i.e., is that State, in the exercise of its territorial jurisdiction over its inland waters, obliged, by virtue of a general rule of international law, to admit foreign public vessels into its ports and bays, or not? In the quoted Règlement of the Institut de Droit international of 1928 it was held in article 12:

> A moins de dispositions contraires, les ports sont ouverts aux bâtiments militaires étrangers, à charge par ceux-ci d'observer strictement, pour leur entrée et leur séjour, les conditions sous lesquelles ils sont admis.[39])

In article 6 paragraph 1 of Draft No. 12 of the American Institute of International Law on "Jurisdiction" it was said that "the entry of warships shall depend entirely upon the consent of the republic, sovereign of the port. In time of peace, such consent shall be presumed." [40]) Ph. C. Jessup wrote: „Most of the other examples cited merely show that States regulate in some detail the foreign warships which enter their waters. It is believed that these regulations indicate no more than that such public vessels enter under a privilege which is revocable at the will of the local sovereign. Normally the

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[37]) Actes de la Conférence, vol. III, p. 59. In the same sense, Sir Maurice Gwyer, p. 63.

[38]) "Même si une réglementation formelle n'a pas été établie par l'Etat riverain à l'effet d'interdire aux bâtiments de guerre en passage de se livrer à des actes incompatibles avec le respect de la souveraineté ou de la sécurité de l'Etat riverain (sondages répétés, relevés de côtes, manoeuvres navales, exercices de tir, exécution de sentences capitales, etc.), on doit considérer comme engagée la responsabilité internationale de l'Etat dont les forces navales se livreraient à de tels actes. Ces actes altèrent profondément le caractère du passage; il peut y avoir encore passage au sens matériel du mot; il n'y a, à coup sur, plus passage au sens juridique et, en tout cas, il n' a plus passage inoffensif.", G. Gidel op. cit. p. 286.

[39]) Annuaire de l'Institut 1928 p. 740. Cf. the Règlement of 1898, article 10, Annuaire p. 276.

[40]) A.J.I.L. Off. Doc. Special Number 1926 p. 323.

passage or sojourn of such vessels is not prohibited. Legally, it may be forbidden at any time." [41]) G. Gidel was of opinion that "l'Etat a le droit de fermer aux bâtiments de guerre étrangers l'accès de ses eaux intérieures, ports ou mouillages—sauf, bien entendu, le cas de relâche forcée pour détresse; mais s'il n'a pas manifesté sa volonté d'user de ce droit, ou d'en subordonner l'exercice à des conditions admises par la coutume internationale, l'accès de ses ports ou mouillages est présumé ouvert aux bâtiments de guerre étrangers. Le droit international présume donc le consentement de l'Etat riverain à l'accès des navires de guerre dans ses eaux intérieures; mais il appartient à l'Etat riverain d'effacer cette présomption par une manifestation appropriée de volonté, soit par voie de traité, soit par voie de mesure d'ordre interne." [42]) H. Klein wrote: "Vielmehr sind gewohnheitsrechtlich die Seehäfen aller Staaten den fremden Kriegsschiffen bei Beachtung gewisser Formalitäten in Friedenszustande geöffnet. Hierin liegt aber keine Rechtspflicht des Uferstaates, sondern nur ein freiwilliges Zugeständnis." [43])

So, it seems that the coastal State is not obliged, by virtue of any general rule of international law, to admit foreign public vessels into its inland waters. Moreover, it is generally accepted, that a previous authorization or notification is required: the Institut de Droit international enunciated in its Règlement of 1928:

> Le commandant d'un bâtiment militaire étranger qui se propose de mouiller dans une rade ou dans un port, en demande préalablement l'autorisation aux autorités locales en indiquant ses motifs, et n'entre qu'après avoir reçu une réponse affirmative. De justes causes, dont l'autorité territoriale est juge souverain, pourraient motiver un refus d'admission ou une invitation au départ. [44])

C. Baldoni said:

> Il reste en conséquence bien établi qu'en principe l'admission dans les eaux territoriales ne peut avoir lieu qu'avec le consentement de l'Etat riverain. [45])

And at the Hague Codification Conference 1930, the Rumanian Delegate, Mr. Meitani, said:

> La question de la présence de navires de guerre dans les eaux territoriales d'un Etat intéresse un très grand nombre de Puissances, et particulièrement celles qui n'ont pas encore de relations diplomatiques avec leurs voisins. Dès l'instant que les eaux territoriales d'un Etat font partie du territoire de celui-ci, et du moment qu'une autorisation de l'Etat côtier est nécessaire pour qu'un navire de guerre d'un autre Etat puisse entrer dans un port, j'estime

[41]) Op. cit. p. 121.
[42]) Op. cit. vol. II, Les eaux intérieures p. 59.
[43]) Staatsschiffe und Staatsluftfahrzeuge im Völkerrecht, Berlin 1934, p. 27.
[44]) Article 13, Annuaire 1928 p. 740/1. Cf. the Règlement of 1898, article 11, Annuaire p. 276.
[45]) Loc. cit. p. 226.

> qu'une autorisation est également nécessaire pour le navire de guerre qui désire traverser les eaux territoriales d'une Puissance étrangère. En tout cas, une notification de la présence de ce navire de guerre est absolument indispensable. ... J'estime donc que nous devons prévoir, sinon une autorisation préalable, du moins une notification permettant à l'Etat intéressé de prendre les mesures de sécurité qu'il jugera opportunes. [46])

It may be argued that the territorial jurisdiction of the coastal State prevails, again in this respect, over the governing jurisdiction of the flag-State.[47])

As to the *sojourn* of public vessels in foreign inland waters, attention should be paid to a recent decision of the Judicial Committee of the Privy Council, dated December 2, 1938, in the case of Chung Chi Cheung v. The King.[48]) This was "an appeal from a judgment of the Full Court of Hong-kong dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong-kong before the Chief Justice (Sir A. D. A. MacGregor) and a jury. The appellant was convicted of the murder of Douglas Lorne Campbell and was sentenced to death. The murder was committed on board the Chinese Maritime Customs cruiser 'Cheung Keng' while that vessel was in Hong-kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser. The former was captain; the appellant was cabin boy. Both were British nationals. At the trial the point was taken that, as the murder took place on an armed public vessel of the foreign Government, the British Court had no jurisdiction in the matter. The contention was overruled by the Chief Justice at the trial, and, on appeal, his decision was upheld by the Full Court over which he presided." From the judgment of the Board, delivered by Lord Atkin, the following passages may be quoted:

> On the question of jurisdiction two theories have found favor with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction, in fact, in any court where jurisdiction depends on the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic courts in accordance with principles of international law will accord to the ship and its crew and its contents certain immunities, some of which are wel settled, though others are in dispute. In this view the immunities do not depend on an objective exterritoriality, but on implication of the

[46]) Actes de la Conférence, vol. III, p. 59.

[47]) Cf. Th. Ortolan: Règles internationales et diplomatie de la mer, Paris 1864, 4th ed., vol. I, p. 190/1. See about national regulations governing the visits of men-of-war to foreign ports: A.J.I.L. Off. Doc. 1916 p. 121/78.

[48]) 55 Times Law Reports 184, A.J.I.L. 33 (1939) - 376.

domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules on our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our courts, and on what principle are they based?

The principle was expounded by that great jurist Chief Justice Marshall, Schooner Exchange v. M'Faddon ((1812) 7 Cranch 116), a judgment which illuminated the jurisprudence of the world. He said (at pp. 136-7):

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. ... All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. ... This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

The Chief Justice then proceeded to illustrate the class of cases to which he had referred. He took first (p. 137) "the exemption of the person of the sovereign from arrest or detention within a foreign territory". Secondly (p. 138), "standing on the same principles as the first, is the immunity which all civilized nations allow to foreign ministers". At p. 138 he said:

> Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

The judgment then proceeded to the third case (p. 139), "in which a sovereign is understood to cede a portion of his territorial jurisdiction"—namely, "where he allows the troops of a foreign Power to pass through

his dominions". The Chief Justice laid down (at. p. 140) that "the grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require." He pointed out that, differing from the case of armed troops, where an express license to enter foreign territory would not be presumed, the private and public vessels of a friendly Power have an implied permission to enter the ports of their neighbors unless and until permission is expressly withdrawn. When in foreign waters private vessels are subject to the territorial jurisdiction. He said (at pp. 144-5):

> But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied licence therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality. ... It seems then to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

This conclusion is based on the principles expounded in the extracts from which the Chief Justice summarized at p. 143 of the report:

> The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

.....

Their Lordship have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim, which regards the public ship "as a floating portion of the flag-state". However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating-island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew te one another on board ship. If one member of the crew assault another on board, it would be universally agreed that the local courts would not seek to exercise jurisdiction, and would decline it unless, indeed, they were invited to exercise it by competent authority of the flag nation. But if a resident in the receiving State visited the public ship and committed theft, and returned to shore, is it conceivable that when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, the local courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance or otherwise. He naturally would leave the case to the local courts. But on this hypothesis the crime has been committed on a portion of foreign territory. The local court then has no jurisdiction, and this fiction dismisses the offender untried and untriable.

For it is a common-place that a foreign country cannot give territorial jurisdiction by consent. Similarly in the analogous case of an embassy. Is it possible that the doctrines of international law are so rigid that a local burglar who has broken and entered a foreign embassy, and having

completed his crime is arrested in his own country, cannot be tried in the courts of the country? It is only necessary to test the proposition to assume that the foreign country has assented to the jurisdiction of the local courts. Even so, objective exterritoriality would, for the reason given above, deprive our courts at any rate of any jurisdiction in such a case. The result of any such doctrine would be not to promote the power and dignity of the foreign sovereign, but to lower them by allowing injuries committed in his public ships or embassies to go unpunished.

On this topic their Lordships agree with the remarks made by Professor Brierly in The Law of Nations (1928), p. 110:

> The term "exterritoriality" is commonly used to describe the status of a person or thing physically present in a State's territory, but wholly or partly withdrawn from that State's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is, in fact, within, and not outside, the territory; it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor and to deduce untrue legal consequences form it as though it were a literal truth. At most it means nothing more than that a person or things has some immunity from the local jurisdiction; it does not help us to determine the only important question—namely, how far this immunity extends.

The true view is that in accordance with the conventions of international law the territorial sovereign grants to foreign sovereigns, and their envoys, and public ships and the naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offenses committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service by local jurisdiction.

What are the precise limits of the immunities it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offenses on land. It is not necessary for their Lordships to consider these. In the present case the question arises as to the murder of one officer and the attempted murder of another by a member of the crew. If nothing more arose the Chinese Government could clearly have had jurisdiction over the offense, and though the offender had for reasons of humanity been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. It is difficult to see why the fact that either the victim of the offender, or both, are local nationals should make a difference if both are members of the crew. But this request was never made. The only request was for extradition, which is based on treaty and statutory rights, and in the circumstances inevitably failed. But if the principles which their Lordships have been discussing are accepted, the immunities which the local courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign court over his rights of property. Here is no question of saying you may treat an offense committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a sover-

> eign may say: "You have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it." The original jurisdiction in such a case flows afresh.
>
> Applying these considerations to the present case, it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is not only that, with full knowledge of the proceedings, they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if on consideration they decided to claim jurisdiction themselves. But the circumstances stated, together with the fact that the material instruments of conviction, the revolver bullets, etc., were left without demur in the hands of the Hong-kong police, make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails. There was a further point raised by the Crown as to the possible effect of the Treaty of Tientsin in 1858, in renouncing jurisdiction by Chinese over British subjects who committed crimes in China. The Supreme Court was prepared to decide in favor of the Crown on this point also, but, in view of the opinion already expressed on the main point, it is unnecessary to decide this, and no opinion is expressed on it. For the above reasons their Lordships will humbly advise his Majesty that this appeal be dismissed.[49])

This decision—it should be noted that it is one of a domestic, not of an international court—contains some important statements of the law which are in point. First, the Committee held that a public vessel in foreign inland waters is not, and is not to be treated as territory of her own nation. This means, that the coastal State remains competent even over foreign public vessels in its ports and bays. The conflict that arises between the territorial jurisdiction of the coastal State over its inland waters and the governing jurisdiction of the flag-State over its public vessels concerns the *exercise,* not the attribution, of territorial jurisdiction of the coastal State. This appears, *inter alia,* from the text of article 19 of the Draft Convention of the Harvard Research Committee on Territorial Waters, which article runs as follows:

> A State may not *exercise* [50]) jurisdiction over a vessel of war, or other public vessel not engaged in commerce, of another State; but while such a vessel is in territorial waters it must observe port, harbor and navigation laws and regulations, and it may at any time be requested or required to depart.[51])

In a comment on this article, it was observed:

> The regulation of entrance and sojourn of foreign vessels of war has tended to become uniform and reciprocal in character. A State may properly object to the entrance of such a number of foreign vessels of war as might constitute a threat. It may be essential, however, that vessels of war call at certain ports en route to other ports. Visits of courtesy are sometimes made. The placing of a vessel of war at the disposition of

[49]) Loc. cit.
[50]) My italics.
[51]) Loc. cit. p. 328.

