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INTERNATIONAL LAW

INTERNATIONAL LAW

A TREATISE

BY

L OPPENHEIM, M A , LL D

Vol II DISPUTES, WAR AND NEUTRALITY

SEVENTH EDITION, REVISED

Edited by H LAUTERPACHT, M A , LL D

INTERNATIONAL LAW

A TREATISE

By L. OPPENHEIM, M.A., LL.D.

LATE WHEWELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY OF CAMBRIDGE, LATE MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW

VOL I.—PEACE

SEVENTH EDITION

EDITED BY

H. LAUTERPACHT, M.A., LL.D.

WHEWELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY OF CAMBRIDGE
FELLOW OF TRINITY COLLEGE, CAMBRIDGE, OF GRAY'S INN, BARRISTER-AT LAW
ASSOCIATE OF THE INSTITUTE OF INTERNATIONAL LAW

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PREFACE

TO THE SEVENTH EDITION

THE sixth edition of the first volume of this treatise was published in the summer of 1947 The fact that within less than one year the preparation of yet another edition has proved necessary is due largely to the circumstance that before 1947 the volume had been out of print for a number of years and that there was therefore an accumulated demand for it on the part of students and libraries After consideration, and with the full agreement of Messrs Longmans, Green and Co , I discarded the idea of merely re-printing the sixth edition For although that edition was published in 1947, it was sent to the printer in 1945 Accordingly, the proper course seemed to be to bring this volume up to date, in a new edition, as far as possible The intervening two years were the formative period of the United Nations and of the institutions set up under its aegis There would be no justification for neglecting, in a treatise of this kind, an account of these developments For these reasons I have expanded considerably the chapter on the United Nations, which has grown by nearly fifteen pages, and the sections on the Trusteeship System and the International Labour Organisation The sections on the League of Nations and the Mandates System have been correspondingly reduced The same method of balancing the addition of new matter by the elimination of the old has been applied in other parts of the treatise with regard both to the text and to the bibliographies the usefulness of which is bound to suffer, in the long run, by the indiscriminate retention of antiquated authorities As the result, the length of the present volume is exactly the same as that of its predecessor in the sixth edition In general, for those who possess it, the sixth edition remains a serviceable instrument of study and reference While libraries

may attach importance to possessing an up-to-date edition, the same consideration does not, in these days of shortages of materials and high cost of books, necessarily apply to the general reader

I wish to express my appreciation to Messrs Longmans, Green and Co , and to the printers, Messrs T and A Constable Ltd , for their efficient and courteous co-operation

I am greatly indebted to Mrs Gladys Lyons, B Sc (Econ), for secretarial assistance, for reading the proof, and for revising the Index

H LAUTERPACHT

TRINITY COLLEGE, CAMBRIDGE,
March 1948

BIOGRAPHICAL NOTE

FROM MR ROXBURGH'S PREFACE TO THE THIRD EDITION

LASSA FRANCIS LAWRENCE OPPENHEIM, the author of this book, was born near Frankfurt on March 30, 1858 Educated there, and at the Universities of Berlin, Gottingen, Heidelberg, and Leipzig, he showed great versatility of talent, studying philosophy, medicine, and theology as well as law Among his teachers were Binding, von Jhering, and Bluntschli In 1886 he began to lecture in the University of Freiburg, and became Extraordinary Professor there in 1889 , he was called to a Professorial Chair at Basle in 1891 During these years he wrote several books, mainly upon Criminal Law He left Basle for England in 1895, determined to devote the mature years of his life to International Law, which he had then recently been teaching He studied its varied literature with characteristic energy, and set himself to write this treatise, first published in 1905 and 1906 He was then Lecturer in International Law at the London School of Economics In 1902 he married a daughter of Lieutenant-Colonel Cowan, and had one daughter, Mary In 1908 he succeeded Westlake in the Chair founded at Cambridge by William Whewell, and made it his constant aim to fulfil the charge given to the holder 'to lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations' He was elected an Associate, and then a Member, of the Institute of International Law, and an Honorary Member of the Royal Academy of Jurisprudence at Madrid As Whewell Professor he devoted himself to the duties of his office, lecturing to large classes and watching with special care over the training of Whewell scholars All who were thus drawn within his circle were fascinated by his enthusiasm and personal charm He brought out a second edition of this treatise

in 1912, and was writing monographs and contributing articles to many papers He edited the *Zeitschrift fur Volkerrecht* in collaboration with Kohler until the outbreak of the war In 1909 he had published *International Incidents*—a book of problems for discussion with his pupils A short study of the *Panama Canal Conflict* was widely read, and with General Edmonds he prepared a manual of *Land Warfare* for the guidance of Officers of His Majesty's Army His next work was to collect the papers of John Westlake, and to edit a series of contributions to International Law and Diplomacy

During these Cambridge days his reputation had spread all over the world, and he enjoyed to the full the new opportunity thus brought to him He sought, and gained easily, the friendship of distinguished jurists everywhere , and through a cordial exchange of opinions he was able to study their varying points of view For such a work his training in different legal systems had especially fitted him, since his conceptions of jurisprudence were truly international Visitors came to Whewell House from many lands, and his wife, who shared his interest in his work, his friends, and his pupils, joined in welcoming them to their home Warmly received, they went and came again In the Professor's private room at the Law Schools is a gallery of photographs of international lawyers of almost every nationality

Then came the war He had already offered his services to the British Government, and was able to lend his knowledge and prestige towards the overthrow of a system which would have throttled the Law of Nations The new uses for this book soon exhausted the second edition , but he would not then publish a third, and confined himself to collecting material and recording the changes which each day brought He felt that the stress of events was too great for him to mould judgments that should be fashioned in a mind in repose So he looked to the United States, then at peace, to sustain the legal traditions of International Law during the struggle, and himself became Corresponding Member of the American Institute of International Law in 1915 He also hoped that an American jurist would first tell the legal story of the war, and this hope his friend, Professor Garner of

Illinois, has brought to fulfilment With cautious sympathy he watched the growth of the League of Nations movement, and three lectures which he had delivered upon it were in the press when Germany asked for an armistice

He at once began to prepare the new edition of this treatise He was eager to point out that during the World War 'not the whole of International Law has gone to pieces, but only parts of the Law of War,' and that 'the Law of Peace is the centre of gravity of International Law' But the strain of the war had overtaxed his health, and the ill effects now revealed themselves His friends found him in the summer of 1919 with his enthusiasm impaired by physical weariness, and he spoke regretfully of the mass of new material before him He doubted whether he would live to work through it At the beginning of August he went to Wales, breaking away from a study of the German Treaty He had just heard that the University was to confer upon him the degree of Doctor of Letters Rest and change did not restore him, and he came home dangerously ill He died on October 7, 1919

This is no place to set a value upon his achievements, or to voice the affection and esteem of those who knew him That is being done by his old friend, Edward Arthur Whittuck, to whom the former editions of this treatise were dedicated, in the new *British Year Book of International Law* (1920-1921) His power of insight, his passion for research he gave freely in the cause of the Law of Nations His optimism, so attractive to all, was tempered by sober understanding 'I will not deny,' he wrote at the end of the war, 'that the League may fall to pieces, and that a disaster like the present may again visit mankind' But such thoughts did not deter him To him labour in International Law was service for humanity, for future generations he could give no more than his best, and would give no less [1]

[1] See also appreciations and obituary notices in the following journals London *Times* newspaper, October 9, 1919, *Cambridge Review*, November 7, 1919, *British Year Book of International Law*, 1920-1921, pp 1-9, by E. A Whittuck, *American Journal of International Law*, xiv. (1920) pp 229-232, by C N Gregory.

THE WRITINGS OF L. OPPENHEIM ON INTERNATIONAL LAW

I

BOOKS AND MONOGRAPHS

International Law A treatise Longmans, Green and Co Vol 1 (Peace) 1905, vol II (War) 1906, 2nd ed, vols 1 and II, 1912
International Incidents Cambridge University Press, 1909, 2nd ed, 1911
Die Zukunft des Volkerrechts Leipzig, 1911 English translation by J P Bate, 1921
Land Warfare (in collaboration with Colonel—now General—J E Edmonds) His Majesty's Stationery Office, 1912
The Panama Canal Conflict Cambridge University Press, 1913, 2nd ed, 1913
The League of Nations and its Problems Longmans, Green and Co, 1919
Editor of The Collected English Papers of John Westlake on Public International Law Cambridge University Press, 1914
Co Editor of Zeitschrift fur Volkerrecht, vols 1 VIII (1906 1914)
Editor of Contributions to International Law and Diplomacy Longmans, Green and Co

II

OTHER WRITINGS

England and Transvaal State Property (A Letter to *The Times*, November 24, 1900)
Zur Lehre von den territorialen Meerbusen (*Zeitschrift für Volkerrecht*, vol 1 (1906) pp 579 587)
Der Tunnel unter dem Aermelkanal und das Volkerrecht (*Zeitschrift für Volkerrecht*, vol II (1907) pp 1-16)
The Science of International Law Its Task and Method (*American Journal of International Law*, vol II (1908) pp 313-356)
The Meaning of Coasting Trade in Commercial Treaties (*Law Quarterly Review*, vol XXIV (1908) pp 328 334)
Enemy Character after the Declaration of London (*Law Quarterly Review*, vol XXV (1909) pp 372-384)
The Declaration of London (*Quarterly Review*, October 1909, pp 464 485)
Die Fischerei in der Moray Firth (*Zeitschrift für Volkerrecht*, vol V (1911) pp 74-95)
Introduction to Bentwich, Students' Leading Cases and Statutes on International Law Sweet and Maxwell, 1913
Opinion on the American Institute of International Law (*Revue générale de droit international public*, vol XX (1913) pp 108-111)
Professor Westlake (*Cambridge Review*, April 24, 1913)
La Mer territoriale (*Annuaire de l'Institut de Droit International*, vol XXVI (1913) pp 403-412)
Das Jahrbuch des Volkerrechts (*Zeitschrift für Volkerrecht*, vol VIII (1914) pp 95-100)
Die Stellung der feindlichen Kauffarteischiffe im Seekrieg (*Zeitschrift für Volkerrecht*, vol VIII (1914) pp 154 169)
Zur Lehre vom internationalen Gewohnheitsrecht (*Zeitschrift für internationales Recht*, vol XXV (1915) pp 1-13)
A Pot Pourri of International Law (*Cambridge Review*, January 20 and 27, 1915)
Introduction to Picciotto, The Relations of International Law to the Law of England and the United States of America McBride, Nast and Co, 1915.

Introduction to Roxburgh, The Prisoners of War Information Bureau in London Longmans, Green and Co , 1915

Introduction to Satow, A Guide to Diplomatic Practice Longmans, Green and Co , 1917

Introduction to Roxburgh, International Conventions and Third States Longmans, Green and Co , 1917

On War Treason (*Law Quarterly Review*, vol xxxiii (1917) pp 266-286)

The Legal Relations between an Occupying Power and the Inhabitants (*Law Quarterly Review*, vol xxxiii (1917) pp 363-370)

Opinion concerning a League of Nations (*The World Court*, February 1918, pp 74-76)

Le Caractère essentiel de la Société des Nations' (*Revue générale de droit international public*, vol xxvi (1919) pp 234-244)

ABBREVIATIONS

OF TITLES OF BOOKS, ETC, QUOTED IN THE TEXT

THE books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication But certain books and periodicals which are often referred to throughout this work are quoted in an abbreviated form, as follows

Accioly	=	Accioly, Tratado de Direito internacional público, 3 vols (1933-1935)
A J	=	American Journal of International Law
Annuaire	=	Annuaire de l'Institut de Droit International
Annual Digest	=	Annual Digest and Reports of Public International Law Cases 1919-1922, edited by Sir John Fischer Williams and H Lauterpacht (1932), 1923-1924, edited by the same (1933), 1925-1926, edited by A D McNair and H Lauterpacht (1929), 1927-1928, edited by the same (1931), 1929-1930 (1935), 1931-1932 (1938), 1933-1934 (1940), 1935-1937 (1941), 1938-1940 (1942), 1941-1942 (1945), 1919 - 1942 (supplementary volume) (1947)—all edited by H Lauterpacht
Anzilotti	=	Anzilotti, Corso di diritto internazionale, vol I 3rd ed (1928), French translation by Gidel (1929), vol III part I (1915).
A S Proceedings	=	Proceedings of the American Society of International Law
Balladore Pallieri	= =	Balladore Pallieri, Diritto internazionale pubblico (1937)
Baty	=	Baty, The Canons of International Law (1930)
B I I	=	Bulletin de l'Institut Intermédiaire International
Bibliotheca Visseriana	=	Bibliotheca Visseriana Dissertationum Jus Internationale Illustrantium.
Bittner	=	Bittner, Die Lehre von volkerrechtlichen Urkunden (1924)
Bluntschli	=	Bluntschli, Das moderne Volkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878)
Borchard	=	Borchard, The Diplomatic Protection of Citizens Abroad (1915).

Br and For St Papers	=	British and Foreign State Papers (Hertslet), vol 1 (1841), continued up to date
Brierly	=	Brierly, The Law of Nations, 3rd ed (1942)
Bulmerincq	=	Bulmerincq, Das Volkerrecht, 2nd ed (1889)
Bustamante	=	Bustamante, Derecho internacional público, 3 vols (1933-1935)
B Y	=	British Year Book of International Law
Calvo	=	Calvo, Le Droit international théorique et pratique, 5th ed , 6 vols (1896)
Cavaglieri	=	Cavaglieri, Lezioni di diritto internazionale (general part, 1925)
Clunet	=	Journal du droit international
Cruchaga	=	Cruchaga-Tocornal, Nociones de Derecho internacional, 3rd ed , 2 vols (1923-1925)
Despagnet	=	Despagnet, Cours de droit international public, 4th ed (1910)
Dicey	=	Dicey, Conflict of Laws, 4th ed (1927)
Dickinson, *Cases*	=	Dickinson, A Selection of Cases and Other Readings on the Law of Nations (1929)
Documents	=	Documents on International Affairs, edited by Wheeler-Bennett
Fauchille	=	Fauchille, Traité de droit international public, 8th ed of Bonfils' Manuel de droit international public, vol 1 part 1 (1922), vol 1 part 2 (1925), vol 1 part 3 (1926), vol II (1921)
Fenwick	=	Fenwick, International Law, 2nd ed (1934)
Fiore	=	Fiore, Nouveau droit international public French translation by Antoine from the 2nd Italian edition, 3 vols (1885)
Fiore, *Code*	=	Fiore, International Law Codified Translation by Borchard from the 5th Italian edition (1918)
Fischer Williams, *Chapters*	=	Fischer Williams, Chapters on Current International Law and the League of Nations (1929)
Fontes Juris Gentium	=	Fontes Juris Gentium, edited by V Bruns For details see p 108, n 1
Gareis	=	Gareis, Institutionen des Volkerrechts, 2nd ed (1901)
Garner, *Developments*	=	Garner, Recent Developments in International Law (1925)
Gemma	=	Gemma, Appunti di diritto internazionale (1923)
Genet	=	Genet, Traité de diplomatie et de droit diplomatique, 3 vols (1931-1932)
Gidel	=	Gidel, Le droit international public de la mer, le temps de paix vol 1 Introduction—La haute mer (1932) , vol II Les

		eaux intérieures (1932), vol III La mer territoriale et la zone contiguë (1934)
Grotius	=	Grotius, De Jure Belli ac Pacis (1625)
Grotius Annuaire	=	Grotius Annuaire International
Grotius Society	=	Transactions of the Grotius Society
Guggenheim	=	Guggenheim, Lehrbuch des Volkerrechts, Parts I and II (1947)
Hackworth	=	Hackworth, Digest of International Law, 7 vols (1940-1943)
Hague Recueil	=	Recueil des cours, Académie de Droit International de La Haye
Hall	=	Hall, A Treatise on International Law, 8th ed (1924), by A Pearce Higgins
Halleck	=	Halleck, International Law, 2 vols, 4th English ed by Baker (1908)
Hartmann	=	Hartmann, Institutionen des praktischen Volkerrechts in Friedenszeiten (1874)
Harvard Research	=	Research in International Law Under the Auspices of the Harvard Law School Draft Conventions Prepared for the Codification of International Law Directed by M O Hudson (1929) I Nationality (Reporter Flournoy), II Responsibility of States (Borchard), III Territorial Waters (G G Wilson) —(1932) I Diplomatic Privileges and Immunities (Reeves), II Legal Position and Functions of Consuls (Quincy Wright), III Competence of Courts in regard to Foreign States (Jessup), IV Piracy (Bingham), V A Collection of Piracy Laws of Various Countries (Morrison) —(1935) I Extradition (Burdick) II Jurisdiction with respect to Crime (Dickinson) III Treaties (Garner)
Hatschek	=	Hatschek, Das Volkerrecht als System rechtlich bedeutsamer Staatsakte (1923), English translation by Manning (1930)
Heffter	=	Heffter, Das europaische Volkerrecht der Gegenwart, 8th ed by Geffcken (1888)
Heilborn,	=	Heilborn, Das System des Volkerrechts entwickelt aus den volkerrechtlichen Begriffen (1896)
Hershey	=	Hershey, The Essentials of International Public Law and Organisation, 2nd ed (1927)
Hertslet's *Commercial Treaties*	=	Hertslet, Collection of Treaties and Conventions between Great Britain and Other Powers, so far as they relate to Commerce

		and Navigation, vol 1 (1820), continued to date
Higgins and Colombos	=	Higgins and Colombos, The International Law of the Sea (1943)
H L R	=	Harvard Law Review
Hold-Ferneck	=	Hold-Ferneck, Lehrbuch des Volkerrechts, vol 1 (1930), vol II (1932)
Holland, *Lectures*	=	Holland, Lectures on International Law, edited by T A and W L Walker (1933)
Holland, *Studies*	=	Holland, Studies in International Law
Holtzendorff	=	Holtzendorff, Handbuch des Volkerrechts, 4 vols (1885-1889)
Hudson, *Cases*	=	Hudson, Cases and Other Materials on International Law, 2nd ed (1936)
Hudson, *Legislation*	=	Hudson, International Legislation vol 1 1919-1921 (1931), vol II 1922-1924 (1931), vol III 1925-1927 (1931), vol IV 1928-1929 (1931), vol V 1929-1931 (1936), vol VI 1932-1934 (1937), vol VII 1935-1937 (1941)
Hyde	=	Hyde, International Law, chiefly as interpreted and applied by the United States, 2nd ed, 3 vols (1945)
J C L	=	Journal of Comparative Legislation and International Law
Keith's Wheaton	=	Wheaton's Elements of International Law, 6th English edition by A Berriedale Keith, vol 1 (1929), vol II (7th ed, 1944)
Kluber	=	Kluber, Europaisches Volkerrecht, 2nd ed by Morstadt (1851)
Kohler	=	Kohler, Grundlagen des Volkerrechts (1918)
Lapradelle-Politis	=	Lapradelle-Politis, Recueil des arbitrages internationaux, vol 1 (1905), vol II (1924)
Lauterpacht, *Analogies*	=	Lauterpacht, Private Law Sources and Analogies of International Law (1927)
Lauterpacht, *The Function of Law*	=	Lauterpacht, The Function of Law in the International Community (1933)
Lawrence	=	Lawrence, The Principles of International Law, 7th ed, revised by P H Winfield (1923)
Lawrence, *Essays*	=	Lawrence, Essays on Some Disputed Questions of Modern International Law (1884)
Lindley	=	Lindley, The Acquisition and Government of Backward Territory in International Law (1926).

Liszt	=	Liszt, Das Volkerrecht, 12th ed by Fleischmann (1925)
L N T S	=	League of Nations Treaty Series Publication of Treaties and International Engagements registered with the Secretariat of the League of Nations
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols (1883-1884)
De Louter	=	De Louter, Le droit international public positif, French translation from the Dutch original, 2 vols (1920)
L Q R	=	Law Quarterly Review
McNair	=	McNair, The Law of Treaties British Practice and Opinions (1938)
Maine	=	Maine, International Law, 2nd ed (1894)
Manning	=	Manning, Commentaries on the Law of Nations, new edition by Sheldon Amos (1875)
Martens	=	Martens, Volkerrecht, German translation from the Russian original, 2 vols (1883-1886)
Martens, G F	=	G F Martens, Précis du droit des gens moderne de l'Europe, new edition by Vergé, 2 vols (1858)
Martens, R Martens, N R Martens, N S Martens, N R G Martens, N R G , 2nd ser Martens, N R G , 3rd ser		These are the abbreviated quotations of the different parts of Martens, Recueil de Traités, which are in common use
Martens, *Causes celèbres*	=	Martens, Causes célèbres du droit des gens, 2nd ed , 5 vols (1858-1861)
Mérignhac	=	Mérignhac, Traité de droit public international, vol I (1905), vol II (1907), vol III (1912)
Moller	=	Moller, International Law in Peace and War, English translation from the Danish, vol I (1931), vol II (1935)
Moore	=	Moore, A Digest of International Law, 8 vols (1906)
Moore, *International Arbitrations*	=	Moore, History and Digest of the International Arbitrations to which the United States has been a Party, 6 vols (1898)
Nordisk T.A	=	Nordisk Tidskrift for International Ret *Acta scandinavica juris gentium*
Nys	=	Nys, Le droit international, 2nd ed , 3 vols (1912)
Off J.	=	Official Journal of the League of Nations.