> a foreign sovereign is sometimes a mark of honor. Ambassadors or other public officials are sometimes conveyed to foreign countries upon vessels of war. States are careful to avoid misunderstandings and acts which might cause friction in connection with the visits of vessels of war of the other States. The minimum of authority consistent with safety is therefore exercised over foreign vessels of war. It is for the advantage of the vessel of war that it be at a safe anchorage, that it be guarded against injury from ignorance of port regulations and that the health of its personnel be assured. Port and sanitary regulations should therefore be respected. There would be difficulty in enforcing regulations interfering with the internal economy of a vessel of war or with the conduct of its personnel. The local authorities accordingly abstain from the application of customs, ordinary police and other regulations upon vessels of war and their personnel. According to current practice, representations are made through the diplomatic channel in case of minor matters. Only on serious occasions will the littoral State address demands to the commander of the vessel.[52])

Secondly, the Committee held that "the domestic courts in accordance with principles of international law will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view the immunities do not depend on an objective exterritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs." Some immunities, which are well settled, were enumerated: "the sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled."

In doctrine, a distinction is generally made between immunities granted to the vessel and immunities granted to the crew, in order to localize acts concerning the persons interested in such acts, which may occur either on the vessel or ashore.[53]) As to the immunities of the vessel, it is generally admitted that the public vessel is exempted from the operation of the local laws,[54]) from police-acts,[55]) and

[52]) Loc. cit. p. 328/9.

[53]) "Le principe de la distinction entre ces deux sortes d'immunité n'est pas dans la distinction entre une chose—le navire—et des personnes: car l'immunité du navire comporte une série d'applications qui se répercutent sur les personnes; le principe de la distinction est avant tout dans la localisation des actes concernant les personnes intéressées par ces actes, cette localisation ayant lieu tantôt sur le navire et tantôt sur le territoire terrestre de l'Etat riverain.", G. Gidel, op. cit., vol. II, p. 268.

[54]) But they should respect the local regulations concerning navigation, station, and sanitary police: "Les bâtiments militaires étrangers admis dans les ports doivent respecter les lois et les règlements locaux, notamment ceux qui concernent la navigation, le stationnement et la police sanitaire.", Règlement of the Institut de Droit international, 1928, article 15, Annuaire 1928 p. 741.

[55]) "Les bâtiments militaires admis dans un port étranger restent soumis à l'action de la Puissance dont ils relèvent, sans que les pouvoirs locaux puissent faire d'actes d'autorité à bord de ces navires, ni exercer de juridiction sur les personnes qui s'y trouvent, sauf les cas expressément prévus dans le présent règlement.". "Les agents des douanes doivent s'abstenir de visites à bord des bâtiments militaires étrangers et se borner à une surveillance extérieure.", articles 16 and 17 of the above-quoted Règlement 1928.

from seizure.[56]) As to the immunities of the crew, the latter are in general exempted from civil[57]) and criminal[58]) jurisdiction.[59])

[56]) "Les bâtiments militaires ne peuvent pas être l'objet de saisie, d'arrêt ou de détention par une mesure de justice quelconque ni d'aucune procédure judiciaire in rem. Toutefois, les intéressés ont le droit de porter leurs réclamations devant les tribunaux compétents de l'Etat dont ces bâtiments battent régulièrement pavillon, sans que cet Etat puisse se prévaloir de son immunité: 1) pour les actions du chef d'abordage ou d'autres accidents de navigation; 2) pour les actions du chef d'assistance, de sauvetage et d'avaries communes; 3) pour les actions du chef de réparations, fournitures et autres contrats relatifs au navire.", article 26 of the Règlement 1928. Cf. article 6, § 3 of Draft No. 12 of the American Institute of International Law: "Ships of war shall not be subject to the jurisdiction of the republic in which they are sojourning, but the said republic may, if it deem it convenient to the national interest, order or compel them to depart.", A.J.I.L. Off. Doc., Special Number 1926, p. 324. See also the recent decision of the U.S. Supreme Court, dated January 31, 1938, in the case of the Compañía Espanola de Navegación Maritima, S.A. v. the Spanish Steamship 'Navemar'. The Court held inter alia: "Admittedly a vessel of a friendly Government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. ... And in a case such as the present it is open to a friendly Government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the Courts of the United States. If the claim is recognized and allowed by the executive branch of the Government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. ... The foreign Government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative.", A.J.I.L. 32 (1938) - 384. Cf. M. Mittelstein: Arrestirbarkeit und Arrestfreiheit der Schiffe, Zeitschrift für Internationales Privat- und Strafrecht, 2 (1892) - 241/75.

[57]) "Les différends susceptibles de surgir à l'occasion des obligations contractées à titre privé par des hommes du bord, peuvent être du ressort des juridictions compétentes de l'Etat du port, sans que, toutefois, les personnes régulièrement portées sur le rôle d'équipage puissent être atteintes par des exécutions personnelles, telles que la contrainte par corps, et être ainsi distraites du service du bord.", article 25 of the Règlement 1928. See also article 26. Cf. the international Convention for the unification of certain rules relating to the immunity of state-owned vessels, Brussels, April 10, 1926, and Additional Protocol, May 24, 1934, L.N.T.S. vol. 176 p. 199 (comment: R.D.I.L.C. 53 (1926) - 453/84), and, to compare, the Convention for the regulation of aerial navigation, Paris, October 13, 1919, A.J.I.L. Off. Doc. 1923 p. 195, articles 30/3.

[58]) "Les crimes et délits commis à bord des bâtiments militaires, soit par les gens de l'équipage, soit par toutes autres personnes se trouvant à bord, sont soustraits à l'exercice de la compétence des tribunaux de l'Etat du port, aussi longtemps que le bâtiment s'y trouve, quelle que soit la nationalité des auteurs ou des victimes. Toutefois, si le commandant livre le délinquent à l'autorité territoriale, celle-ci, recouvre l'exercice de sa compétence normale.", article 18 of the Règlement 1928. As to acts done as private persons, cf. the 'Forte' case: "Considérant que les officiers lors de leur arrestation n'étaient pas revêtus des insignes de leur grade, et que dans un port fréquenté par tant d'étrangers ils ne pouvaient prétendre à être crus sur parole lorsqu'ils se déclaraient appartenir à la Marine Britannique, tandis qu'aucun indice apparent de cette qualité ne venait à l'appui de leur déclaration; que, par conséquent, une fois arrêtés ils devaient se pouvaient prétendre à être crus sur parole lorsqu'ils se déclaraient appartenir à la un traitement différent de celui qui eût été appliqué dans les mêmes conditions à toutes autres personnes.", Brazil-Great Britain, arb., 18-6-1863, de Martens N.R.G. 1-20-486, Survey No. 70. Cf. article 20, § 1 and 2 of the Règlement 1928.

[59]) As to the right of asylum, see articles 21 to 23 of the Règlement 1928. Cf. Moore I-350/90.

However, it is difficult to enumerate immunities fully: they "do not depend on an objective exterritoriality, but on implication of the domestic law"; [60]) "when the local court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not"; immunities "are conditional,[61]) and can in any case be waived [62]) by the nation to which the public ship belongs." Thus, each case must be decided individually. The effective granting of immunities by the coastal State will depend on different factors: on the function of the public vessel,[63]) on the question whether the flag-State has waived immunities expressly or tacitly,[64]) whether she has disregarded the local navigation, police, sanitary regulations, etc. However, the fact that immunities are conditional, does not mean that the granting of them is a matter of courtesy:[65]) in international law, the normal functioning of foreign public services should be respected by the foreign coastal (or receiving) State, reciprocally. This appears particularly during the *sojourn* of public vessels in foreign inland waters, when the coastal State will limit the exercise of its territorial jurisdiction in favour of the exercise of the governing jurisdiction of the flag-State. But it appears also, that this governing jurisdiction does not prevail when a public vessel, which is *navigating* the high seas, is passing through a foreign marginal sea or making for foreign inland waters: immunities granted to public

[60]) It should be noted that the decision is one of a British court and that, according to the words of Lord Finlay in the Lotus case before the Permanent Court of International Justice, "international law, wherever applicable, is considered as part of the law of England, and our judges must apply it accordingly.", p. 54.

[61]) "Mais il faut maintenir très énergiquement le principe que l'immunité du navire de guerre dans les eaux étrangères n'est jamais—même dans la mesure où le droit international la reconnaît—qu'une immunité conditionnelle, subordonnée à la correction de l'attitude du navire de guerre: 'l'Etat riverain ne peut être condamné à tolérer toutes les infractions que les navires étrangers pourraient commettre contre son ordre juridique et ses intérêts'.", G. Gidel, op. cit. vol. II, p. 265.

[62]) Cf. what has been said about the waiving of diplomatic immunities.

[63]) The Harvard Research Committee observed that "when a State enters into ordinary trade and commercial undertakings or makes no distinction between public and private property treatment, government owned or operated vessels in a foreign port may become a matter of policy. Manifestly if a state-owned vessel engaged in trade is to have all the exemptions of a vessel in the public service, many changes in the economics of maritime commerce would be introduced.", comment on article 22 of the Draft Convention on Territorial Waters, loc. cit. p. 363.

[64]) See the above-quoted decision of the Judicial Committee of the Privy Council.

[65]) The statement in the Alabama arbitration, that "the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations.", is somewhat uncertain (Great Britain-U.S.A., 14-9-1872, Moore 1-655, Survey No. 94). Cf. the decision of the United States Supreme Court in the case of the "Santissima Trinidad", 7 Wheaton 283.

vessels are functional immunities, in order to avoid foreign interference with the normal functioning of such vessels as public services, but not for the privileging of their navigation.[66])

Reference: Annuaire de l'Institut de Droit international 1898 p. 275, 1928 p. 739; C. Baldoni: Les navires de guerre dans les eaux territoriales étrangères, Recueil des Cours 65 (1938) - 185/303; M. Böger: Die Immunität der Staatsschiffe, Kiel 1928; E. D. Dickinson: The immunity of public ships employed in trade, A.J.I.L. 21 (1927)-108; C. R. Dunlop: Immunity of state ships, Journal of Comparative Legislation and International Law 1924 p. 272/7; G. Feine: Die völkerrechtliche Stellung der Staatsschiffe, Berlin 1921; J. W. Garner: Immunities of state-owned ships employed in commerce, British Yearbook 1925 p. 128/43; idem: Legal status of state-owned ships employed in trade, A.J.I.L. 19 (1925) - 745/8; idem: Legal status of government ships employed in commerce, A.J.I.L. 20 (1926) - 759/67; G. Gidel: Le Droit international public de la mer, vol. II Les eaux intérieures, Chateauroux 1932, p. 59/76, 253/368, vol. III La mer territoriale et la zone contiguë, p. 277/91; H. Klein: Staatsschiffe und Staatsluftfahrzeuge im Völkerrecht, Berlin 1934; N. Matsunami: Immunity of state ships as a contribution towards unification of the laws on the subject, London 1924; L. W. F. H. Omta: Immuniteit van staatsschepen en -ladingen en van staatsluchtvaartuigen, Amsterdam 1938; L. van Praag: Juridiction et droit international public, The Hague 1915 nos. 157/63, 251/9; H. Pratt Judson: Status of government vessels, Proceedings of the American Society of International Law, 1922 p. 62/6; Report of the Royal Commission on fugitive slaves, 1876 (Cd. 1516); Responsibility of the United States on maritime claims arising out of the operation of government-owned vessels, Yale Law Journal 39 (1930) - 1189/96; G. van Slooten: Immuniteit van staatsschepen, Weekblad voor Privaatrecht, Notarisambt en Registratie, August 1922 (nos. 2746/8); idem: Immunité de navires d'Etat, Bulletin I.I.I. 1924 p. 2/10; idem: La Convention de Bruxelles sur le status juridique des navires d'Etat, R.D.I.L.C. 53 (1926) - 453/84; L. de Stael-Holstein: L'immunité des navires d'Etat devant le Comité maritime international, R.D.I.L.C. 50 (1923) - 489/91; J. de Witt Hamer: L'exterritorialité des vaisseaux d'Etat, R.D.I.L.C. 36 (1904) - 290/5.