Ö Z o R	=	Österreichische Zeitschrift fur offentliches Recht
P C.I J.	=	Publications of the Permanent Court of International Justice Series A—Judgments B—Advisory Opinions A/B—Cumulative Collection of Judgments and Advisory Opinions given since 1931 C—Acts and Documents relating to Judgments and Advisory Opinions D—Collection of Texts governing the Jurisdiction of the Court E—Annual Reports
Perels	=	Perels, Das internationale offentliche Seerecht der Gegenwart, 2nd ed (1903)
Phillimore	=	Phillimore, Commentaries upon International Law, 3rd ed , 4 vols (1879-1888)
Piedelièvre	=	Piedelièvre, Précis de droit international public, 2 vols (1883-1895)
Praag	=	Praag, Juridiction et droit international public (1915)
Praag, *Supplément*	=	Supplement to the above (1935)
Pradier-Fodéré	=	Pradier-Fodéré, Traité de droit international public, 8 vols (1885-1906)
Pufendorf	=	Pufendorf, De Jure Naturae et Gentium (1672)
Ralston	=	Ralston, The Law and Procedure of International Tribunals, revised ed (1926) Supplement (1936)
Ray, *Commentaire*	=	Ray, Commentaire du Pacte (1930)
Recueil T A M	=	Recueil des décisions des tribunaux arbitraux mixtes
Reddie, *Researches*	=	Reddie, Researches, Historical and Critical, in Maritime International Law, 2 vols (1844)
Répertoire	=	Lapradelle et Niboyet, Répertoire de droit international Founded by Darras in 1929
R G	=	Revue générale de droit international public
R I	=	Revue de droit international et de législation comparée
R I (Geneva)	=	Revue de droit international, de sciences diplomatiques, politiques et sociales
R I (Paris)	=	Revue de droit international
R I F	=	Revue internationale française du droit des gens

Rivier	=	Rivier, Principes du droit des gens, 2 vols. (1896)
Rivista	=	Rivista di diritto internazionale
Rousseau	=	Rousseau, Principes généraux du droit international public, vol i (1944)
Satow	=	Satow, A Guide to Diplomatic Practice, 3rd ed by Ritchie (1932)
Scelle	=	Scelle, Précis de droit des gens, vol i (1932), vol ii (1934)
Schucking und Wehberg	=	Schucking und Wehberg, Die Satzung des Volkerbundes, 2nd ed (1924).
Schwarzenberger	=	Schwarzenberger, International Law as Applied by International Courts and Tribunals, vol i (1945)
Scott, *Cases*	=	Scott, Cases on International Law (1922)
Sirey	=	Recueil général des lois et des arrêts (founded by Sirey)
Smith	=	Smith, Great Britain and the Law of Nations, a Selection of Documents, vol i (1932), vol ii (1935)
Spiropoulos	=	Spiropoulos, Traité théorique et pratique du droit international public (1933)
Stier Somlo	=	Stier Somlo, Handbuch des Volkerrechts (1920)
Stowell	=	Stowell, International Law A Restatement of Principles in Conformity with Actual Practice (1931)
Strupp, *Éléments*	=	Strupp, Éléments du droit international public, universel, européen et américain, 2nd ed , 3 vols (1930)
Strupp, *Grundzuge*	=	Strupp, Grundzuge des positiven Volkerrechts, 5th ed (1932)
Strupp, Wort	=	Worterbuch des Volkerrechts und der Diplomatie, ed by Strupp (begun by Hatschek), 3 vols (1924-1929)
Suarez	=	Suarez, Tratado de Derecho internacional público, 2 vols (1916).
Taylor	=	Taylor, A Treatise on International Public Law (1901)
Temperley	=	Temperley, History of the Peace Conference of Paris, 6 vols (1920-1924)
Testa	=	Testa, Le droit public international maritime, translation from the Portuguese by Boutiron (1886)
Toynbee, *Survey*	=	Toynbee, Survey of International Affairs.
Travers	=	Travers, Le droit pénal international, 5 vols. (1920-1922).

Treaty Series	=	United Kingdom Treaty Series, vol i 1892, and a volume every year
Twiss	=	Twiss, The Law of Nations, etc , 2 vols 2nd ed , vol i (Peace, 1884), vol ii (War, 1875)
Ullmann	=	Ullmann, Volkerrecht, 2nd ed (1908)
Vattel	=	Vattel, Le droit des gens, 4 books in 2 vols , new edition (1773)
Verdross	=	Verdross, Die Verfassung der Volkerrechts-gemeinschaft (1926)
Walker	=	Walker, A Manual of Public International Law (1895)
Walker, *History*	=	Walker, A History of the Law of Nations, vol i (1899)
Walker, *Science*	=	Walker, The Science of International Law (1893)
Westlake	=	Westlake, International Law, 2 vols , 2nd ed (1910-1913)
Westlake, *Chapters*	=	Westlake, Chapters on the Principles of International Law (1894)
Westlake, *Papers*	=	The Collected Papers of John Westlake on Public International Law, ed by L Oppenheim (1914)
Wharton	=	Wharton, A Digest of the International Law of the United States, 3 vols (1886)
Wheaton	=	Wheaton, Elements of International Law, 8th American edition by Dana (1866)
Z I	=	Zeitschrift fur internationales Recht.
Z o R	=	Zeitschrift fur offentliches Recht
Z o V	=	Zeitschrift fur auslandisches offentliches Recht und Volkerrecht
Z V	=	Zeitschrift fur Volkerrecht

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[*Note*—The following is a list of cases which received judicial consideration Throughout the Index at the end of the volume will be found a number of cases and incidents which were the subject of diplomatic discussion or contemporary record]

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INTRODUCTION

FOUNDATION AND DEVELOPMENT OF THE LAW OF NATIONS

CHAPTER I

FOUNDATION OF THE LAW OF NATIONS

I

THE LAW OF NATIONS AS LAW

Hall, pp 13 16—Maine, pp 50 53—Lawrence, §§ 1 3, and *Essays*, pp 1 36—Phillimore, I §§ 1-12—Brierly, pp 34 46—Rousseau, pp 1 105—Twiss, I §§ 104 105—Moore, I §§ 1 2—Westlake, I pp 1 13, and *Papers*, pp 392 413—Walker, *History*, I §§ 1 8—Hershey, §§ 1 10—Hyde, I §§ 1 5—Fenwick, ch II—Heffter, §§ 1 5—Holtzendorff in *Holtzendorff*, I pp 19 26—Liszt, § 1, II, III, IV—Nys, I pp 138 151—Rivier, I § 1—Fauchille, §§ 5-31—Pradier Fodéré, I §§ 1 23—Merignhac, I pp 5 28—Fiore, I §§ 186 208, and *Code*, §§ 1 31—Strupp, *Éléments*, § 1—Gemma, pp 3-7—Cavaglieri, pp 3 18, 34 50—De Louter, I pp 1 17, 58 76—Cruchaga, I §§ 69 83, 94 101—Suarez, I §§ 1 3, 12 14—Bustamante, pp 2 56—Scelle, I pp 1 27 and II pp 1 14—Keith's Wheaton, pp 1 10—Smith, I pp 1 14—Balladore Pallieri, pp 3 54—Anzilotti, pp 41 48—Fischer Williams, *Chapters*, pp 1 27—Lauterpacht, *The Function of Law*, pp 399 438, and in *Hague Recueil*, vol 62 (1937) (IV), pp 100-128—Higgins, *The Binding Force of International Law* (1910)—Oppenheim, *The Future of International Law* (1911) (English translation, 1921)—Heilborn, *Grundbegriffe des Volkerrechts* (1912), §§ 1 15—Grosch, *Der Zwang im Volkerrecht* (1912), pp 1 38, 109-137—Praag, §§ 1 3—Krabbe, *The Modern Idea of the State* (1917) (English translation, 1921), pp 233 262—Kelsen, *Das Problem der Souveranitat und die Theorie des Volkerrechts* (1920), pp 102 274, *Allgemeine Staatslehre* (1925), pp 119 132, *Law and Peace in International Relations* (1942), pp 3 82, and *General Theory of Law and State* (1945), pp 328-354—Verdross, pp 1 42 and 92 96, *Die Einheit des rechtlichen Weltbildes* (1923), pp 36 135, and in *Z I*, 29 (1921), pp 65 91—Spiropoulos, *Théorie générale du droit international* (1930), pp 1-83—Walz, *Das Wesen des Volkerrechts und Kritik der Volkerrechtsleugner* (1930)—Bluhdorn, *Einführung in das angewandte Volkerrecht* (1934), pp 1 106—Schiffer, *Die Lehre vom Primat des Volkerrechts in der neueren Literatur* (1937)—Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 19 157—Sperduti, *La fonte suprema dell' ordinamento internazionale* (1946)—Pollock in *L Q R*, 18 (1902), pp 418 429—Scott in *A J*, 1 (1907), pp 831 866, and in *R I* (*Paris*), 1 (1927), pp 637 657—Willoughby and Root in *A J*, 2 (1908), pp 357 365 and 451 457—Nys in *A J*, 6 (1912), pp 1 29, 279 315—Foulke in *Columbia Law Review*, 19 (1919), pp 429 466—Salvioli in *Rivista*, 3rd ser, I (1921 1922) pp 20-80—Cavaglieri, *ibid*, pp 289 314, 479 506—Edmunds in *Virginia Law Review*, November 1927, pp 19 30—Brierly in *Hague Recueil*, vol 23 (1928) (III), pp 467 549, and vol 58 (1936) (IV), pp 5-34—Bruns in *Z o V*, 1 (1929) pp 1 56—Spiropoulos in *R I* (*Paris*), 3 (1929), pp 97-130—Heydte in *Z o R*, 9 (1931), pp 526 546—Redslob in *R I*, 3rd ser, 14 (1933), pp 488 513, 615 633—Salvioli in *Hague Recueil*, vol 46 (1933) (IV), pp 5-17—Schindler, *ibid*, pp 233 322—Strupp, *ibid*, vol 47 (1934) (I),

pp 263 500—Rundstein in *R I*, 3rd ser, 12 (1931), pp 491-512, 669-689—Le Fur, *Hague Recueil*, vol 54 (1935) (IV), pp 5-193—Corbett in *University of Toronto Law Journal*, 1 (1) (1935), pp 3-16—Jones in *B Y*, 16 (1935), pp 5-19—Wengler in *Z o R*, 16 (1936), pp 322-392—Goodhart in *Grotius Society*, 22 (1936), pp 31-44—Scrimali in *Z o R*, 21 (1941), pp 190-216—Hurst in *Grotius Society*, 30 (1944), pp 119 127—Glanville Williams in *B Y*, 22 (1945), pp 146-163—Kelsen in *Ö Z o R*, 1 (1946), pp 20-83

Conception of the Law of Nations[2]

§ 1 Law of Nations or International Law (*Droit des gens, Volkerrecht*) is the name for the body of customary and conventional rules which are considered legally[1] binding by civilised States in their intercourse with each other Such part of these rules as is binding upon all the civilised States without exception, as, for instance, the law connected with

[1] In contradistinction to mere usages, to morality, and to rules of so-called International Comity (see below, §§ 3, 9, and 19c)

[2] One effect of the First World War was to produce among international lawyers a widespread dissatisfaction with the inadequacies of existing laws and legal philosophy and a conviction of the necessity of restating much of the law and finding a new basis for it Amongst a mass of literature the following may be mentioned Fauchille, §§ 1711 1721, Stowell, pp 729 762, Alvarez, *Le droit international de l'avenir* (1916), Eltzbacher, *Totes und lebendes Volkerrecht* (1916), Niemeyer, *Aufgaben künftiger Volkerrechtswissenschaft* (1917), Nippold, *The Development of International Law after the World War* (1917) (translated by Hershey, 1923), Lammasch, *Das Volkerrecht nach dem Kriege* (1917), Schucking, *Die volkerrechtliche Lehre des Weltkrieges* (1917), Nelson, *Rechtswissenschaft ohne Recht* (1917), Jitta, *The Renovation of International Law* (1919), Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1918), Zitelmann, *Die Unvollkommenheiten des Volkerrechts* (1919), Woltzendorf, *Die Lüge des Volkerrechts* (1919), Garner, *Developments*, pp 1 42, 775 818, and in *R G*, 28 (1921), pp 413-440, Feilchenfeld, *Volkerrechtspolitik als Wissenschaft* (1922), Niemeyer, *Rechtspolitische Grundlegung der Völkerrechtswissenschaft* (1923), Burckhardt, *Die Unvollkommenheit des Völkerrechts* (1923), Nathan, *The Renascence of International Law* (1925), Politis, *Les nouvelles tendances du droit international* (1927), and in *R I* (*Paris*), 1 (1927), pp 57-75, Blühdorn, *op cit*, pp 214 243, Fischer Williams, *Chapters*, pp 68 85, Breschi, *Di alcuni recenti sviluppi del diritto internazionale* (1931), Cavaglieri, *La rinnovazione del diritto internazionale ed i suoi limiti* (1931), Müllereisert, *Die Dynamik des revolutionaren Staatsrechts, des Volkerrechts und des Gewohnheitsrechts* (1933), Kraus, *Die Krise des zwischenstaatlichen Denkens* (1933), Laun, *Der Wandel der Ideen Staat und Volk* (1933), Scott, *Le progrès du droit des gens* (1934), Van Vollenhoven, *The Law of Peace* (translated from Dutch, 1936), pp 113 261, Griziotti, *Riflessioni di diritto internazionale* (1936), Alvarez, *Le nouveau droit international* (1924), and *La psychologie des peuples et la reconstruction du droit international* (1936), Rolin in *R G*, 26 (1919), pp 129-141, De Louter in *R G*, 26 (1919), pp 76 110, Pound in *Bibliotheca Visseriana*, 1923, 1 pp 73 90, Kunz in *Grotius Society*, 10 (1925) pp 115-142, and in *Strupp, Wort*, III pp 294-302, Hudson in *American Bar Association Journal* (Feb 1925), pp 102 107, and in *A J*, 22 (1928), pp 330 350, Dickinson in *West Virginia Law Quarterly*, 32 (1925), pp 4-32, and in *Michigan Law Review*, 25 (1927), pp 622 644, Alvarez in *Grotius Society*, 15 (1929), pp 35 48, Garner in *R G*, 37 (1930), pp 225-240, and in *Hague Recueil*, vol 35 (1931) (I) pp 609-720, Del Vecchio, *ibid*, vol 38 (1931) (IV.),

legation and treaties, is called *universal* International Law, in contradistinction to *particular* International Law, which is binding on two or a few States only. But it is also necessary to distinguish *general* International Law This name must be given to the body of such rules as are binding upon a great many States, including the leading Powers General International Law, as, for instance, the Declaration of Paris of 1856, has a tendency to become universal International Law.