C. Military forces on foreign territory (military occupation)

Land-, sea-, and air-forces of a State are generally considered as public services, and are, consequently, subject to the governing jurisdiction of the State. When the army of a given State enters the territory of a foreign State, a conflict arises between the territorial jurisdiction of the foreign State and the governing jurisdiction of the entering State. Such a military movement may occur in time of peace and in time of war; in order not to confuse the effects of both occurrences, military occupation in time of *war* will also be discussed later.

I. Military occupation of alien territory in time of peace

This may be effected by garrison troops or by occupation troops.

a. Garrison troops

The position of garrison troops has been discussed before the Council of the League of Nations with respect to the Saar Basin. By virtue of article 49 of the Treaty of Versailles, Germany surrendered in favour

[66]) In time of war, special privileges are attached to public vessels as regards their navigation.

of the League of Nations, in the capacity of trustee, the government of the territory of the Saar Basin. In accordance with § 16 of the Annex to articles 45 to 50 of the said Treaty, the government of the named territory was to be entrusted to a Commission representing the League of Nations.In § 23 it was stipulated:

> The laws and regulations in force on November 11, 1918, in the territory of the Saar Basin (except those enacted in consequence of the State of war) shall continue to apply. If, for general reasons, or to bring these laws and regulations into accord with the provisions of the present Treaty, it is necessary to introduce modifications, these shall be decided on, and put into effect by the Governing Commission, after consultation with the elected representatives of the inhabitants in such a manner as the Commission may determine. ...

And in § 25:

> The civil and criminal courts existing in the territory of the Saar Basin shall continue. A civil and criminal court will be established by the Governing Commission to hear appeals from the decisions of the said courts and to decide matters for which these courts are not competent. The Governing Commission will be responsible for settling the organization and jurisdiction of the said court. Justice will be rendered in the name of the Governing Commission.

And in § 30:

> There will be no military service, whether compulsory or voluntary, in the territory of the Saar Basin, and the construction of fortifications therein is forbidden. Only a local gendarmerie for the maintenance of order may be established. It wil be the duty of the Governing Commission to provide in all cases for the protection of persons and property in the Saar Basin.[67])

On June 28, 1921, the Governing Commission issued the following decree:

> 1. The Courts of the Saar Territory shall be competent in the case of all crimes, misdemeanours, and infractions of the law committed by civilians.
> 2. The Military Courts for the troops entrusted with the maintenance of order in the Saar Territory—as these possess the status of garrison troops—shall only be competent to try the military, except in the case provided for in article 3 below. They shall also be competent to try members of the Gendarmerie (Officers, N.C.O.'s, and Gendarmes) stationed in the Saar Territory, in respect of crimes and offences which the latter may have committed in the execution of their duties, while prosecuting punishable offences, and while investigating violations of the law in administrative matters.
> 3. The Military Courts shall, however, be competent to try civilians of any nationality for a crime or misdemeanour involving espionage, committed in the Saar Territory, and directed against the safety of the troops entrusted with the maintenance of order in the Saar Territory. In such cases the President of the Governing Commission shall entrust them with the prosecution.
> 4. If criminal proceedings are to be instituted on account of complicity, or for any other reason, against either civilians or military, each Court shall prosecute the defendants under its jurisdiction, unless one of the two Courts (by virtue of a special agreement for the particular case between the member of the Governing Commission in charge of Justice and the General Officer commanding the Saar Troops) entrusts the prosecution to the other. By virtue of this agreement the latter Court shall become competent to prosecute all defendants committed to it. In any case, either of the two

[67]) A.J.I.L. Off. Doc. 1919 p. 174/5.

Courts must communicate its proceedings to the other if requested to do so, and also impart all requisite documents and information bearing on the proceedings in question.

5. If martial law be proclaimed in the Saar Territory, or in any part thereof, the decree of the Governing Commission shall determine the competence of the Military Courts.[68])

The status of the French Troops detailed for the maintenance of order was explained in a letter by the Chairman of the Governing Commission to the Secretary General of the League of Nations, dated September 22, 1922:

> The position of these troops is as follows. They are garrison troops. They are not under the control of the Army of the Rhine, but are under the direct control of the French War Minister. They are confined to strictly military duties and their officers do not exercise any control over the people of their representatives. A Decree of the Governing Commission has withdrawn the inhabitants of the Saar from the jurisdiction of the courts-martial, which are now only competent to adjudicate in cases in which the military personnel is concerned.[69])

On August 28, 1922, the German Government wrote to the Secretary General of the League of Nations, *inter alia:*

> With regard to the Treaty of Versailles, §§ 23 and 25 referred to above (of the Annex to articles 45 to 50) establish, in a manner admitting neither dispute nor exception, that only the laws in force can be applied in the Saar Territory; that only the Courts provided for by the Treaty are authorised to administer justice, and that judicial decisions can only be taken in the name of the Governing Commission. French courts-martial, on the other hand, will always administer French Law, and their decisions will always be pronounced in the name of the French nation. The result of this is an irreconcilable contradiction. This contradiction could not be smoothed over by the argument that French courts-martial would be authorised to try civilians only on condition of a special order being given by the Governing Commission and that consequently they would only have a derivative competence, for a special order of this kind would not modify their nature as courts of a foreign State, the laws of which they administer and in the name of which they pronounce sentence.
>
> A detailed examination of the decree makes this contradiction clear. The decree implies violation of the principle that military courts are only authorized to try the military except in a state of siege or war. The violation in the case of the Saar Territory is made all the more remarkable 1) by the fact that paragraph 30 of the Annex of Articles 45 to 50 of the Treaty of Versailles entirely forbids the existence of military forces, and accordingly removes the conditions which would warrant establishment of military courts, and 2) by the fact that the members of the French Courts-martial are not fellow-countrymen of the accused but are the representatives of a foreign State.
>
> It is also provided that French courts-martial shall be competent in cases of espionage endangering the safetey of the troops. This provision refers purely to a question of competence and does not lay down what constitutes an act of espionage of this nature, nor what the penalty shall be. This question can only be decided in accordance with French law, for only French courts will be called upon to take cognisance of such cases. A decision on the question of competence will authorise the application in the Saar Territory of laws which are expressly declared inapplicable by paragraph 23 of the Annex. In the case of a proclamation of a state of siege, the Governing Commission reserves to itself the right to lay down

[68]) L.N.O.J. 1921, p. 861/2.
[69]) L.N.O.J. 1922, p. 1131.

special regulations with regard to the competence of courts-martial. By this means, the judicial system previously in existence, in which the competence of extraordinary military courts was strictly limited by law will be superseded by a regulation which gives the Governing Commission a completely free hand in any case which may arise, and creates a condition of uncertainty with regard to the law. But it should be clearly stated that, in the case of the Saar Territory, a state of siege, implying as it does intervention on the part of military courts, is inconsistent with the provisions of paragraph 30 of the Annex.

This question may be regarded from widely different points of view, but the conclusion is always the same: namely, that the jurisdiction of courts-martial and especially of French courts-martial in respect of inhabitants of the Saar Territory cannot be reconciled with the provisions of the Treaty of Versailles.

This argument cannot be rebutted on the ground that the French troops could not refrain from taking measures of defence against attempts upon their safety if they were to maintain order effectively, and upon the ground that such measures of defence could only be put into practice by the transfer of jurisdiction, in cases of this nature, to the courts-martial which form part of the military forces. Such an objection would apply only in practice and could not influence the decision of the fundamental question of jurisdiction. Moreover, this objection would only prove that the employment of French troops instead of a local gendarmerie for the maintenance of order is a fundamental contravention of the Treaty, as it would, beyond doubt, be followed by a further violation in other matters.

The German Government must, therefore, renew its protest against the exercise of jurisdiction by French courts-martial in respect of inhabitants of the Saar Territory, and again beg the League of Nations to take measures for the suppression of these courts.[70])

On December 9, 1922, the Chairman of the Governing Commission answered, *inter alia:*

The German Note is wrong when it states that "military courts are only authorised to try the military except in a state of siege or war". This is approximately the theory that the representatives of the German Government maintained in the arbitration proceedings arising out of the so-called 'Casablanca deserters' affair, but this theory was rejected by the permanent Court of arbitration at The Hague in its award made on May 22, 1909.

The main principles of international law in respect of the competence of military courts set up in foreign countries are as follows. Military courts are competent to deal with offences committed by the military. They are also competent to deal with crimes or offences against bodies of troops or the individual soldiers composing them. This latter view is admitted without there being any necessity to make a distinction between occupation in time of war and the presence of foreign troops for any other reason (von Liszt: Treaty on German Penal Law, French translation, vol. II, page 573). This is a result of the extraterritorial status which is recognised as a right of bodies of troops in foreign countries, and this extraterritorial status is theirs, says the same author (Völkerrecht, 9th edition, § 8, III, 6, page 76), whether their presence is based on the consent of the country in which they are or not. It should be noted that in the matter with which we are dealing no author has proposed that a distinction should be made between occupation and garrison troops. The wording used is general and applies to both. For instance, A. Corsi (L'occupazione militare in tempo di guerra, page 136) uses very far-reaching terms: "An army in a foreign country, whatever be the reasons and the conditions of its stay there, must, just like a warship at sea, obtain from its laws and its military courts the protection which it requires against acts which threaten its safety and the maintenance of its discipline." Pradier-Fodéré (Traité de droit international public, vol. VII, No. 2976, p. 854) holds the same view: "In the case of an occupation

[70]) L.N.O.J. 1923, p. 85.

which is of an entirely peaceful nature, for instance with a view to friendly protection which has been requested, the occupying Power does not send its armies into a foreign country and fly its flag there to expose its troops to agression and insult." When explaining the legal opinion of the French Supreme Court of Appeal (January 19th, 1865, Sirey 1865-1-53), which recognised the competence of the French court-martial in the case of attacks by Italians on French soldiers during the occupation of Rome, M. Pillet (Le droit de la guerre, vol. II, p. 226, no. 1) says: "This was a precautionary measure made necessary not so much by the state of war as by the presence of a French army on foreign territory."