International Law in the meaning of the term as used in modern times did not exist during antiquity and the first part of the Middle Ages It is in its origin essentially a product of Christian civilisation, and began gradually to grow from the second half of the Middle Ages But it owes its existence as a systematised body of rules to the Dutch jurist and statesman Hugo Grotius, whose work, *De Jure Belli ac*

pp 545 649, Le Fur, *ibid*, vol 41 (1932) (III), pp 548 598, Ladyženskij in *Théorie du droit*, 6 (1932), pp 23 40, Keller in *Z V*, 17 (1933), pp 342 372, Martin in *Canadian Bar Review*, 12 (1934), pp 227 241, Scelle in *R I (Paris)*, 15 (1935), pp 7 35, Le Fur, *ibid*, 17 (1936), pp 7 25, Brierly in *Nordisk T A*, 7 (1936), pp 3 17 See also the literature in regard to the recent criticism of the conception of Sovereignty at § 66 (n 1), the bases of the Law of Nations at § 11 (n 1), and that relating to the recent 'Natural Law' tendencies in the science of International Law, at § 59 (p 103, n 6)

The international crisis which preceded and accompanied the Second World War, and the fact that organised international society proved unable to check frequent and flagrant breaches of the law of nations, gave rise both to further criticisms of international law and to attempts to answer them See, for instance, Fischer Williams, *Aspects of Modern International Law An Essay* (1939), Niemeyer, *Law Without Force* (1941), Kelsen, *Law and Peace in International Relations* (1942), Brierly, *The Outlook for International Law* (1944), and in *International Affairs*, 22 (1946), pp 352 360, Vedel in *R G*, 46 (1939), pp 9 36, Jessup in *Foreign Affairs* (U S A), 18 (1939-1940), pp 244 253, Keeton in *Grotius Society*, 27 (1941), pp 31-58, Feldl in *Z o R*, 22 (1942), pp 193 208, Schwarzenberger in *A J*, 37 (1943), pp 460-479, and in *A Manual of International Law* (1947), pp 130 152, Kunz in *American Political Science Review*, 38 (1944), pp 354 369, Dickinson in *California Law Review*, 33 (1945), pp 506 542

It is important to distinguish between the criticism of international law and that of the science of international law The latter cannot be held responsible, to any appreciable degree, for the shortcomings of international law whose growth and authority must depend upon the willingness of States to accept, through progressive limitations of their sovereignty, the normal restraints of law The science of international law can assist in that development by disclosing the shortcomings of existing law, by examining the possibilities of its improvement, and by exercising restraint in rationalising its defects as being inherent in the nature of States and in the impossibility of subjecting their vital interests to the rule of law See also Briggs, *The Progressive Development of International Law*, and Smith, *The Crisis of the Law of Nations* (both in the form of publications of the Turkish Institute of International Law, 1947) And see, in particular, Jessup, *A Modern Law of Nations* (1948), an important work of a general character

Pacis, libri iii, appeared in 1625, and became the foundation of all later development

The Law of Nations is a law regulating primarily the intercourse of States with one another, not that of individuals As, apart from International Law, there is as yet no superior authority above sovereign States, the Law of Nations is usually regarded as a law *between*, not above,[1] the several States, and is, therefore, since the time of Bentham, also called 'International Law'

Bentham's distinction between International Law public and private has been generally accepted, but it is necessary to emphasise that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called private International Law is not, at any rate not as a rule [2] The latter concerns such matters as fall at the same time under the jurisdiction of two or more different States And as the municipal laws of different States are frequently in conflict with each other respecting such matters, there has evolved a body of principles for avoiding or limiting such conflicts [3] What is now termed Private International Law may, however, at the same time become International Law in proportion as States

[1] The arguments used by Snow (see *A J*, 6 (1912), pp 890 900, and *R G*, 19 (1912), pp 309 318) against the term *International Law*, and his proposal to substitute for it the term *Supernational Law*, are based upon the view that 'all law comes from above'

[2] Pillet in *R I*, 3rd ser, 4 (1923), pp 345 355, regards this so called private International Law not so much as Municipal Law but as a cosmopolitan customary law based on general convenience Upon which see Pollock's comment in *L Q R*, 40 (1924), pp 271 274 See also Frankenstein, *Internationales Privat recht* (1926), § 3, Plaisant, *Les règles de conflit de lois dans les traites* (1946)

[3] See an article by Beckett in *B Y*, 7 (1926), pp 73 96, entitled 'What is Private International Law?', Cheshire, *Private International Law* (2nd ed, 1938), pp 3 24, 82-92, Wolff, *Private International Law* (1945), pp 11-15, Arminjon in *R.I.*, 3rd ser, 10 (1929), pp 680-698, Rundstein in *Théorie du droit*, 9 (1935), pp 255-269, Nussbaum in *Columbia Law Review*, 42 (1942), pp 189 *et seq* On the relation of Public and Private International Law see Siotto Pintor in *L'Egypte contemporaine*, 26 (1935), pp 237 267, Scelle, 1 pp 42 49, Rundstein in *R I*, 3rd ser, 17 (1936), pp 314 349, and Starke in *L Q R*, 42 (1936), pp 395 401 On a projected international tribunal on questions of private International Law see Carlander in *Nordisk T A*, 2 (1931), pp 49 60 On the codification of private international law see Nolde in *Hague Recueil*, vol 55 (1936) (1), pp 303 427 For a survey of the decisions of the Permanent Court on questions of private International Law see Hammarskjold in *Revue critique du droit international*, 30 (1934), pp 315 344 As to conflict of laws before international tribunals see Lipstein in *Grotius Society*, 27 (1941), pp 141 181, and 29 (1943), pp 51-84.

agree by law-making treaties [1] upon rules the application of which would solve such conflicts

Legal Force of the Law of Nations contested

§ 2 Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of International Law are *legally* binding Hobbes [2] and Pufendorf [3] had already answered the question in the negative During the nineteenth century Austin [4] and his followers took up the same attitude They defined law as a body of rules for human conduct set and enforced by a sovereign political authority If indeed this definition of law be correct, the Law of Nations cannot be called law For International Law is a body of rules governing the relations of sovereign States between one another There is not a sovereign political authority above the sovereign States which could enforce such rules However, this definition of law is not correct It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some other sovereign authority in a non-constitutional State It does not cover that part of Municipal Law which is termed unwritten or customary law There is, in fact, no community and no State in the world which could exist with written law only Everywhere there is customary law in existence besides the written law This customary law was never expressly enacted by any law-giving body, or it would not be merely customary law Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only through that indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary in the same way as the written law, and that the State does not prevent them from doing so This is, however, nothing else than a fiction Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law

[1] See Appendix A, below

[2] *De Cive*, XIV 4

[3] *De Jure Naturae et Gentium*, II c III § 22

[4] *Lectures on Jurisprudence*, VI

before that recognition, and States recognise unwritten rules as law only because courts of justice do so.

Characteristics of Rules of Law

§ 3. For the purpose of finding a correct definition of law it is indispensable to compare morality and law with each other, for both lay down rules, and to a great extent the same rules, for human conduct Now the characteristic of rules of morality is that they apply to conscience, and to conscience only. An act loses all value before the tribunal of morality if it was not done out of free will and conscientiousness but was enforced by some external power or was done from some consideration which lies outside the boundaries of conscience On the other hand, the characteristic of rules of law is that they shall, if necessary, be enforced by external power [1] Rules of law apply, of course, to conscience quite as much as rules of morality But the latter require to be enforced by the internal power of conscience only, whereas the former require to be enforced by some external power [2]

Law-giving Authority not essential for the Existence of Law

§ 4 If these are the characteristic signs of morality and of law, we are justified in stating the principle A rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only, whereas, on the other hand, a rule is a rule of law, if by common consent of the community it will eventually be enforced by external power Without some kind both of morality and of law no community has ever existed, or could possibly exist But there need not be, at least not among primitive communities, a law-giving authority within the community Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority Wherever we have an opportunity of observing a primitive community, we find that some of its rules for human conduct apply to conscience only, whereas others will be enforced by common consent of the community, the former are rules of morality

[1] See Westlake, *Papers*, p 12, and Twiss, 1 § 105

[2] This distinction between rules of law and of morality is, however, by no means generally recognised See, for instance, Heilborn, *Grundbegriffe des Volkerrechts* (1912), pp 3-10 And see Vinogradoff in *Michigan Law Review*, 23 (1924), pp 1 8 and pp 138 153, and, as to international morality, below, p 33

only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential. Whenever a question of law arises in a primitive community, it is the community itself and not a court which decides it Of course, when a community is growing out of the primitive condition of its existence and becomes gradually so enlarged that it turns into a State in the proper sense of the term, the necessities of life and altered circumstances of existence do not any longer allow the community itself to do anything and everything And the law can then no longer be left entirely in the hands of the different factors which make it grow gradually from case to case It is for this reason that we find in every State a legislature, which makes laws, and courts of justice, which administer them (It is for the same reason that the absence of a legislature in the relations of States can be explained only by reference to the assumption that these relations are those of a primitive community. But that assumption cannot be easily reconciled with the fact that we are here concerned with relations of modern civilised States We must not attach exaggerated importance to the argument affirming the legal nature of International Law by reference to primitive communities)[1]

If we ask whence comes the power of the legislature to make laws, there is no other answer than this from the common consent of the community. Thus, in Great Britain, Parliament is the law-making body by common consent An Act of Parliament is law, because the common consent of Great Britain is behind it That Parliament has law-making authority is law itself, but unwritten and customary law It follows that all statute or written law is based on unwritten law in so far as the power of Parliament to make statute law is given to Parliament by unwritten law. It is by the common consent of the British people that Parliament has the power of making rules which shall be

[1] See Lauterpacht, *The Function of Law*, p 406 And see Westlake, *Collected Papers*, p xxii 'if we give the name of law to anything which we so discover in a remote state of society before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense'

enforced by external power But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary, which are day by day recognised through courts of justice