The argument justifying the competence of military jurisdiction rests on the fact that the troops form an organised, disciplined and co-ordinated whole, which must, through its organisations, not only control its own administration (jurisdiction over the military) but also defend itself against external attack. To oblige them to remain powerless when faced with criminal acts threatening their safety would be equivalent to authorising them to appeal to the right of legitimate defence and to meet force with force. Two treaties provide precedents which confirm these arguments. The first of these is the Treaty of August 6th, 1764, between the Republic of Genoa and France (De Clercq, vol. XV, p. 87). The Genoese Government had asked France to send a body of troops to Corsica for the purpose of "holding and defending some of the places which the Republic possesses in that island and contributing as far as possible to the complete pacification of the country." The Treaty states that the duty of garrisoning the five places in question is to be entrusted to French troops: it lays down that these troops are not intended to make war but to garrison these places and provide for their internal policing, and that the Republic of Genoa shall retain in the said places "all the rights and the exercise of its sovereignty so far as the civil, ecclesiastical and municipal government is concerned", and finally, that in the case of France being at war with a Power with which Genoa was at peace, "the presence of the French troops in Corsica should not be regarded as affecting the neutrality which the Republic might desire to observe towards the belligerent parties." All these provisions clearly show that at that time the French troops in Corsica were garrison troops and not troops of occupation. Article 5 of the same Treaty laid down that "offences committed by the inhabitants against the military, and any other offences which it may be necessary to punish for the safe keeping of the place, shall be judged and punished by a provost court-martial under orders of the French general, without the civil courts of the Republic having any right to appeal against such sentences."

In the same way, as a result of the alliance of February 24, 1812, between France and Prussia, a Convention of the same date regarding the assistance to be given by Prussia in the event of war against Russia (De Clercq, vol. II, p. 356) authorises the French troops to pass through Prussian territory. Article 12 of this Convention lays down that offences "committed against individuals of the allied army shall be judged by military commissions set up by the generals of the said army."

The principles of international law therefore support the statement that the French military courts of the troops garrisoning the Saar are competent to deal with crimes or offences committed against those troops by the inhabitants. ...

The German Note is likewise wrong when it criticises the application of French law by courts-martial instead of the law in force in the Saar Territory on November 11, 1918. It is a recognised principle of international law that a criminal court only applies its own law.[71])

In a Resolution of February 20, 1923, the Council of the League of Nations decided that it was of opinion "that it is unnecessary for it to

[71]) L.N.O.J. 1923, p. 87/8. Cf. the Report by M. Tang Tsai-Fou, February 2, 1923, to the Council of the League of Nations, L.N.O.J. 1923, p. 361.

discuss the question of courts-martial, as, since the adoption of its resolution of June 20, 1921, no case has arisen." [72])

It may be argued that military occupation of alien territory in time of peace by garrison troops—temporarily—, is based on treaty or agreement between the occupied State and the occupying State: on the one hand, the occupied State remains invested with its territorial jurisdiction and it may exercise it, except over the foreign garrison troops; on the other hand, the occupying State exercises its governing jurisdiction over its army (garrison troops), exclusively, notwithstanding the fact that those troops are on foreign territory. In this conflict, the governing jurisdiction of the occupying State prevails over the territorial jurisdiction of the occupied State with regard to the garrison troops.

b. Occupation troops

The position of occupation troops is apt to vary because these troops may be on foreign territory for very different reasons. As to the occupied State: no general rule of international law could be so construed as to warrant a conclusion that by the mere fact of occupation, the territorial jurisdiction will cease to belong exclusively to the occupied State and will partially belong to the occupying State. Mr. F. Llewellyn Jones said rightly that "neither belligerent occupation nor pacific occupation involves any surrender or transfer of the sovereignty of the Government of the occupied territory." [73]) Only the exercise of that jurisdiction seems to be limited. On the one hand, it may not be exercised, as will presently be seen, over the occupation troops. It would be misleading, however, to speak, in this respect, of a so-called 'exterritoriality' of those troops [74]): it is not the negative fiction of exterritoriality, but the fact that the occupying State, as it has to organize, to assure the functioning of, and to defend its troops considered as public services, even outside the national territory, that explains the limitations imposed on the occupied State in the exercise of its territorial jurisdiction. On the other hand, it may be that this jurisdiction is further limited by treaty or agreement between the occupied and the occupying State. This affects the very status of the occupation troops in each case and the corresponding

[72]) L.N.O.J. 1923, p. 147. See also p. 146/50, 230, and 361/8.

[73]) Military occupation of alien territory in time of peace, Transactions of the Grotius Society, 9 (1923) - 159.

[74]) "On peut même dire, avec plus d'exactitude encore, que, dans l'occupation pacifique, la législation de l'Etat occupé est seule appliquée, avec cette réserve toutefois que le corps d'occupation jouit du bénéfice de l'exterritorialité.", R. Robin: Des occupations militaires en dehors des occupations de guerre, Paris 1913 p. 629.

jurisdiction of the occupying State over its troops. The Permanent Court of Arbitration held in the Casablanca case between France and Germany that "a corps of occupation as a rule also exercises exclusive jurisdiction over all persons belonging to it", and that "the jurisdiction of the corps of occupation should have the preference in case of a conflict when the persons belonging to this corps have not left the territory which is under the immediate, lasting, and effective control of the armed force" [75]). Occupation must be effective, and if so, the occupying State enjoys an exclusive jurisdiction over its occupation troops. In an annotation on a decision of the French Court of Cassation, dated March 22, 1923, in which it was held that "le territoire étranger occupé, même à la suite de la guerre, pour la protection des intérêts publics qui commandent cette occupation, est, au sens de l'article 63 Code just. milit., un territoire ennemi. Attendu que tout fait comportant une sanction pénale commise sur ce territoire et qui est de nature à compromettre lesdits intérêts ressortit à la compétence de la juridiction militaire",[76]) Prof. Nast wrote:

> L'occupation d'un pays étranger n'a pas son but en elle-même: son but est la réalisation ou la protection de certains intérêts publics; elle est un acte de souveraineté. Or, pour exercer cette souveraineté, pour réaliser ou protéger ces intérêts, l'Etat occupant emploie sa force armée, qui n'est que son agent d'exécution. En donnant compétence aux juridictions militaires pour connaître des faits portant atteinte à la sécurité de l'armée d'occupation, ce n'est pas seulement celle-ci qu'on veut protéger, mais c'est aussi l'Etat dont elle n'est que l'agent d'exécution, c'est sa souveraineté, c'est son indépendance. Et, comme l'Etat occupant est fondé à douter de l'impartialité des juridictions locales, il est naturel qu'il confie à ses propres tribunaux, qui, par hypothèse, sont des juridictions militaires, la mission d'assurer la protection de sa souveraineté, et, en même temps, la réalisation ou la défense des intérêts qu'il poursuit en occupant le territoire étranger.[77])

Whereas the occupying State enjoys governing jurisdiction over its occupation troops in foreign territory, which jurisdiction is exclusive with regards to other States, just as over its garrison troops, the Government of the occupying State will put some pressure, by the presence of the occupation troops, on the Government of the occupied State, which is not the case with garrison troops. This appears in particular when pacific occupation is not based on a treaty or agreement, but on some unilateral act. Military occupation of alien territory in time of peace can be based on treaty, for instance by way of guarantee. It may be remembered that the agreement between the United States of America, Belgium, the British Empire, and France,

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[75]) May 22, 1919, A.J.I.L. 3 (1909) - 757, 758, Survey No. 289.
[76]) Dalloz 1923-1-124.
[77]) Dalloz 1923-1-122. Cf. Dalloz 1865-1-500,501; 1866-1-46; 1866-5-84, 278, etc. See also L. Renault in R.D.I.L.C. 14 (1882) - 82.

of the one part, and Germany of the other part, with regard to the military occupation of the territories of the Rhine, signed at Versailles on June 28, 1919, in conformity with articles 428 to 432 [78]) of the Treaty of Versailles, provided in article 3:

> a) The High Commission shall have the power to issue ordinances so far as may be necessary for securing the maintenance, safety, and requirements of the Allied and Associated forces. Such ordinances shall be published under the authority of the High Commission, and copies thereof shall be sent to each of the Allied and Associated Governments and also to the German Government. When so published they shall have the force of law and shall be recognized as such by all the Allied and Associated military authorities and by the German civil authorities.
>
> b) The members of the High Commission shall enjoy diplomatic privileges and immunities.
>
> c) The German courts shall continue to exercise civil and criminal jurisdiction subject to the exceptions contained in paragraphs d) end e) below.
>
> d) The armed forces of the Allied and Associated Powers and the persons accompanying them, to whom the general officers commanding the armies of occupation shall have issued a revocable pass, and any persons employed by, or in the service of such troops, shall be exclusively subject to the military law and jurisdiction of such forces.
>
> e) Any person who commits any offence against the persons or property of the armed forces of the Allied or Associated Powers may be made amenable to the military jurisdiction of the said forces.

And in article 5:

> The civil administration of the Provinces (Provinzen), Government departments (Regierungsbezirke), urban circles (Stadtkreise), rural circles (Landkreise), and communes (Gemeinde), shall remain in the hands of the German authorities, and the civil administration of these areas shall continue under German law and under the authority of the central German Government, except in so far as it may be necessary for the High Commission by ordinance under article 3 to adapt that administration to the needs and circumstances of military occupation. It is understood that the German authorities shall be obliged, under penalty of removal, to conform to the ordinances issued in virtue of article 3 above.[79])

It appears from these excerpts, that the exercise of the occupied State's territorial jurisdiction can be limited not only with respect to the occupation troops, but also as regards administrative measures. In that case, the occupying State does not only exercise its governing jurisdiction over its occupation troops, but it also diplays some activities, which, normally, lie in the field of the activities of the territorial sovereign.

Further, military occupation may be established, by agreement, for the maintenance of order. In article 88 of the Treaty of Versailles it was provided that

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[78]) "As a guarantee for the execution of the present Treaty by Germany, the German territory situated to the west of the Rhine, together with the bridgeheads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present Treaty.", article 428; "All matters relating to the occupation and not provided for by the present Treaty shall be regulated by subsequent agreements, which Germany hereby undertakes to observe.", article 432.

[79]) A.J.I.L. Off. Doc. 1919, p. 404, 406.

> In the portion of Upper Silesia included within the boundaries described below, the inhabitants will be called upon to indicate by a vote whether they wish to be attached to Germany or to Poland. ... The Polish and German Governments hereby respectively bind themselves to conduct no prosecutions on any part of their territory and to take no exceptional proceedings for any political action performed in Upper Silesia during the period of the regime laid down in the Annex hereto and up to the settlement of the final status of the country. Germany hereby renounces in favour of Poland all rights and title over the portion of Upper Silesia lying beyond the frontier line fixed by the Principal Allied and Associated Powers as the result of the plebiscite.[80])

In the Annex to that article, it was stipulated in § 2:

> The plebiscite area shall be immediately placed under the authority of an international Commission of four members to be designated by the following Powers: the United States of America, France, the British Empire, and Italy. It shall be occupied by troops belonging to the Allied and Associated Powers, and the German Government undertakes to give facilities for the transference of these troops to Upper Silesia.

And in § 3:

> The Commission shall enjoy all the powers exercised by the German or the Prussian Government, except those of legislation or taxation. It shall also be substituted for the Government of the province and the Regierungsbezirk.
>
> It shall be within the competence of the Commission to interpret the powers hereby conferred upon it and to determine to what extent it shall exercise them, and to what extent they shall be left in the hands of the existing authorities.
>
> Changes in the existing laws and the existing taxation shall only be brought into force with the consent of the Commission. The Commission will maintain order with the help of the troops which will be at its disposal, and, to the extent which it may deem necessary, by means of gendarmerie recruited among the inhabitants of the country. The Commission shall provide immediately for the replacement of the evacuated German officials and, if occasion arises, shall itself order the evacuation of such authorities and proceed to the replacement of such local authorities as may be required. ...[81])

Finally, States may agree that military occupation may take place after failure of one of the Parties to perform treaty obligations. Thus it was provided in § 18 of Annex II to Article 244 of the Treaty of Versailles:

> The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances.[82])

But military occupation may also result from a unilateral act, such

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[80]) A.J.I L. Off. Doc. 1919, p. 195/6.

[81]) A.J I.L. Off. Doc. 1919, p. 197.