Definition and three Essential Conditions of Law

§ 5 On the basis of the results of these previous investigations we are now able to give a definition of law We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external*[1] *power*

The essential conditions of the existence of law are, therefore, threefold There must, first, be a community There must, secondly, be a body of rules for human conduct within that community And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power It is not an essential condition either that such rules of conduct should be written rules, or that there should be a law-making authority or a law-administering court within the community concerned If we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community[2]

Law not to be identified with Municipal Law

§ 6 But it must be emphasised that, if there is law to be found in every community, law in this meaning must not be wholly identified with the law of States, the so-called Municipal Law,[3] just as the conception of State must not be identified with the conception of community The conception of community is a wider one than the conception of State A State is a community, but not every community

[1] That is, *external* to the person against whom they are enforced

[2] The best example of the existence of law outside the State is the law of the Roman Catholic Church, the so-called Canon Law This Church is an organised community whose members are dispersed over the whole surface of the earth They consider themselves bound by the rules of the Canon Law, although there is no sovereign political authority that sets and enforces those rules But there is an external power through which the rules of the Canon Law are enforced—namely, the punishments of the Canon Law, such as excommunication, refusal of sacraments, and the like The rules of the Canon Law are in this way enforced by common consent of the whole Roman Catholic community

[3] Throughout this work the term 'Municipal Law' is used in the sense of national or State law in contradistinction to International Law *Municipium* was 'a town, particularly in Italy, which possessed the right of Roman citizenship but was *governed by its own laws*' Lewis and Short, *Latin Dictionary*

is a State Likewise the conception of law pure and simple is a wider one than that of Municipal Law Municipal Law is law, but not every law is Municipal Law, for instance, the Canon Law is not. Municipal Law is a narrower conception than law pure and simple The body of rules which is called the Law of Nations or International Law may, therefore, be law in the strict sense of the term, although it may not possess all the characteristics of Municipal Law, and although the divergence from generally recognised principles of Municipal Law may as a rule be regarded as expressive of the weakness of the Law of Nations *qua* law [1] To make sure whether the Law of Nations is or is not law, we have to inquire whether the three essential conditions of the existence of law are to be found in the Law of Nations.

The 'Family of Nations' a Community.

§ 7. As the first condition is the existence of a community, the question arises whether an international community exists whose law could be the Law of Nations Before this question can be answered, the conception of a community must be defined A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals This definition of a community covers not only a community of individual men, but also a community of individual communities such as individual States But is there in existence a universal international community of all individual States ? [2] This question had already, before the First World

[1] See below, § 51 (3), where the progress of International Law is described as dependent on its development on the lines of Municipal Law Care must, therefore, be taken not to exaggerate the so called specific character of International Law as a reason for acquiescing in or justifying solutions radically different from general principles of law as adopted within the State and from rules of morality embodied in those principles See as to the dangers of the insistence on the specific character of International Law, Lauterpacht, *The Function of Law*, pp 403 407

[2] For a discussion of this question see Hold Ferneck, *Volkerrecht*, 1 (1930) pp 17 26, 84 110 (an able denial of the existence of an international community), Balladore Pallieri, pp 3 30, Brierly, pp 34, 35, Bustamante, pp 431-445, Burckhard, *Die Organisation der Rechtsgemeinschaft* (1927), pp 374 416, Meinecke, *Weltbürgertertium und Nationalstaat* (1928), Knubben, *Die Subjekte des Volkerrechts* (1928), pp 191 201, 351 371, Delos, *La société internationale et les principes du droit public* (1929), Stratton, *Social Psychology of International Conduct* (1929), pp 293 305, Walz, *Das Wesen des Volkerrechts und Kritik der Volkerrechtsleugner* (1930), pp 157-162, De la Brière, *La communauté*

War, been decided in the affirmative as far as the States of the civilised world were concerned Science and art, which are by their nature to a great extent international, created a constant exchange of ideas and opinions between the subjects of the several States Of the greatest importance were, however, agriculture, industry, and, in particular, trade It is international trade which has created navigation on the high seas and on the rivers flowing through different States It is, again, international, commercial, and other interests which have called into existence the nets of railways which cover the continents, and the international postal, telegraphic, radiotelegraphic and radiotelephonic arrangements

Cultural, scientific, and humanitarian interests have called for international co-ordination and organisation [1] In addition to the various permanent organs and institutions of the League of Nations, of the United Nations, and of the International Labour Organisation, a number of international offices and international commissions [1] have been established for the administration of international business, and a Permanent Court of Arbitration and, later, an International Court of Justice have been set up at The Hague Though the individual States are sovereign and independent of each other, though there is no international Government above them, there exists a powerful unifying factor, namely, their common interests The influence of that unifying factor is liable to suffer a set-back whenever economic nationalism, political intolerance and the pursuit of self-sufficiency on the part of sovereign States tend to create artificial barriers among the peoples composing them Whenever that happens, the authority and reality of International Law are likely to weaken But such retrogression,

des Puissances (1932), Maim, *Volkerbund und Staat* (1932), Part I , Laun, *Der Wandel der Ideen Staat und Volk als Äusserung des Weltgewissens* (1933), pp 327-445 , Blühdorn, *Einführung in das angewandte Volkerrecht* (1934), pp 90-100 , Corbu, *Essai sur la notion de règle en droit international* (1935) , Scelle in *Hague Recueil*, vol 46 (1933) (IV), pp 339 346 , Zimmern in *Grotius Society*, 20 (1934), pp 25-44 , Walsh in *Hague Recueil*, vol 53 (1935) (III), pp 101-170 , Del Vecchio in *Théorie du droit*, 10 (1936), pp 1-13 On some psychological and sociological aspects of international relations see Hodges, *The Background of International Relations* (1931), and Alvarez, *La psychologie des peuples et la reconstruction du droit international* (1936) See also West, *Conscience and Society* (1942), pp 176-212, and in *Grotius Society*, 28 (1942), pp 133-150

[1] See below, Appendix A

being contrary to the natural tendencies of development and to the realities of national intercourse between States, must be regarded as temporary and as leaving essentially intact the existence of an international community Neither do differences in culture, in the economic structure, or in the political system, affect as such the existence of the international community as one of the basic factors of International Law The object and resulting scope of the rules of International Law being limited,[1] its existence is not conditioned by a uniformity of outlook and tradition which plays an important, although not indispensable, part in securing the rule of law within the State

The 'Family of Nations' a Community with Rules of Conduct

§ 8 Thus the first essential condition for the existence of law is, at least in the long run, a reality But the second condition cannot be denied either For hundreds of years more and more rules have grown up for the conduct of the States between each other These rules are to a great extent customary rules But side by side with these customary and unwritten rules more and more written rules are daily created by international agreements, such as the Declaration of Paris of 1856, the Hague Rules concerning land warfare of 1899 and 1907, and the vast number of general conventions often referred to as law-making or legislative treaties

External Power for the Enforcement of Rules of International Conduct

§ 9 Equally, an affirmative answer must be given to the question whether there exists a common consent of the community of States that the rules of international conduct shall be enforced by external power Governments of States, and the public opinion of the whole of civilised humanity, agree and consent that the body of rules for international conduct which is called the Law of Nations shall, if necessary, be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations In the absence of a central authority for the enforcement of the rules of the Law of Nations, States have on occasions to take the

[1] They are limited for the reason that, in view of the immense diversity of the component parts of the international community, the legal rules binding upon States must be limited to the relatively restricted scope of matters capable of uniform regulation For a somewhat different explanation see Briefly in *Acta Scandinavica*, 7 (1936), p 9

law into their own hands Self-help,[1] and intervention on the part of other States which sympathise with the wronged one, are the means by which the rules of the Law of Nations can be and actually are enforced And, subject to the obligations of the Charter of the United Nations and of the General Treaty for the Renunciation of War,[2] war is the ultimate instrument for defending violated legal rights vital to the existence of States Moreover, the Covenant of the League and the Charter, by providing for a system of sanctions for repressing the violation of its principal obligation, have elevated enforcement of the law to the authority of a recognised principle of conventional[3] law It is true that there is at present no central Government above the Governments of the several States, which could in every case secure the enforcement of the rules of International Law For this reason, compared with Municipal Law and the means available for its enforcement, the Law of Nations is certainly the weaker of the two A law is the stronger, the more guarantees are given that it can and will be enforced[4] It is, in the present circumstances, inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is no international Government above the national ones which could enforce the rules of International Law in the same way as a national Government

[1] For a stimulating discussion of this question from the point of view of legal history see Lambert, *La vengeance privée et les fondements du droit international public* (1936)

[2] See below, vol II §§ 52*g* 52*q*

[3] The term 'conventional rule' is used throughout this work to indicate a rule created by express agreement

[4] As to the sanctions of International Law see the following Root in *A J*, 2 (1908), pp 451 457, Higgins, *The Binding Force of International Law* (1910), Siotto Pintor in *Rivista*, 12 (1918), pp 208 228, Roxburgh in *A J*, 14 (1920), pp 26 37, Hyde, 1 § 4, Stowell, pp 11 15, Dupuis in *Hague Recueil*, 1924 (1), pp 407 444, Mitrany, *The Problem of International Sanctions* (1925), Buell and Dewey, *Are Sanctions Necessary to International Organisation?* (1932), Spaight, *An International Air Force* (1932), Bruck, *Les sanctions en droit international public* (1933), Morgenthau, *La réalité des normes* (1934), pp 214 226, the same in *R I*, 3rd ser, 16 (1935), pp 474 503, 809 836, Widmer, *Der Zwang im Volkerrecht* (1936), Kelsen, *Law and Peace in International Relations* (1942), pp 3 26, Brierly in *Grotius Society*, 17 (1931), pp 67 78, Scott in *A S Proceedings*, 1933, pp 5 33, Hyde, *ibid*, pp 34 40, Foster in *American Political Science Quarterly*, 49 (1934), pp 372 385, Wehberg in *Hague Recueil*, vol 48 (1934) (II), pp 7 132, Scelle, *ibid*, vol 55 (1936) (I), pp 156 177, 193 196, Cavaré in *R G*, 44 (1937), pp 385 445, Husserl in *University of Chicago Law Review*, 12 (1945), pp 115 139 And see vol II § 52*b* See also below §§ 156, 528*a*

enforces the rules of its Municipal Law. This weakness becomes particularly conspicuous in time of war, for belligerents who fight for their existence will always be apt to brush aside such rules of the Law of Nations concerning warfare as are supposed to hinder them in the conduct of their military operations But a weak law is nevertheless still law

Practice recognises Law of Nations as Law

§ 10. In practice International Law is constantly recognised as law The Governments of the different States are of opinion that they are legally, as well as morally, bound by the Law of Nations Likewise, the public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations States not only recognise the rules of International Law as legally binding in innumerable treaties, but emphasise constantly the fact that there is a law between themselves They moreover recognise this law by their Municipal Law ordering their officials, their civil and criminal courts, and their subjects to observe such conduct as is in conformity with the duties imposed upon their sovereign by the Law of Nations If a violation of the Law of Nations occurs on the part of an individual State, the public opinion of the civilised world, as well as the Governments of other States, stigmatises such violation as a violation of law pure and simple. On the other hand, the inadequacy of public opinion as a compelling and motivating force is in itself an expression of the weakness of International Law as a body of legal rules

Violations of International Law are certainly frequent, especially during war But the offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations as justifying their conduct And although the frequency of the violations of International Law may strain its legal force to breaking point, the formal, though often cynical, affirmation of its binding nature is not without significance.