[82]) Ibidem p. 264. The Ruhr Basin was occupied by France in 1920; this occupation, says Paul Fauchille "a laissé les autorités allemandes et les services publics continuer à fonctionner, mais sous le contrôle des autorités militaires françaises.", Traité de Droit International Public, vol. II (Guerre et Neutralité), p. 1052/3, No. 1709, 1.

as intervention,[83]) or reprisals;[84]) in such cases, it is clear that the exercise of the occupied State's territorial jurisdiction will be once more limited in favour of the occupying State.

The conclusion is that it is difficult to determine, as a general rule, the exact extent and exercise of jurisdictions of the occupying State, owing to the various reasons for pacific occupation and its conventional regulations. M. L. Cavaré rightly wrote: "La vérité est qu'il ne paraît pas possible de définir pour toutes les occupations, et en une fois, les compétences de l'occupant. Elles sont infiniment variables, comme l'occupation dont elles sont un accessoire. Rien n'est plus souple et plus difficilement saisissable que la notion d'occupation militaire pacifique; les formes qu'elle revêt sont aussi variées que les fins qu'elle se propose: les pouvoirs dont l'occupant est investi varieront en corrélation avec elles." [85])

II. Occupation of enemy territory in time of war

In time of war, invasion precedes military occupation of enemy territory. Invasion is a period of fighting within a battle-zone; occupation is a period of relative tranquillity behind the battle-line. Article 42 of the Regulations annexed to the Convention concerning the laws and customs of war on land, The Hague October 18, 1907, provides: "A territory is considered as being occupied when it is actually (French text: 'de fait') under the authority of the hostile army. The occupation extends only to the regions where this authority is established and capable ot being asserted." [86])

In fact, belligerent occupation rests on an act of war, it must be effective, and it has a temporary character.[87]) In law, it gives rise, mainly, to three groups of relations which will now be examined.

a. Relations between the occupying State and its occupation troops

If an occupying State enjoys, in an exclusive manner with regard to other States, governing jurisdiction over its occupation troops on foreign non-enemy territory,[88]) *a fortiori* it enjoys an exclusive governing jurisdiction over its occupation troops on enemy territory.

[83]) *E.g.:* exepedition of troops of European Powers against a revolt of the Boxers in China, 1900, to safeguard the foreigners.

[84]) *E.g.:* the occupation of the port of Corinto, Nicaragua, by the British, 1896; occupation of a port of the island Mitylene, Turkey, by French mariners, 1901; occupation of Corfu, Greece, by the Italian, 1923, etc.

[85]) Quelques notions générales sur l'occupation pacifique, R.G.D.I.P. 31 (1924) - 353/4.

[86]) A.J.I.L. Off. Doc. 1908, p. 112.

[87]) Cf. W. E. Hall: A Treatise on International Law, 8th ed., Oxford 1924, §§ 52, 54, 153/61. Occupation, he says, "is merely a phase in military operations" (§ 155).

[88]) *Vide supra.*

The United States Supreme Court, which, like all domestic courts, regards this relation between the invading State and its troops as a matter of military law, held in the case Coleman v. Tennessee:

> ... When the armies of the U.S. were in the enemy's country, the military tribunals mentioned had, under the laws of war and the authority conferred by the section named, exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. ... If an army marching through a friendly country would thus be exempt from its civil and criminal jurisdiction, a fortiori would an army invading an enemy's country be exempt. The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offences committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded. ... The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering State or the orders of its military commander. By such occupation, the political relation between the people of the hostile country and their former Government or sovereign are for the time severed; but the municipal laws, that is, the laws which regulate private rights, enforce contracts, punish crime and regulate the transfer of property, remain in full force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before, unless thus changed. In other words, the municipal laws of the State and their administration remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent.
>
> This doctrine does not affect, in any respect, the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the Army of the U.S. in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people. As respects them, the same acts which constituted offences before the military occupation constituted offences afterwards; and the same tribunals, unless superseded by order of the military commanders, continued to exercise their ordinary jurisdiction.[89])

b. Relations between the occupying State and the occupied State

The conflict arising between the governing jurisdiction of the occupying State and the territorial jurisdiction of the occupied State is regulated by international law. The question arises whether, as in time of peace, the occupied State remains invested with its territorial jurisdiction. Only a few international decisions seem to be available

[89]) 97 U.S. 509. See also the same Court in Dow v. Johnson, 100 U.S. 158, Freeland v. Williams, 131 U.S. 405, etc. As to the relation between the occupying troops and the inhabitants of the occupied State, see e.g.: Dr. Graf Stauffenberg: Vertragliche Beziehungen des Okkupanten zu den Landeseinwohnern, Z.f.a.ö.R.u. V. II-1-86/119 (1931); Mewes: Die Rechtsverhältnisse zwischen den Angehörigen des Besatzungsheeres und den Landeseinwohnern, in: Protokolle der Tagung richterlichter Militärjustizbeamter in Brussel am 29/30 September 1916, samt einigen vorbereitenden Gutachten, zusammengestellt auf Anordnung Seiner Exzellenz des General-gouverneurs in Belgien, Herrn Generaloberst Freiherrn von Bissing. Durch Oberkriegsgerichtsrat K. A. Willeke, p. 58.

on this point: Eugène Borel, arbitrator in the Turkish Public Debt case, said that "quels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté." [90]) Among national decisions, there is one ancient ordinance of the Council of Flanders, dated September 11, 1677, wherein it was held that "par la prise et l'occupation d'une ville, forteresse ou place durant la guerre, le souverain ne perd pas la propriété et la souveraineté du pays qui en dépend ou de ses appendances, notamment aussi longtemps que ceux-ci ne sont pas cédés par traité." [91]) In a prize case ("The Gerasimo"), the Judicial Committee of the Privy Council held on March 2/4, 1857:

> that the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of the "Dart" and "Happy Couple", when the rule operated with extreme hardship. ... On the other hand, when places in a friendly country have been seized by and are in possession of the enemy, the same doctrine has been held. ... These authorities, with the other cases cited at the Bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. ... It seems impossible to hold that by means of an occupation so taken, so continued, and so terminated, Moldavia ever became part of the dominions of Russia, and its inhabitants subjects of Russia, and, therefore, enemies of those with whom Russia was

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[90]) April 18, 1925, ed. Geneva 1925, p. 40, Survey No. 353. Cf. a decision of the M.A.T. Hungary-Kingdom of Serbians, Croatians and Slovenians, dated September 13, 1928, wherein it was held that "le Traité d'armistice n'a pas eu pour effet de transférer au Gouvernement des Serbes, Croates et Slovènes les droits de souveraineté appartenant au Gouvernement hongrois par rapport aux territoires occupés; que les autorités hongroises chargées de l'exercice de ces droits continuaient de fonctionner.", M.A.T. vol. 8 p. 593. Belligerent occupation was also discussed before the Permanent Court of International Justice in the case of the Lighthouses between France and Greece, but the Court did not pronounce an opinion thereon; Cf. Series C. No. 74, Greek Case p. 125 ("le pouvoir qu'il (i.e. the occupied State) possède en droit, il ne peut pas l'exercer en fait"), French Counter-Case p. 168, Greek Counter-Case p. 202, Speech of Prof. Basdevant, agent for France p. 250 ("L'occupation de guerre n'apporte aucune limite juridique à l'autorité du souverain légal. Le souverain légal rencontre toutes sortes d'obstacles de fait; ces obstacles de fait découlent de l'état de guerre; mais aucune limite juridique ne lui est imposé, spécialement par la Convention de La Haye"), Speech M. Politis, agent for Greece, p. 328, Speech Prof. Basdevant p. 354. Mr. Séfériadès, who filed a separate opinion, touched to this matter: Series A/B No. 62, p. 50/1,53 (March 17, 1934).

[91]) Plakkaat van Vlaanderen, III, 1, 105. This ordinance is quoted in H. van Houtte: Les occupations étrangères en Belgique sous l'ancien Régime, Gent 1930, vol. I, p. 272. He observes: "Le premier document que nous ayons rencontré, où le transfert immédiat de la souveraineté à l'occupant se trouve contesté, est une ordonnance du Gouvernement Espagnol des Pays-Bas des 26-29 juillet 1675, défendant aux habitants de la Province de Limbourg et des pays d'Outre-Meuse, après la prise de la ville de Limbourg par les Français, de reconnaître un autre souverain que le roi d'Espagne. Mais cette ordonnance est trop laconique pour pouvoir être considérée comme une affirmation de principe.", p. 271. Cf. R.D.I.L.C. 58 (1931) - 364/74.

at war. The utmost to which the occupation could be held to amount was a temporary suspension of the suzeraineté of the Porte, and a temporary assumption of that suzeraineté by Russia; but the national character of the country remained unaltered, and any intention to alter it was disclaimed by Russia.[92])

In a decision of May 20, 1916, the Belgian Court of Cassation held that

> la souveraineté belge émanée de la nation n'est pas, par le fait de l'occupation d'une partie du territoire par les armées allemandes, passée au chef de ces armées, la force ne créant pas le droit;[93])

and in a decision of July 5, 1917, the same Court held:

> Attendu que la force militaire, élément exclusivement matériel, ne saurait altérer la substance essentiellement juridique du droit de souveraineté et, moins encore, transférer celui-ci du chef de l'Etat envahi dans celui de l'occupant, bien qu'elle fournisse à celui qui la détient le moyen de paralyser la mise en pratique de tout ou partie des droits du souverain;
> Attendu que la théorie surannée de l'abolition de la souveraineté nationale en cas d'occupation ne repose sur aucune base;
> Attendu que celle plus récente du démembrement est une thèse scientifique qui n'a point jusqu'ores passé dans le droit positif; que, dès ses premiers mots, l'article 43 du Règlement annexé à la quatrième Convention de La Haye la repousse; que, pour la concilier avec cet article, il faudrait faire abstraction des mots "en fait" qui sont exclusifs de toute idée de démembrement en droit.[94])

It appears from these decisions that the occupied State remains invested with its territorial jurisdiction notwithstanding belligerent occupation of its territory by foreign troops. This point of view is also shared by many authors on international law. Mr. F. Llewellyn Jones wrote that "neither belligerent occupation nor pacific occupation involves any surrender or transfer of the sovereignty of the Government of the occupied territory. In the case of war occupation all that passes to the occupying Power is the right to exercise the authority necessary for the safety of its troops and for the operations of war. From this it will be seen that the laws of the invaded State continue in force, unless the position of the occupying army is prejudiced thereby. All the administrative officers and officers connected with the judicial system of the country perform their usual functions. The daily life of the inhabitants of the occupied territory, even in war, should be interfered with as little as possible."[95]) And R. Robin was of opinion that

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[92]) E. S. Roscoe: Reports of Prize Cases, 1745-1859, London 1905, vol. II p. 584/586, 589/90.
[93]) Pasicrisie belge 1915/6 p. 417.
[94]) Pasicrisie belge 1917, p. 281. See also two interesting decisions of the United States Supreme Court: United States v. Rice, 1819, 4 Wheaton 247, and Fleming v. Page, 1850, 9 Howard 603.
[95]) Loc. cit. p. 159.

> la souveraineté du pays occupé..., paralysée en fait..., subsiste en droit. L'occupation n'est qu'un fait de guerre. ...Quant à l'occupant, ...son autorité sur ce territoire ne repose que sur le fait de la possession. C'est à raison de sa détention de fait qu'il a certains droits et, comme corrolaire, certaines obligations. Son pouvoir n'est donc qu'un pouvoir de fait, et non l'exercice d'un droit de souveraineté; pouvoir précaire, ne découlant que de la possession, et que ne pourra se transformer en droit qu'à la conclusion de la paix, par la cession du territoire occupé. ... Simple état de fait, l'occupation de guerre ne peut donner naissance qu'à un pouvoir de fait: elle ne modifie pas, en droit, la situation internationale du territoire occupé. [96])

From the discussions at the Hague Conference of 1899 on the Convention concerning laws and customs of war on land, the following opinions may be quoted:

> M. Beernaert objecte que l'on ne peut pas conventionellement attribuer d'avance au vainqueur certains pouvoirs sur le territoire du vaincu. ...
>
> M. Rolin est d'avis qu'on ne doit pas reconnaître conventionnellement et d'avance le droit du vainqueur. L'idée qui préside à ces articles est de fixer des limites que le vainqueur ne pourra pas dépasser, sauf le cas des nécessités de la guerre. Il s'agit ici non de stipuler ce que le vainqueur est autorisé à faire, mais ce qui doit lui être interdit. ...
>
> Le Comte Nigra résume l'idée qui se dégage clairement de la délibération: on ne peut empêcher le fait et l'on ne peut pas reconnaître le droit. ...
>
> M. Bourgeois: D'une part, tous les délégués sont d'accord pour ne vouloir, en aucun cas, donner le caractère de droit à ce qui est seulement un fait, le fait de guerre. D'autre part, tous sont également d'accord pour rechercher les moyens de diminuer les charges que ce fait de guerre imposerait aux populations. [97])

If, therefore, on the one hand, the occupied State remains invested with its territorial jurisdiction *during* the belligerent occupation, it cannot, on the other hand, *exercise* that jurisdiction in view of the fact that its territory is effectively occupied by enemy troops. This exercise will be re-established *after* the enemy occupation has come to an end, unless the territory concerned is ceded by the treaty of peace. As was held by E. Borel as arbitrator in the quoted Turkish Public Debt case: "le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur. Une dérogation à ce principe ne peut être admise que si elle est nettement convenue dans le traité en cause." [98])

c. Relations between the occupying State and the inhabitants of the occupied State

Since the occupied State cannot, during the belligerent occupation, exercise its territorial jurisdiction, display of necessary state-activities on the occupied territory will lie in the hands of the occupying State.

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[96]) Op. cit. p. 5/7, note p. 8.

[97]) A. Mechelynck: La Convention de La Haye concernant les lois et coutumes de la guerre sur terre, Gand 1915, p. 342, 344, 393, 394.

[98]) Loc. cit. p. 41.

As to the occupying State: its power rests on a fact. The occupying Power, as Mr. L. Oppenheim says, holds the inhabitants of the occupied State "in the hollow of his hand; he will crush them if they are not obedient. They must be obedient because he can enforce obedience. His authority is based, not on any law, but on his force; it rests on his bayonets, and on the good will, if any, of the inhabitants." [99]) But, if the occupying State *can* do all it deems fit to do for the prosecution of its war, it has also the duty "to restore, and, as far as possible, to insure public order and life", in conformity with the requirement of effective occupation. It is the very aim of the just quoted Hague Convention to limit the power of the occupying State. Article 43 holds: "When the legally constituted authority has actually passed into the hands of the occupant, the latter shall take all measures within his power to restore and, as far as possible, to insure public order and life, respecting the laws in force in the country unless absolutely prevented." [100]) The text of this article is not wholly correct, for, the "legally constituted authority" does not "pass into the hands of the occupant": [101]) belligerent occupation, as has been observed, does not involve any transfer of jurisdictions, it only impedes the exercise of jurisdictions by the occupied State. The question arises, then, what jurisdictions the occupying State exercises over the inhabitants of the occupied State. It cannot exercise over them its own territorial jurisdiction, as it can only exercise this jurisdiction within its own territorial limits, and as, moreover, it has to respect, following the quoted article 43, the law in force in the country unless absolutely prevented. [102]) Nor can it exercise the jurisdictions of the occupied State: since the power of the occupying State rests on a fact of war, the new legislative measures (ordinances) cannot have the character of laws of the occupied State.[103]) The Court of Appeal of Liège, in an interesting decision

[99]) The legal relations between an occupying power and the inhabitants, Law Quarterly Review 33 (1917) - 368.

[100]) A.J.I.L. Off. Doc. 1908 p. 112.

[101]) "Will man den Sinn der Haager Regel richtig fassen, so musz man sagen, dasz nicht die gesetzmäszige Gewalt, sondern ihre Ausübung auf den Besetzenden übergeht, was das Haager Recht irrtümlich als tatsächlichen Uebergang dieser Gewalt konstruiert.", S. Cybichowski: Das völkerrechtliche Okkupationsrecht, Z. f.V. 18 (1934) - 299.

[102]) "Die Behauptung einiger Autoren, dasz der Besetzende die eigene und nicht eine fremde Staatsgewalt ausübt, ist unvereinbar mit der Vorschrift, dasz er grundsätzlich die fremden Landesgesetze zu beachten hat und ihm infolgedessen die in ihnen geregelten Kompetenzen des feindlichen Staates zustehen.", Cybichowski, loc. cit.

[103]) "Attendu que les arrêtés de l'occupant ne sont pas des lois et ne valent pas comme lois, si l'on entend par là qu'ils auraient, en eux-mêmes, et par leur vertu propre, le même caractère et la même autorité que la législation nationale interne de l'Etat occupé dans laquelle ils viendraient s'incorporer sans avoir reçu

of February 13, 1917, examined the question in how far the national judge (of the occupied State) may appreciate these ordinances. The Court held:

> Attendu que la mission du pouvoir judiciaire, émanation de la Souveraineté nationale, consiste dans l'application de la législation belge à laquelle ses membres ont juré obéissance;
>
> Que, s'il applique des lois établies par une autorité étrangère, ce n'est que lorsqu'il y est expressément ou tacitement invité ou habilité par une disposition de sa loi nationale;
>
> Att. que l'occupation étrangère, essentiellement différente de la conquête, n'a pas eu pour effet de modifier la Constitution ni les attributions du pouvoir judiciaire, qui conserve son caractère de pouvoir national et ne peut appliquer les décrets de l'autorité étrangère, même occupante, que dans les limites ci-avant indiquées;
>
> Att. que les arrêtés des 10 février et 27 mars 1915 s'autorisent du règlement annexé à la IVe Convention internationale de La Haye du 18 octobre 1907, dont les prescriptions sont devenues obligatoires en Belgique en vertu de la loi du 25 mai/8 août 1910;
>
> Att. que la question à résoudre est donc celle de savoir si, en tant qu'ils modifient des dispositions de la loi belge relatives à la compétence et au ressort et qu'ils instituent une juridiction spéciale pour connaître des contestations en matière de louage, ces arrêtés du gouverneur général ont été pris en conformité ou en violation de l'article 43 dont ils se prévalent;
>
> Att. que cet article est ainsi conçu: "L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics, en respectant, sauf empêchement absolu, les lois en vigueur dans le pays";
>
> Att. qu'il ressort de ces termes que, loin de reconnaître à l'occupant le pouvoir de légiférer en maître dans le pays occupé, la Convention de La Haye lui impose, au contraire, le respect des lois qui y sont en vigueur, et ne l'autorise qu'à titre exceptionnel à les modifier;
>
> Att. que, pour déterminer si les modifications dont le validité est contestée ont été décrétées dans les limites du pouvoir reconnu par cette disposition, il importe d'en chercher la portée exacte à la lumière des travaux de la Conférence de Bruxelles et de La Haye où elle a été élaborée et dont les Protocoles, ainsi que le déclarait le général de Voigts-Rettz, sont les commentaires de la loi;
>
> Att. que l'on objecterait vainement que, s'agissant de délimiter le pouvoir législatif de la Puissance occupante en territoire occupé, question qui relève du droit public international, l'interprétation de l'article 43 échapperait d'une façon absolue au pouvoir judiciaire, lequel, en s'y prêtant, empiéterait sur les attributions du pouvoir national compétent;
>
> Att., en effet, que les juges ne prononçant pas par voie de disposition générale et réglementaire (article 5 du Code civil), une interprétation obligatoire pour les parties litigeantes relativement à la cause qui leur est soumise, ne peut lier les Hautes-Parties contractantes, à l'égard desquelles ils n'ont pas juridiction;
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> Att. d'autre part, que le juge ne peut, sans se rendre coupable de déni de justice, refuser de juger sous prétexte de l'obscurité de la loi (article 4 du Code civil), et qu'ainsi son pouvoir d'interpréter la loi est le corrolaire de son devoir de l'appliquer;
>
> Att. enfin qu'à raison même de son objet, la Convention de La Haye, qui

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la sanction de l'autorité légitime; qu'ils ne sauraient être autre chose que des ordres de l'autorité militaire de l'occupant.", Cour de Cassation de Belgique, May 20, 1916, Pasicrisie 1915/6 p. 417 Cf. Dr. Schauer: Das Gesetzgebungsrecht des Okkupanten, in the quoted Protokolle (p. 286), p. 42 et seq. See the same author in: Das Belgische Kassationshof zur Frage des Gesetzgebungsrechts des Okkupanten, Deutsche Juristen-Zeitung 1916 p. 658/62. In other sense: the same Court in a decision of July 12, 1844, Pasicrisie 1844 p. 213/4.

érige en règles obligatoires pour les Etats contractants certains principes du droit des gens, n'est appelée à sortir ses pleins et entiers effets qu'en un temps où, les relations diplomatiques étant rompues entre les intéressés, une interprétation commune et amiable est devenue impossible, et qu'il se concevrait malaisément que le juge, appelé à en appliquer les dispositions pendant les hostilités, dût s'interdire d'en pénétrer le sens;

Att. que la conciliation des divers principes qui sont en jeu peut se traduire dans cette formule, que la Cour a le droit d'interpréter la Convention de La Haye dans la mesure où la solution de la question de compétence dont elle est valablement saisie rend cette interprétation nécessaire;

Att. que les commentateurs de la Convention de La Haye ont exactement caractérisé la nature du pouvoir reconnu à la Puissance occupante en disant "qu'elle ne gouverne pas, mais qu'elle administre", et que, s'acquittant des fonctions que l'autorité légitime est provisoirement dans l'impossibilité de remplir, c'est à l'aide de la législation existante qu'elle doit assurer le maintien de l'ordre et de la vie publics;

Att. que, en dehors de ses exigences d'ordre militaire, la guerre entraîne à sa suite une perturbation de l'ordre économique à laquelle il n'est pas toujours possible de porter remède au moyen de la législature établie pour le temps de paix;

Que c'est pour ce motif et dans ces bornes, qu'indépendamment des mesures commandées par les nécessités militaires, qui sont étrangères au présent débat, l'on a reconnu à la Puissance occupante, chargée d'assurer l'ordre et la vie publics dans le territoire occupé, le droit éventuel et exceptionnel de modifier une législation que des circonstances spéciales rendent inefficace;

Att. que, ce droit trouvant sa cause dans le trouble occasionné par l'état de guerre, ce n'est que par un abus de sa puissance et en violation de la mission tutélaire que la convention de La Haye lui assigne, que l'occupant porterait la main sur des lois dont l'état de guerre n'exigerait pas le changement;

Att. que c'est en s'inspirant de cette idée directrice que, d'accord avec le Président de la Conférence de Bruxelles de 1874, le Baron Lambermont, délégué de la Belgique, et le général de Voigts-Rettz, délégué de l'Allemagne, ont, sans contradiction des délégués des autres Puissances, considéré comme intangibles les lois d'ordre privé concernant notamment la famille, les successions, les propriétés privées, etc.;

Att. que c'est dans le même esprit que le texte de l'article 43 a été adopté définitivement, à l'unanimité, par les représentants des Etats contractants à la séance du 10 juin 1899 de la Conférence de La Haye;

Att. dès lors que, dans l'hypothèse envisagée par la partie appelante, ou l'occupant viendrait à décréter des modifications au régime des successions, aux lois relatives au divorce ou au mariage, le pouvoir judiciaire devrait nécessairement refuser l'application de ces décrets pris en violation de la Convention de La Haye;

Att. qu'il n'en est pas ainsi dans le cas actuel;

Att. que le bouleversement économique, occasionné par la guerre, a une répercussion directe sur la question du logement et peut, comme l'histoire de la guerre franco-allemande de 1870 le démontre, nécessiter à cet égard l'établissement d'un régime légal nouveau;

Que cette matière rentre donc dans le cadre de celle où, substitué provisoirement à l'autorité légitime, le pouvoir occupant peut apporter des modifications à la législation nationale;