BASIS OF THE LAW OF NATIONS

Common Consent the Basis of Law

§ 11 If law is, as defined above (§ 5), a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, common consent is the basis of all law [1] What, now,

[1] It will be noted that 'common consent' is a sociological rather than a legal explanation of the validity of the law In law the question still arises Why is consent binding? Probably the answer to that question as to the validity of the first source of law cannot itself be a legal one Its validity cannot be proven as a legal proposition, it must be assumed by reference to what has been called the initial hypothesis (see Salmond, *Jurisprudence*, § 48) adopted on the basis of non legal considerations See especially Kelsen, *Das Problem der Souveranitat und die Theorie des Volkerrechts* (1920), *passim*, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928), *Reine Rechtslehre* (1934), pp 129 154, and in *Hague Recueil*, vol 14 (1926) (IV), and vol 42 (1932) (IV) See also Lauterpacht, *The Function of Law*, pp 420-423, Briefly in *Hague Recueil*, vol 23 (1928) (III), pp 467-549, Cavaglieri, *ibid*, vol 26 (1929) (I), p 362, Bourquin, *ibid*, vol 35 (1931) (I), pp 75 80, Metall in *Z o R*, 11 (1931), pp 416 428, Le Fur in *Hague Recueil*, vol 54 (1935) (IV), pp 146 166, Walz in *Archiv des offentlichen Rechts*, vol 58 (1936), pp 1-16 And see below, § 493, on the binding force of treaties The doctrine of the initial hypothesis as the basis of International Law has been clearly formulated by Kelsen, the originator of what has become known as the Vienna School, in a series of writings referred to above As to the influence of Kelsen and of the Vienna School on International Law see Lauterpacht in *Modern Theories of Law* (1933), pp 125-129, Kunz, *Volkerrechtswissenschaft und reine Rechtslehre* (1923), and in *New York University Law Quarterly Review*, 11 (1933-1934), pp 370-421, Jaeger, *Le problème de la souveraineté dans la doctrine de Kelsen* (1932), Schiffer, *Die Lehre vom Primat des Volkerrechts in der neueren Literatur* (1937), Man, *L'école de Vienne et le développement du droit des gens* (1938), Akzin in *R I (Paris)*, 1 (1927), pp 342 372, Balladore Pallieri in *Rivista*, 27 (1935), pp 24 28, J M Jones in *B Y*, 16 (1935), pp 42-55, Starke, *ibid*, 17 (1936), pp 66 81, Stern in *American Political Science Review*, 30 (1936), pp 736 741 That influence has extended in particular to such matters as the relation of the systems of International and Municipal Law, State sovereignty, the subjects of International Law, personification of the State, etc On these questions there is a striking similarity of view between the Vienna School and the views of the French writer Duguit and his followers Duguit's principal works in this connection are *Traité du droit constitutionnel*, 3 vols (2nd ed, 1921), and *Le droit social et le droit individuel et la transformation de l'État* (3rd ed, 1922) On Duguit's contribution to International Law see Le Fur in *Archives de philosophie du droit*, 1932, pp 175-212, and in *Hague Recueil*, vol 54 (1935) (IV), pp 72-94, and, in particular, Réglade in *R G*, 37 (1930), pp 381 419 See also Bonnard in *Théorie du droit*, 1 (1926) pp 18 40, and III (1928) pp 55-70, Kunz, *ibid*, I (1926) pp 140 152 and 204-221 The theories of Duguit have been recently amplified and applied to International Law in a creative manner on a biological basis by Scelle in his *Précis de droit des gens*, vol I (1932), vol II (1934) See also his *La théorie juridique de la révision des traités* (1936). And see Segal in *Théorie du droit*, 9 (1935) pp 186-

does the term 'common consent' mean? If it meant that all the individuals who are members of a community must at every moment of their existence expressly consent to every point of law, such common consent could never be proved. The individuals, who are the members of a community, are successively born into it, grow into it together with the growth of their intellect during adolescence, and die away successively to make room for others The community remains unaltered, although a constant change takes place in its members 'Common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to the wills of its single members The question whether there be such a common consent in a special case is not a question of theory, but of fact only It is a matter of observation and appreciation, and not of logical and mathematical decision, just as is the well-known question, How many grains make a heap? Those legal rules which come down from ancestors to their descendants remain law so long as they are supported by the common consent of those descendants. New rules can only become law if they find common consent on the part of those who constitute the community at the time. It is for that reason that custom is at the background of all law, whether written or unwritten.

194 According to Scelle there exists over and above the legal order a natural order conceived as the sum total of biological laws whose observance imposes itself upon the legislator with absolute necessity, his task is to translate these laws into legal rules, the concordance of the legal and biological law is the intrinsic basis of the validity of the law It may be of some interest to compare Scelle's sociological and biological foundation of International Law with Westlake's attempt to base it on 'the social nature of man and his material and moral surroundings' *Collected Papers*, p 81 See also Reeves in *Hague Recueil*, vol 3 (1924) (II), pp 5 94 And see Chklaver, *Le droit international dans ses rapports avec la philosophie du droit* (1929), Alvarez, *Le nouveau droit international* (1924), the same, *La philosophie des peuples et la reconstruction du droit international* (1936), and, for comment thereon, Le Fur in *Hague Recueil*, vol 54 (1935) (IV), pp 124-146 See also Djuvara in *Hague Recueil*, vol 64 (1938) (II), pp 485-616, Rousseau, pp 55-105, Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 19-157 And see the literature quoted above, § 1, and below, §§ 15, 20, and 52

Common Consent of the Family of Nations the Basis of International Law

§ 12 The customary rules of International Law have grown up by common consent of the States—that is, the different States have acted in such a manner as to imply their tacit consent to these rules As far as the process of the growth of a usage and its turning into a custom can be traced back, customary rules of the Law of Nations came into existence in the following way The intercourse of States with each other necessitated some rules of international conduct Single usages, therefore, gradually grew up, the different States acting in the same or in a similar way when occasion arose As some rules of international conduct were from the end of the Middle Ages urgently wanted, the writers on the Law of Nature prepared the ground for their growth by constructing certain rules on the basis of religious, moral, rational, and historical reflections Hugo Grotius' work, *De Jure Belli ac Pacis, libri tres* (1625), offered a systematised body of rules which recommended themselves so much to the needs and wants of the time that they became the basis of the subsequent development When afterwards, especially in the nineteenth century, it became apparent that customs and usages alone were not sufficient, or not sufficiently clear, new rules were created through law-making treaties being concluded which laid down rules for future international conduct Thus conventional rules gradually grew up side by side with customary rules

New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of their admittance. It is therefore not necessary to prove for every single rule of International Law that every single member of the Family of Nations consented to it No single State can say on its admittance into the Family of Nations that it desires to be subjected to such and such a rule of International Law, and not to others The admittance includes the duty to submit to all the rules in force, with the sole exception of those which, as, for instance, the rules of the Geneva Convention, are specially stipulated for such States only as have con-

cluded, or later on acceded to, a certain international treaty creating the rules concerned

On the other hand, no State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations [1] The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State This applies not only to customary rules, but also to such conventional rules as have been called into existence through a law-making treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory Powers to give notice of withdrawal It would, for instance, be a violation of International Law on the part of a signatory of the General Treaty for the Renunciation of War of 1928 to declare that it would cease to be a party

States the Subjects of the Law of Nations

§ 13. Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively An individual human being, such as a king or an ambassador for example, is not directly a subject of International Law Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not, as a rule, international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the State concerned by International Law Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are, on this view, not international duties, but duties imposed by Municipal Law

[1] See De Louter, I p 17 'La doctrine qu'un État souverain n'est engagé par sa volonté qu'aussi longtemps que cette volonté persiste est inacceptable par cela même qu'elle sape les bases essentielles du droit international La seule différence entre le droit international et le droit national se trouve dans leur origine, leur caractère obligatoire est parfaitement identique' See also, to the same effect, Kelsen, *Der Begriff der Souveranität*, etc, pp 162-174, Lauterpacht, *Analogies*, pp 54 59, and the literature there quoted

in accordance with a right granted to, or a duty imposed upon, the State concerned by International Law.[1] However, this view is no longer generally accepted

Persons other than States as Subjects of International Law

§ 13a. While it is of importance to bear in mind that primarily States are subjects of International Law, it is essential to recognise the limitations of that principle[2] Its correct meaning is that States only create International Law, that International Law is primarily concerned with the rights and duties of States and not with those of other persons, and that States only possess full procedural capacity before international tribunals Further than this that principle does not go In particular, when we say that International Law regulates the conduct of States we must not forget that

[1] See the *Mavrommatis* judgment of the Permanent Court, Series A, No 2, p 12, line 10

[2] In the first three editions of this treatise the view was expressed that States only and exclusively are the subjects of International Law See Hold Ferneck, 1 pp 247 257, Knubben, *Die Subjekte des Volkerrechts* (1928), Wolgast, *Volkerrecht* (1934), § 144, Kosters in *B I I I*, 9 (1923), pp 1-31, Lord Phillimore in *Hague Recueil*, vol 1 (1923), pp 63 68, E Kaufmann in *Hague Recueil*, vol 54 (1935) (IV), pp 402-427, Schoen in *Z V*, 23 (1939), pp 411-448 But see for a rejection or serious qualification of that view Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899), *passim*, Fiore, *International Law Codified* (Borchard's transl, 1918), § 66, Westlake, *Collected Papers*, Rehm in *Z V*, 1 (1907), p 53, Diena in *R G*, 16 (1909), pp 57-76, and, after the First World War Kelsen, *Das Problem der Souveranitat und die Theorie des Volkerrechts* (1920), and in *Hague Recueil*, vol 42 (1932) (IV), pp 141 172, Krabbe, *The Modern Idea of the State* (English transl, 1921), pp 240 245, Duguit, *Traité de droit constitutionnel* (1923), 1 pp 551 560, Niemeyer, *Volkerrecht* (1923), p 86, Politis, *Les nouvelles tendances du droit international* (1927), pp 55 93, and in *Hague Recueil*, vol 6 (1925) (I), pp 8 10, Verdross, *Verfassung*, p 160, Anzilotti, pp 121-136, Balladore Pallieri, pp 167-172, 277-279, Scelle, 1 pp 42-44, Lauterpacht, *Analogies*, pp 73-82, in *Economica*, 1925, pp 309-315, and in *Hague Recueil*, vol 62 (1937) (IV), pp 207-243, Stowell, pp 8, 9, Schwarzenberger, pp 35 42, Spiropoulos, *L'individu en droit international* (1928), and in *Hague Recueil*, vol 30 (1929) (V), pp 126 266, von der Luhe, *Die internationale juristische Person* (1931), Segal, *L'individu en droit international* (1932), Mazzoleni, *Personalità giuridica e soggetti del diritto internazionale* (1933) Ténékidès, *L'individu dans le droit international* (1933), Cavaglieri in *Rivista*, 17 (1925), pp 18 32, 168 187, Hamburger in *Z I*, 36 (1926), pp 117-148, Akzin in *R I* (*Paris*), 4 (1929), pp 451 489, Bourquin in *Hague Recueil*, vol 35 (1931) (I), pp 33-47, Fischer Williams in *B Y*, 13 (1932), pp 33-35, Hostie in *Hague Recueil*, vol 40 (1932) (II), pp 488-509, Siotto-Pintor, *ibid*, vol 41 (1932) (III), pp 251-357, Scelle, *ibid*, vol 46 (1933) (IV), pp 363-373, Strupp, *ibid*, vol 47 (1934 (I), pp 418 422, 463 468, Geocze in *R I* (*Geneva*), 12 (1934), pp 119-134, Herz in *Théorie du droit*, 10 (1936) pp 100-111, Preuss in *R I F*, 8 (1939), pp 160-174, Aufricht in *American Political Science Review*, 37 (1943), pp 217-243 See also Jessup, *The Modern Law of Nations* (1948), pp 15-42, and Lauterpacht in *L Q R*, 63 (1947), pp 438 460, and 64 (1948), pp 97-119.

the conduct actually regulated is the conduct of human beings acting as the organ of the State As Westlake said, 'The duties and rights of States are only the duties and rights of the men who compose them' [1] If that view is accepted, then it is scientifically wrong and practically undesirable to divorce International Law from the general principles of law and morality which underlie the main systems of municipal jurisprudence regulating the conduct of human beings Also, although States are the normal subjects of International Law they may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of International Law Persons engaging in piracy are subject to duties imposed, in the first instance, not by the municipal law of various States but by International Law The same applies to the rights and duties of political communities recognised as belligerents Prior to 1929 the Holy See, though not a State, was a subject of international rights and duties Although individuals cannot appear as parties before the International Court of Justice,[2] States may confer upon them the right of direct access to international tribunals [3] As the Permanent Court of International Justice expressly recognised in the Advisory Opinion concerning the Jurisdiction of the Courts of Danzig, States may directly grant to individuals direct rights by treaty , such rights may validly exist and be enforceable without having been previously incorporated in municipal law [4] The doctrine adopted in many municipal systems to the effect that International Law is part of the law of the land is upon analysis yet another factor showing that International Law may act *per se* upon individuals, who become, to that extent, subjects of

[1] *Collected Papers*, p 78

[2] Article 34 of the Statute of the International Court of Justice provides as follows 'Only States may be parties in cases before the Court' See below, vol II § 25a

[3] See below, § 288

[4] While admitting that in principle a treaty 'cannot, as such, create direct rights and obligations for private individuals,' the Court said 'It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts', P C I J , Series B, No 15, p 17 See for comment thereon Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp 50 53.

International Law [1] Municipal tribunals have on occasions expressly recognised the international personality of international administrative unions and of their organs [2]

Equality an Inference from the Basis of International Law

§ 14 Since the Law of Nations is based on the common consent of States as sovereign communities, the member-States of the Family of Nations are equal to each other as subjects of International Law States are by their nature certainly not equal as regards power, territory and the like But as members of the community of nations they are, in principle, equal, whatever differences between them may otherwise exist This is a consequence of their sovereignty in the international sphere [3] As such the abstract principle of State equality, while still forming part of International Law, is open to objections of the kind levelled against other extreme manifestations of State sovereignty [4] The Charter of the United Nations, although professedly based on the principle of 'sovereign equality' [5] of States, embodies far-reaching derogations from the conception of equality of States in the accepted sense [6]

III

SOURCES OF THE LAW OF NATIONS

Hall, pp 5-13—Maine, pp 1 25—Lawrence, §§ 50 55—Phillimore, I §§ 17 33—Twiss, I §§ 82 103—Taylor, §§ 30 36—Westlake, I pp 14-19—Wheaton, § 15—Halleck, I pp 60 68—Hershey, §§ 11 15—Hyde, I § 3—Ullmann, §§ 8 9—Heffter, § 3—Holtzendorff in *Holtzendorff*, I pp 79-155—Heilborn, *Grundbegriffe des Volkerrechts* (1912), §§ 6 9, and in *Hague Recueil*, 1926 (1), pp 5 60—Liszt, § 2—Schwarzenberger, pp 12-18—Strupp, *Éléments*, § 2A—Rivier, I § 2—Nys, I pp 152 173—Fauchille, §§ 46 63 (3)—Rousseau, pp 106 125, 815 950—Despagnet, §§ 58 63—Pradier Fodéré, I §§ 24 35—Merignhac, I pp 79 113—Martens, I § 43—Fiore, I §§ 224 238—Calvo, I §§ 27-38—Praag, §§ 7 15—Cavaglieri, pp 50 74—De Louter, I pp 42 58—Cruchaga, I §§ 102 111—Scelle, II pp 298 316, 345 365—Bustamante, pp 56 80—Keith's Wheaton, pp 10 23, 35 38—Fenwick, ch IV—Stowell, pp 26 34—Holland, *Lectures*, pp 16 28—Smith, vol I pp 1-14—Balladore Pallieri, pp 80 146—Anzilotti, pp 66 86—Lauterpacht, *Analogies, passim*, *Function of Law*, pp 51 135, and in *Hague Recueil*,

[1] See below, § 21*a*
[2] See below, p 776, n 5
[3] See below, §§ 115 116.
[4] See below, § 115*a*
[5] For a critical examination of this term see Kelsen in *Yale Law Journal*, 53 (1944), pp 207 220
[6] See below, § 168*e*

vol 62 (1937) (IV), pp 149 187—Spiropoulos, *Théorie générale du droit international* (1930), pp 83 114—Bergbohm, *Staatsvertrage und Gesetze als Quellen des Volkerrechts* (1877)—Jellinek, *Die rechtliche Natur der Staatsvertrage* (1880)—Cavaglieri, *La Consuetudine giuridica internazionale* (1907), and in *R G*, 18 (1911), pp 259 292, and in *Rivista*, 14 (1921), pp 149-187, 289 314, 479 506—Verdross, pp 42 75—Bluhdorn, *Die Einführung in das angewandte Volkerrecht* (1934), pp 112 185—Korte, *Grundfragen der volker rechtlichen Rechtsfahigkeit* (1934), pp 56-102—Borchard in *Recueil d'Études* for Gény, 3 (1934), pp 328 361—Finch, *The Sources of Modern International Law* (1937) (translation from *Hague Recueil*, vol 53 (1935) (III), pp 535 627)—Redslob, *Les principes du droit des gens moderne* (1937), pp 9 20, 29 47—Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 161-449—Sörensen, *Les sources du droit international* (1946)—Oppenheim in *Z I*, 25 (1915), pp 1 13—Perassi in *Rivista*, 2nd ser, 6 (1917), pp 195 223, 285 314—Sherman in *A J*, 15 (1921), pp 349 360—Reeves, *ibid*, pp 361 374—Corbett in *B Y*, 1925, pp 20 30—Mulder in *R I*, 3rd ser, 7 (1926), pp 555 576—Brierly in *Hague Recueil*, vol 23 (1928) (III), pp 478 488, and vol 58 (1936) (IV), pp 69 81—Verdross, *ibid*, vol 30 (1929) (V), pp 275 305—Bourquin, *ibid*, vol 35 (1931) (I), pp 48 80—Metall in *Z o R*, 11 (1931), pp 416 428—Heydte in *Z V*, 16 (1931 1932), pp 461 478—Hostie in *Hague Recueil*, vol 40 (1932) (II), pp 476 487—Morelli in *Rivista*, 24 (1932), pp 388 404, 483 506—Gihl in *Nordisk T A*, 3 (1932), pp 38 64—Castberg in *Hague Recueil*, vol 43 (1933) (I), pp 313 381—Strupp, *ibid*, vol 47 (1934) (I), pp 301 388—Le Fur, *ibid*, vol 55 (1935) (IV), pp 192 213—Kaufmann, *ibid*, vol 55 (1935) (IV), pp 491 524—Gardiner in *J C L*, 3rd ser, 17 (1935), pp 251 259—Wengler in *Z o R*, 16 (1936), pp 333 392—Basdevant in *Hague Recueil*, vol 58 (1936) (IV), pp 497 522—Kopelmanas in *R I*, 3rd ser, vol 18 (1937), pp 88 143, in *B Y*, 18 (1937), pp 127 151, and in *R I* (*Paris*), vol 21 (1938), pp 101 150—Maranini in *Annuario di diritto internazionale*, 2 (1939) pp 141 171—Bluhdorn in *O Z o R*, 1 (1946), pp 136 171 And see below, § 59, for the literature on positivism and the law of nature

Source in contradistinction to Cause

§ 15 The different writers on the Law of Nations disagree widely with regard to the kinds and numbers of sources of this law The fact is that the term 'source of law'[1] is used in different meanings by the different writers on International Law, as on law in general It seems that most writers confuse the conception of 'source' with that of 'cause,' and through this mistake come to a standpoint from which certain factors which influence the growth of International Law appear as sources of rules of the Law of Nations This mistake can be avoided by going back to the meaning of the term 'source' in general Source means a spring or well, and has to be defined as the rising from the

[1] On the different meanings of this term see Corbett, *op cit*

ground of a stream of water When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground On that spot, we say, is the source of the stream of water We know very well that this source is not the cause of the existence of the stream of water Source signifies only the natural rising of water from a certain spot on the ground, whatever natural causes there may be for that rising If we apply the conception of source in this meaning to the term 'source of law,' the confusion of source with cause cannot arise Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning Where we find that such rules rise into existence, there is the source of them Of course, rules of law do not rise from a spot on the ground as water does, they rise from facts in the historical development of a community Thus in Great Britain a good many rules of law rise every year from Acts of Parliament 'Source of law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force

The two Sources of International Law

§ 16 As the basis of the Law of Nations is the common consent of the member-States of the Family of Nations, it is evident that there must exist as many sources of International Law as there are facts through which such common consent can possibly come into existence A State, just as an individual, may give its consent either directly by an express declaration, or tacitly by conduct which it would not follow in case it did not consent The sources of International Law are therefore twofold—namely (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties, (2) *tacit* consent, that is, implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct Subject, therefore, to what has been said above (§§ 11 and 12) about the meaning of 'common consent'

and below (§ 19) about the binding force of general principles of law, treaties and custom must be regarded as the exclusive sources of the Law of Nations.

Custom in contradistinction to Usage

§ 17 Custom is the older and the original source of International Law in particular as well as of law in general [1] For this reason, although an international court is bound in the first instance to consider any available treaty provisions binding upon the parties, it is by reference to international custom that these treaties are interpreted in case of doubt. This explains why the Permanent Court of International Justice,[2] whose jurisdiction has been almost universally invoked for the purpose of interpreting treaties, has largely relied upon and, in turn, made a substantial contribution to the development of customary International Law [3] Custom must not be confused with usage In everyday life and language both terms are used synonymously, but in the language of the international jurist they have two distinctly different meanings International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are, according to International Law, obligatory or right On the other hand, international jurists speak of a *usage* when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to International Law, obligatory or right Thus the term 'custom' is in the language of international jurisprudence a narrower conception than the term 'usage,' as a given course of conduct may be usual without being customary.

[1] See Gianni, *La coutume en droit international* (1931), Gouet, *La coutume en droit constitutionnel interne et en droit constitutionnel international* (1932), Kuntzel, *Ungeschriebenes Volkerrecht* (1935), Haemmerlé, *La coutume en droit des gens d'après la jurisprudence de la Cour Permanente de Justice Internationale* (1936), Balladore Pallieri in *Rivista*, 20 (1928), pp 338 374, Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 317-370, Bourquin in *Hague Recueil*, 35 (1931) (i), pp 61-75, Raestad in *Nordisk T A*, *Acta Scandinavica*, 4 (1933), pp 61-84, 128 146, Séfériadès in *R G*, 43 (1936), pp 129-196, Kopelmanas in *B Y*, 18 (1937), pp 127-151, Rousseau, pp 815 888

[2] And 'whose function,' as the revised Statute lays down in Article 38, 'is to decide in accordance with international law such disputes as are submitted to it'

[3] See Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp 13 15, and Beckett in *Hague Recueil*, 39 (1932) (i), pp 135-272, and 50 (1934) (iv), pp 193 305 And see below, § 19*a*

Certain conduct of States concerning their international relations may therefore be usual without being the outcome of customary [1] International Law.