Att. il est vrai, que, même en ces matières, l'intervention de l'occupant n'est légitime que s'il y a empêchement absolu de dénouer la crise au moyen de la législation en vigueur;

Att. qu'il n'appartient pas au pouvoir judiciaire de vérifier si cette condition existe, celui auquel incombe le maintien de l'ordre et de la vie publics étant, comme il ressort d'ailleurs des travaux préparatoires, seul juge de la nécessité, de l'opportunité et de l'efficacité des moyens auxquels il convient de recourir pour remplir, dans les limites tracées par la Convention de La Haye, la mission que l'article 43 lui impose;

Att., sans doute, qu'administrant le pays occupé sous la sanction déter-

minée par l'article 3 de la Convention, l'occupant ne peut modifier ou suspendre arbitrairement les lois qui y sont en vigueur; mais que lorsqu'il agit dans la sphère où son droit de légiférer a été circonscrit, l'usage qu'il en fait échappe au contrôle des Cours et Tribunaux;

Att. que, considérées en elles-mêmes, les dispositions des arrêtés des 10 février et 27 mars 1915 relatives à la compétence, au ressort et à l'institution d'une juridiction spéciale, dispositions empruntées à la loi française du 21 avril 1871, ne heurtent pas la conscience de l'homme ni du citoyen;

Que la dignité du magistrat, son honneur, ni ses devoirs envers la Patrie ne lui interdisent pas de les appliquer;

Et qu'il n'a, dès lors, pas le droit, pour éviter de collaborer à cette application, de résigner des fonctions dont il a continué l'exercice dans l'intérêt de son pays et conformément au voeu du gouvernement légitime;

Par ces motifs—la Cour—, De l'avis conforme de M. l'avocat général Ségard, écartant toutes conclusions autres ou contraires, confirme le jugement appelée, et condamne la Société appelante aux dépens.[104])

That the occupying State does not exercise jurisdictions, which, in time of peace, belong either to itself or to the occupied State, appears, moreover, from the fact that the occupying State does not engage, in the display of its activities, its national responsibility with regard to the inhabitants of the occupied territory. In the doctrine of international law, a distinction should be carefully drawn, as was held by the Mixed Arbitral Tribunal Germany-Great Britain, in a decision of December 12, 1923, "between such measures as a State is taking within its own territory, by virtue of its territorial sovereignty, and those measures, which are taken and carried out by its authorities in the enemy country invaded and occupied by its armies. Requisitions in invaded enemy territory belong to the second category." The same Tribunal continued: "However unjustified this seizure and confiscation may have been, in face of Article 52 of the Hague Regulations, it appears, prima facie, as hardly possible to apply the principles of private law concerning illegal dealings by private persons with the private property of others to the acts of a belligerent State in the use or misuse of its military power in an enemy country occupied by its armies." [105]) In a dissenting opinion before the Mixed Arbitral Tribunal France-Germany, the German Arbitrator, W. Frölich, considered that „les actes accomplis par un belligerent en territoire occupé, en vertu du droit de la guerre, sont des actes de souveraineté qui échappent au régime du droit privé." [106]) The occupying State, in the display of its activities with regard to the inhabitants of the occupied territory, engages its international reponsibility as

[104]) Journal Clunet 1917 p. 1809. In the same sense: Cour de Cassation de Belgique, 11-6-1903, Pasicrisie 1903 p. 301; 20-5-1916, Pasicrisie 1915/6 p. 418 (also in Journal Clunet 1920 p. 732). Cf. Stauffenberg loc. cit. p. 104. In other sense: XXX: L'occupation de guerre et les arrêtés du Pouvoir occupant en regard de la juridiction des cours et tribunaux du pays occupé, Brussels 1918. Cf. Dr. G. Wunderlich: Der belgische Justizstreik, Berlin 1930.

[105]) T.A.M. vol. 4 p. 45.

[106]) April 8, 1929, T.A.M. vol. 9 p. 78.

regards the occupied State—which remains invested with all its jurisdictions over its territory and population—in so far as those acts are contrary to the accepted rules of the law of war, *i.e.*, the Convention concerning the laws and customs of war on land.[107]) Article 3 of this Convention provides: "The contracting party, when belligerent, who violates the provisions of said Regulations shall be obliged to pay indemnity, it there is occasion therefor. It shall be responsible for all acts committed by persons forming part of its armed forces." [108]) In an arbitration between Germany and Portugal with respect to paragraph 4 of the Annex to articles 297/8 of the Treaty of Versailles, it was held by the Arbitral Tribunal that „la responsabilité de l'Etat allemand est engagée par tout acte contraire au droit des gens ordonné, ou toléré, par les autorités militaires ou civiles en territoire occupé." [109]) In practice, the effects of this responsibility will only be realized after the war, when the occupied State can again exercise its state jurisdictions and enforce its rights.[110]) During the war—the Mixed Claims Commission Great Britain-U.S.A., under

[107]) "L'occupant peut abuser de deux façons très différentes de son autorité matérielle pour modifier sans raison suffisante l'organisation intérieure du pays qu'il occupe. L'abus n'existe pas seulement quand, édictant des mesures qui excèdent sa compétence, l'occupant dépasse les limites objectives de ses attributions provisoires; il se présente également lorsque l'occupant use de ses pouvoirs dans un but et pour des motifs étrangers à l'objet véritable de sa mission en pays occupé. Tel est le cas lorsque, sous le couvert de mesures d'administration, l'occupant poursuit des fins politiques, lorqu'il s'attache, par exemple, à favoriser la diffusion d'une propagande antipatriotique ou d'un mouvement destiné à jeter la division parmi les populations. Les autorités du pays occupé refuseront de se prêter à de telles manoeuvres. Il y a là une limitation d'ordre subjectif qui rappelle la distinction établie par la juridiction administrative française entre l'excès de pouvoirs et le détournement de pouvoirs et qui offre dans les circonstances actuelles un intérêt particulier.", Ch. de Vischer: L'occupation de guerre, Law Quarterly Review 34 (1918) - 81.

[108]) A.J.I.L. Off. Doc. 1908 p. 90.

[109]) June 30, 1930, Z.f.a.ö.R.u.V. III (1933) - 2 - 10, Survey No. 325. "Ne a confortare l'asserzione della responsabilità territorialmente illimitata rispetto ai beni dei sudditi degli Stati alleati o associati puo valere l'argomentazione logica che lo Stato, anche sul territorio occupato, esercita una sovranità, sia pure di fatto, e che come esso risponde dei danni arrecati ai detti beni, quando siano situati nel suo territorio, ad opera di un provvedimento eccezionale che e esplicazione della sovranità di diritto, cosi deve del pari rispondere dei danni agli averi nemici in territorio occupato quando siano cagionati da un provvedimento eccezionale di guerra, il quale e pure emanazione di una sovranità, essia della sovranità di fatto. Invero, il fondamento della responsabilità per i provvedimenti eccezionali di guerra non e da ricercare alla stregua degli astratti principi di logica ne del diritto commune, secondo il quale, anzi, l'esercizio della sovranità non darebbe luogo a responsibilità alcuna da parte dello Stato: e, per contro, da considerare solo in rapporto alle concrete disposizioni del Trattato di pace, che orea questa responsabilità e ne pone i limiti; ed i limiti, sotto l'aspetto della localizzazione, consistono appunto nella situazione, sul territorio bulgaro, dei beni cui si rivolse il provvedimento pregiudizievole.", Bulgaria-Italy, M.A.T., 13-11-1924, T.A.M. vol. 5 p. 549/50.

[110]) After the war 1914-1918, the validity of many measures taken by Germany in occupied territories was contested by national tribunals, see e.g. Cour de Douai, May 15, 1919, Dalloz 1920-2-145, etc. Cf. R.G.D.I.P. 27 (1920) - 248/77.

Convention of August 18, 1910, held—the occupying State has only a moral, not a legal duty to pay compensation:

> In law, an act of war is an act of defence or attack against the enemy and a necessity of war is an act which is made necessary by the defence or attack and assumes the character of vis major. In the present case, the necessity of war was the occupation of Siboney, and that occupation which is not criticized in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures, i.e., the destruction of the houses and their contents. ... In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war, and according to the principle accepted by the two Governments, it does not give rise to a legal right of compensation. On the other hand, notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitary conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in that way, there may be a moral duty which cannot be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect.[111])

As to the inhabitants of the occupied State: on the one hand, their relations with the Home State remain unaltered during the occupation; after the occupation, their Government may call them to account if, during the belligerent occupation, they have committed acts contrary to their legal obligations as these existed before the beginning of hostilities. On the other hand, they are bound to submit to the occupying Power, not indeed by virtue of their domestic law,[112]) nor pursuant to international law,[113]) but only because that Power can enforce obe-

[111]) Report Nielsen, p. 497, Survey No. 303. As to the right of usufruct (cf. article 55 of the Hague Regulations), see e.g.: Chile-France arb. 5-7-1901, Descamps-R. 1901 p. 409/10, Survey No. 172; France-Greece, P.C.I.J., 17-3-1934, diss. op. Séfériadès, Series A/B No. 62, p. 50. See also Cour de Nancy August 3, 1872, Dalloz 1872-2-230.

[112]) Domestic law demands obedience to the legitimate sovereign only: "The occupant is an enemy who enters the territory forcibly, drives out the legitimate Government, and puts the territory and its inhabitants under his military authority. ... In so far as the occupant conducts the administration of the country according to the existing laws, the inhabitants do not really render obedience to him but to their own laws and to their own Government. The fact that, while conducting the administration of the country according to the existing laws, the occupant is, so to say, the locum tenens of the legitimate Government, does not make the obedience to these laws on the part of the inhabitants appear to be an obedience rendered to the occupant personally.", L. Oppenheim, loc. cit. p. 366/7.

[113]) "To the temporary right of administration acquired by the occupant corresponds, not the duty of the inhabitants to submit to such administration, but the duty of the legitimate Government to recognize, after the occupation has ceased, all the legitimate acts of administration carried out by the occupant. The duty imposed upon the occupant by section 3 of the Hague Regulations is indeed imposed upon him in the interest of the inhabitants, but no international law relations are thereby created between him and the inhabitants. The duty imposed upon him creates international law relations between him and the legitimate Government. The correlative to this duty upon him is not a right of his to

dience, just as a belligerent warship can arrest a private vessel on the high seas, neither the non-combatant nor the captain having any *legal* duty to submit himself.[114])

demand obedience from the inhabitants but a right of the legitimate Government to demand from the occupant that he carries out his administration of the territory in accordance with section 3 of the Hague Regulations. The legitimate Government can demand from the occupant that he complies with the duty concerned because he has actual authority over the territory, and therefore, according to international law, a temporary right of administration over it. He must re-establish and ensure public authority and safety by the authority which he actually possesses, namely, military authority.", L. Oppenheim, loc. cit. p. 367/8.

[114]) As to reference, apart from the authors cited, see also J. E. Conner: The development of belligerent occupation, Iowa 1912.

CONCLUSIONS

At the end of this study it remains to make some general conclusions.

1. It may be stated that there is a category of rules of international law which has for object the attribution of territorial, personal, and governing jurisdiction.

A preliminary question, whether one of the parties to an international dispute is or is not competent in law to take or to refrain from taking a particular action, is settled by one or more positive rules of international law belonging to the category just mentioned.

In this connection, it must be emphasized, that in defining such rules of what is mostly unwritten law, it is dangerous to transfer generally recognized rules of civil law into international law. It was rightly held by Mr. van Lynden van Sandenburg, arbitrator in a case between the German Government and the Commission of Controlled Revenues, that "even in the internal public law of a State the application of the legal maximes of private law is by no means universally admissible; a fortiori the application of the principles of civil law in the sphere of international public law calls for very great caution." [1])

A second question, once the first question settled, is, whether the jurisdiction claimed by State A appertains, or does not appertain, *solely* to that party. This question is essentially a relative one, which, in principle, is not regulated by international law but by domestic law, unless a special rule of customary or treaty law is applicable to that case. Thus, a particular state jurisdiction, attributed by international law, is either exclusive with regard to other States, or is a "mixed" jurisdiction.

In this connection, it must also be emphasized that it would be dangerous to convert national questions into international questions, or the reverse, although it cannot be denied, that, in a given case, it will not be easy to draw a dividing line between instances where a

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[1]) Award June 23, 1926, A.J.I.L. 21 (1927) - 330, Survey No. 373. The same attention should be paid to the international law of treaties, of damages, and of procedure, but this problem lies outside the scope of this study. Cf. Georges Ripert, Les règles du droit civil applicables aux rapports internationaux, Recueil des Cours 44 (1933) - 569/664, and the litterature there cited. See also J. Kosters in Annuaire de l'Institut de Droit international, 1932 p. 301 et seq.

question, primarily a domestic one, shades off into an international question, just as it is, sometimes, a delicate matter to distinguish, in international relations, a political question from a juridical one.

Moreover, the famous paragraph 8 of article 15 of the Covenant of the League of Nations is, from this point of view, not very definite when it speaks "of a matter which *by international law* is solely within the domestic jurisdiction" of a given State, nor can it be said from paragraph 7 of Section A of Chapter VIII of the Proposals for the establishment of a general international Organization (Dumbarton Oaks—Yalta), holding that the foregoing provisions "should not apply to situations or disputes arising out of matters which *by international law* are solely within the domestic jurisdiction of the State concerned". Although the documents concerned are, at this moment, not available, it is no more coincidence that the Charter of the United Nations, signed at San Francisco on June 26, 1945, provides in article 2 § 7 that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.", the words "by international law" having, deliberately as it seems, been omitted.

The practical significance of the existence or otherwise of a positive rule concerning the attribution of state jurisdictions is demonstrative by the fact that, if such a rule exists, the international judge or arbitrator can, and must, apply such a rule, and, hence, the dispute can be decided. If, however, such a rule does not exist, the dispute cannot be decided by the international tribunal, unless the contesting parties have authorized a decision in equity,[2]) or as amiable compositeur,[3]) or merely in favour of one of both parties, giving so to the decision a relative character.

2. It may, furthermore, be stated that there is a second category of rules of international law, which has for object the exercise of territorial, personal, and governing jurisdiction.

Once such a jurisdiction is attributed, its exercise is, in international relations, either limited, or not, in any given case, by a special rule of international law. So, a state jurisdiction either may be exercised in a discretionary manner with regard to international law, or its

[2]) "And this is the nature of the Equitable: a correction of law, where law is defective by reason of its universality", Aristotle, Nic. Eth., V, § 14. Cf. Georges Berlia, Essai sur la portée de la clause de jugement en équité en droit des gens, Paris 1937.

[3]) See p. 41, note 117.

exercise is limited by international law, engaging the international responsibility of the State concerned.

An appeal to an unlimited exercise of state jurisdiction has sometimes [4]) been made by invoking natural law. This has been done in particular in order to support political claims [5]) and in times, when no clear distinction was made between (unwritten) international law and natural law.[6]) It must be noted, however, that since the beginning of the period of stable arbitral decisions (from 1794), natural law has never been applied by international tribunals.[7]) Professor C. van Vollenhoven, acting as President of the General Claims Commission Mexico-U.S.A., under Convention of September 8, 1923, said in the North American Dredging Company of Texas case that "the law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; buth they have failed as a durable foundation of either municipal or international law and cannot be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace." [8]) When Professor van Vollenhoven states that natural law cannot be used in the present day as substitutes for positive international law, his contention is right, but when he contends that this law has failed as a durable foundation of international law, his contention is premature: he overlooks a distinction between positive rules of international law and the foundation of these rules, possibly based on natural law, the nature of which is not defined by the arbitrator. The problem of natural law is a very com-

[4]) Especially with respect to free navigation of rivers, cf. p. 58.

[5]) Cf., e.g., the "Arrêté du Conseil exécutif provisoire de la Convention Nationale", dated November 16, 1792, Gazette Nationale ou le Moniteur Universel, jeudi 22 novembre 1792, No. 327, Séance du mercredi 21 novembre ("... les gênes et les entraves que, jusqu'à présent, la navigation et le commerce ont supportés, tant sur l'Escaut que sur la Meuse, sont directement contraires aux principes fondamentaux du droit naturel que tous les Français ont juré de maintenir...").

[6]) Many books were entitled: "De iure naturae et gentium"; cf. J. Kosters, Les fondements du droit des gens, Leiden 1925, p. 97, 156, 182.

[7]) Moreover, in international law, the problem of the non-retroactivity of laws is well-known, see e.g. the Protocol of St. Petersburg, August 26, 1900, concluded between Russia and U.S.A., Survey No. 236, sub 4.b. This problem is unknown in the sphere of natural law.

[8]) G.P.O. 1927, p. 26, Survey No. 354. Cf. Kosters, op. cit. p. 157.

plicated one: it suffices to state here that natural law has not been invoked by a State before international tribunals for limiting the exercise of a foreign state jurisdiction in favour of a free exercise of its own jurisdiction.

Moreover, an appeal to an unlimited exercise of state jurisdiction has often been made by invoking the independence of States, see p. 175.

In the absence of a positive rule of international law limiting the exercise of a given state jurisdiction, it may happen that its free exercise has been challenged by the opposing party by invoking the theory of the "abuse of rights". As just observed, it is dangerous to transfer rules applicable in a domestic law system into international law. Nevertheless, in some cases, this theory has been invoked before the Permanent Court of International Justice,[9]) and in doctrine, too, this question has been dealt with.[10])

Moreover, a new theory has been advanced, according to which an alleged free exercise of state jurisdiction engages the international responsibility of the State concerned if that exercise is contrary to "international standards".[11])

It appears from the above that the practical significance of the existence or otherwise of a positive rule of international law concerning the exercise of state jurisdictions is very different from the significance of the rules of the first category considered *supra*, since, in the latter case, the international judge or arbitrator can always decide a dispute regarding the exercise of state jurisdictions.

3. Although the material used in this study is limited, not embracing all sources of international law, it could be stated, so far, that the two great principles of international law,[12]) according to which every State enjoys a threefold jurisdiction and exercises its juris-

[9]) See e.g. Series A 7, p. 30, A 24, p. 12, A/B 46, p. 167, A/B 70, p. 8, 49, 73, 75, A/B 77, p. 97; cf. Series C. no. 11, p. 136, 375, 680, 824, and R.G.D.I.P. 1927 p. 443/9.

[10]) N. Politis, Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, Recueil des Cours 6 (1925) - 1 et seq.; Annuaire de l'Institut de Droit international, 1927-II-750/5; G. Leibholz, Das Verbot der Willkür un der Ermessensmiszbrauchs im völkerrechtlichen Verkehr der Staaten, Z.f.a ö R.u.V. 1929-I-77/125; M. Scerni, L'abuso di diritto nei rapporti internazionali. Roma 1930; H. J. Schlochauer, Die Theorie des abus de droit im Völkerrecht, Z.f.V. 17 (1933) - 373/94; T. Selea, La notion de l'abus du droit dans le droit international, Paris 1940; A. Voss, Rechtsmiszbrauch im Völkerrecht, Münster 1940. Cf. pp. 115, 162.

[11]) See e.g. General Claims Commission Mexico-U.S.A., under Convention of September 8, 1923, G.P.O. 1927 p. 91, 105, 131, 165, 429, 436, 439; idem G P.O. 1929, p. 66, 82/3, 85, etc., Survey No. 354. Cf. M.O. Stati, Le standard juridique, Paris 1927; A. Sanhoury, Le standard juridique, Recueil François Gény 1935-II-145; E. Freund, Standards of American Legislation, Chicago 1926; Roscoe Pound, The administrative application of legal standards. See also p. 116, 121.

[12]) I hope to prove, soon, that this conclusion can also be applied in the domestic law system.

dictions, not to the detriment of other States, are based on the well-known "iuris praecepta": 'suum cuique tribuere' and 'alterum non laedere'.[13]) The sphere of all law system lies between these positive and negative poles. The third praeceptum, 'honeste vivere', may be considered as the equilibrium between the two underlying ideas: bonum faciendum—malum evitandum. Montesquieu saw the real sense of this classic precept even for the international domain when he wrote: „Le droit des gens est naturellement fondé sur ce principe, que les diverses nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible, sans nuire à leurs véritables intérêts." [14]) The great lawyer Portalis, in a famous but little known speech, said: „Faire, en temps de paix, le plus de bien, et, en temps de guerre, le moins de mal possible: voilà le droit des gens." [15]) And the great politician Talleyrand held: „Ce droit (des gens) est fondé sur le principe, que les nations doivent se faire: dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible." [16])

International law, it may be concluded, is based on firm principles, which have been recognized by men of good will as long as they have been such, and which, like all that is most essential and fundamental, are unwritten. If all possible rules have not yet been derived from these principles—a fine task for international tribunals which, as I hope to have shown, have already had an important influence upon the development of this law—, there is reason to believe that after the termination of war, many new rules, which were not imagined before, will be recognized as having force of application in interstate relations, so that war is not an occasion for despairing of the future of international law, but, on the contrary, for hope.

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[13]) I. 1.1.3; D.1.1.10.1; Harmenopoulos, Promptuarium Iuris, 1.1.18; Libri Feudorum 5.14. Cf. the Introduction to the Codex Diplomaticus of Leibniz (he studied, it may well be remembered, Roman Law, in the beginning, and wrote some 18 juridical treatises).

[14]) De l'Esprit des Lois, Book I, Chapter III.

[15]) Speech as Commissaire du Gouvernement, on the occasion of the installation of the Conseil des Prises, 1800 (Le Moniteur Universel, 1800, no. 226, p. 915; cf. the same journal, no. 198 (1800), p. 763).

[16]) Rapport du Ministre des Relations Extérieures à S.M. l'Empereur et Roi, Berlin, 20 novembre 1806 (Le Moniteur Universel, 1806, no. 339, p. 1462).

ABREVIATIONS

A. J. I. L., The American Journal of International Law.
A. J. I. L. Off. Doc., Supplement to the A.J.I.L., "Official Documents".
Bulletin I. I. I., Bulletin de l'Institut Juridique International.
De Clercq, J. de Clercq: Recueil des Traités de la France.
Descamps-R., Baron Descamps et Louis Renault: a) Recueil international des traités du XIXe siècle, b) Recueil international des traités du XXe siècle.
La Fontaine, H. La Fontaine: Pasicrisie internationale. Histoire documentaire des arbitrages internationaux, Berne 1902.
Journal Clunet, Journal de droit international, fondé en 1874 par Clunet.
Lapradelle-P., A. de Lapradelle et N. Politis: Recueil des arbitrages internationaux, vol. I and II, Paris 1905 and 1923.
L. N. O. J., League of Nations Official Journal.
L. N. T. S., League of Nations Treaty Series.
De Martens, Recueil des Traités, Nouveau Recueil, Nouveau Recueil Général.
M A. T., Recueil des décisions des tribunaux arbitraux mixtes, Paris.
Moore, J. B. Moore: History and Digest of the international arbitrations to which the United States has been a party, Washington 1898.
Niem. Zeit., Niemeyers Zeitschrift für internationales Recht.
R. D. I., Revue de droit international (A. de Lapradelle).
R. D. I. L. C., Revue de droit international et de législation comparée.
R. D. D. I., Rivista di diritto internazionale.
R. G. D. I. P., Revue générale de droit international public.
R. G. P. C., Recueil général périodique et critique de décisions, conventions et lois relatives au droit international public et privé.
Survey, A. M. Stuyt: Survey of international arbitrations, 1794-1938, The Hague 1939.
U. S. For. Rel., Papers relating to the foreign relations of the United States.
Z. f. V., Zeitschrift für Völkerrecht.
Z. f. ö. R., Zeitschrift für öffentliches Recht.
Z. f. a. ö. R. u. V., Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.

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