As usages have a tendency to become custom, the question presents itself, at what time does a usage turn into a custom ? This question is one of fact, not of theory All that theory can say is this Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law

Treaties as a Source of International Law

§ 18 Treaties are the second source of International Law, and a source which has of late become of the greatest importance As treaties may be concluded for innumerable purposes,[2] usually such treaties only are regarded as a source of International Law as stipulate new general rules for future international conduct or confirm, define, or abolish existing customary or conventional rules of a general character Such treaties may conveniently [3] be called *law-making treaties* Since the Family of Nations is not at present a State-like community, there is no central authority which can make law for it in the way that Parliaments make law by statutes within the States The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is by the members of the Family of Nations concluding treaties in which

[1] See Kluber, § 3 The distinction between custom and usage in International Law is not always used in the sense suggested in the text See, for instance, Hall, § 139, where he says, 'this *custom* has since hardened into a definite *usage*'

[2] See below, § 492

[3] But such convenience may become a source of confusion if we fail to keep in mind that (*a*) *all* treaties are in a real sense law making inasmuch as they lay down rules of future conduct for the parties in a way similar to that in which a private contract lays down the law governing the conduct of the parties in the future, (*b*) the term 'law making' does not imply that there exists among States international legislation in the accepted meaning of the term, namely, the enactment of laws overriding the will of a dissenting minority See, on the use of the term 'international legislation,' McNair in *Iowa Law Review*, 19 (1933 1934), pp 177 189, Hudson, *Legislation*, v p viii See also Brierly in *Problems of Peace*, 5th ser (1930), pp 205 229, Gihl, *International Legislation* (1937), and, on the concept of legislation in general, Akzin in *Iowa Law Review*, 21 (1936), pp 713 750 It is of interest to note that Scelle, who seems to attach importance to the distinction between law making and other treaties, admits in effect that practically all treaties are 'law making' *La théorie juridique de la révision des traités* (1936), p 41

certain rules for their future conduct are stipulated [1] Of course, such law-making treaties create law for the contracting parties solely *Universal* International Law is created only when all or practically all the members of the Family of Nations are parties to these treaties Thus the General Treaty for the Renunciation of War of August 27, 1928,[2] may accurately be regarded as an example of a universal treaty Many law-making treaties are concluded by a few States only, so that the law which they create is *particular* International Law On the other hand, many law-making treaties have been concluded which contain *general* International Law, because the majority of States, including the leading Powers, are parties to them General International Law has a tendency to become universal because such States as hitherto did not consent to it will in future either expressly give their consent or recognise the rules concerned tacitly through custom [3] But it must be emphasised that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations that treaties are binding upon the contracting parties [4]

General Principles of Law as a Source of International Law

§ 19 Thus custom and treaties are the two principal sources of International Law The Statute of the International Court of Justice [5] recognises this expressly in laying down that the Court shall apply '(*a*) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States, (*b*) international custom, as evidence of a general practice accepted as law' But although these are the principal sources of the Law of Nations, they cannot be regarded as its only sources Consent, in so far as it is regarded as the basis of International Law, must be understood as implying the consent of States to abide by the general principles of law resulting from the fact that they are

[1] Most important of all law-making treaties is the Charter of the United Nations, which is discussed below, §§ 168-168*a*

[2] See vol II § 52*b*

[3] For instances of law making treaties see below, § 492

[4] See below, § 493 And see Finch in *Hague Recueil*, vol 53 (1935) (III), pp 588-604

[5] See below, vol II § 25*ae*

members of a legal community Thus the Statute of the International Court of Justice authorises it to apply, in addition to treaties and custom ' (3) The general principles of law recognised by civilised nations ' The meaning of that phrase has been the subject of much discussion [1] The intention is to authorise the Court to apply the general principles of municipal jurisprudence, in particular of private law,[2] in so far as they are applicable to relations of States The Court has seldom found occasion to apply ' general principles of law ' [3] This is so for the reason that as a rule conventional and customary International Law have been deemed sufficient to supply the necessary basis of decision But paragraph 3 of Article 38 nevertheless constitutes an important landmark in the history of International Law inasmuch as the States parties to the Statute did expressly recognise the existence of a third source of International Law independent of, although merely supplementary to, custom or treaty This was in fact the practice of international arbitration before the establishment of the Court [4], since its

[1] Vol II, p 62, n 1 And see Grapin, *Valeur internationale des principes généraux du droit* (1934), Korte, *Grundfragen der volkerrechtlichen Rechtsfahigkeit* (1934), pp 70-84, Bluhdorn, *op cit*, pp 142 157, Cegla, *Die Bedeutung der allgemeinen Rechtsgrundsatze*, etc (1936), Ziccardi, *La costituzione dell' ordinamento internazionale* (1943), pp 399 412, Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (1946), Gutteridge, *Comparative Law* (1946), Chapter v, Petraschek in *Archiv für Rechts- und Sozialphilosophie*, 28 (1935), pp 61 88, Heydte in *Z o R*, 11 (1931), pp 526-546, Verdross in *Hague Recueil*, vol 52 (1935) (II), pp 195-250, and in *R G*, 45 (1938), pp 44 52, Cosentini in *R I (Geneva)*, 13 (1935), pp 102-118, Kopelmanas in *R G*, 43 (1936), pp 285 308, and 45 (1938), pp 44 52, Giuliano in *Rivista*, 33 (1941), pp 69-121

[2] See Lauterpacht, *Analogies, passim*, Bluhdorn, *op cit*, pp 142-146, Laun, *Der Wandel der Ideen Staat und Volk* (1933), pp. 70 85, Knubben in *Z V*, 16 (1931-1932), pp 146 159, 300 313, Ripert in *Hague Recueil*, vol 44 (1933) (II), pp 569 660, Scheuner, *ibid*, 68 (1939) (II), pp 99 199 And see the literature cited above, n 1, as to ' general principles of law '

[3] See *Chorzów Factory* case, Series A, No 17, p 29 (reparation for breach of an engagement), *German Interests in Polish Upper Silesia*, Series A, No 6, p 20 (litispendency), *Interpretation of the Greco Turkish Agreement*, Series B, No 16 (action by individual members of corporate bodies), *Chorzów Factory* case Jurisdiction, Series A, No 9, p 31, *Jurisdiction of the Courts of Danzig*, Series B, No 15, p 27 (a person cannot plead his own wrong) And see Grapin, *op cit*, pp 49 168, Hudson, *The Permanent Court of International Justice*, 1920-1942 (1943), pp 610 612, Rousseau, pp 890-930, Guggenheim, pp 139-147

[4] For a survey of that practice see Lauterpacht, *Analogies*, pp 60 67, Verdross, *Die Einheit des rechtlichen Weltbildes* (1923), pp 120-124, and *Verfassung*, pp 57-59

establishment a number of international tribunals, although not bound by the Statute, have treated paragraph 3 of Article 38 as declaratory of existing law.[1] The formal incorporation of that practice in the Statute of the Court marks the explicit abandonment of the positivist view according to which treaties and custom are the only sources of International Law, with the result that in their absence international tribunals are powerless to render decisions It equally signifies the rejection of the naturalist attitude according to which the law of nature is the primary source of the Law of Nations It amounts to an acceptance of what has been called the Grotian view[2] which, while giving due—and, on the whole, decisive—weight to the will of States as the authors of International Law, does not divorce it from the legal experience and practice of mankind generally[3]

Decisions of Tribunals as a Source of International Law

§ 19a Decisions of courts and tribunals are a subsidiary and indirect source of International Law Article 38 of the Statute of the International Court of Justice provides that, subject to certain limitations,[4] the Court shall apply judicial decisions as a subsidiary means for the determination of rules of law In the absence of anything approaching the common law doctrine of judicial precedent, decisions of international tribunals are not a direct source of law in international adjudications In fact, however, they exercise considerable influence as an impartial and well-considered statement of the law by jurists of authority made in the light of actual problems which arise before them They are often relied upon in argument and decision The Permanent Court, while prevented from treating its previous decisions

[1] See *e g Administrative Decision No II* by Judge Parker, Mixed Claims Commission between the United States and Germany, November 1, 1923 *Annual Digest*, 1923-1924, Case No 205, *Goldenberg & Sons* v *Germany*, Special Arbitral Tribunal between Roumania and Germany, September 27, 1928 *Annual Digest*, 1927-1928, Case No 369, *Lena Goldfields Arbitration*, September 2, 1930 *Annual Digest*, 1929 1930, Case No 1

[2] The indirect result of that article must be the termination of the controversy between the positivist and the naturalist schools But there has been a tendency to minimise the significance of that article (see *e g* Strupp, *op cit*, Chapter II, § 9 See on the other hand, Verdross in *Gesellschaft, Staat und Recht Festschrift für Kelsen* (1931), p 362, who is inclined to regard Article 38 (3) as the basic hypothesis of International Law (see above, p 16, n 1)

[3] See below, §§ 55 57

[4] See Article 59 of the Statute.

as binding,[1] has referred to them with increasing frequency [2] It is probable that in view of the difficulties surrounding the codification of International Law, international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing International Law Decisions of municipal courts are not a source of law in the sense that they directly bind the State from whose courts they emanate But the cumulative effect of uniform decisions of the courts of the most important States is to afford evidence of international custom [3] Although courts are not organs of the State for expressing in a binding manner its views on foreign affairs, they are nevertheless organs of the State giving, as a rule,[4] impartial expression to what is believed to be International Law [5] For this reason, as well as for those

[1] See Article 59 of the Statute and, for a discussion thereof, below, vol II, § 25*ae*, pp 62, 63

[2] For a survey of the practice of the Court in this matter see Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp 5-7, and in *B Y*, 12 (1931), p 60, P C I J, Series E, No 3, pp 217, 218, No 4, pp 292, 293, No 6, p 300, *Annual Digest*, 1925 1926, Case No 329, *ibid*, 1927 1928, Case No 355, Beckett in *Hague Recueil*, vol 39 (1932) (I), p 138 On the authority in English courts of the decisions of the Permanent Court see Jenks in *B Y*, 20 (1939), pp 1 36

[3] See Lauterpacht in *B Y*, 10 (1929), pp 65 95, for a detailed discussion, Finch in *Hague Recueil*, vol 53 (1935) (III), pp 605 627 See also De Louter, I pp 56, 57, Fauchille, Nos 55 57, Westlake, *Collected Papers*, p 83, Rivier, I p 35, Brierly, p 52, Triepel, *Volkerrecht und Landesrecht* (1899), pp 28 32, 99 101, 127, Anzilotti, *La teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), pp 30 *et seq* On the interpretation of municipal law by the Permanent Court see Jenks in *B Y*, 19 (1938), pp 67-103

[4] Prize courts, acting as they do in time or under the influence of war, may not always be in a position to preserve an attitude of detached impartiality See the judgment of Lord Stowell in *The Maria*, 1 Ch Rob 350, for an affirmation of the universality and impartiality of the law administered by the British Prize Court As to the character of prize courts see below, vol II § 434 And see Walker, *The Science of International Law* (1893), p 49, for an expression of the hope that in the future 'municipal courts may become the trusted mouthpieces of International Law as local divisions of the great High Court of Nations' A possible line of development may lie either in conferring upon the International Court of Justice jurisdiction on appeal from judgments of municipal courts or in the establishment within the State of special tribunals competent to decide on questions of International Law

[5] Unlike in the case of treaties, it is not necessary for the creation of international custom that there should be on the part of the acting organs of the State an intention to incur mutually binding obligations, it is enough if the conduct in question is dictated by a sense of legal obligation in the sphere of International Law For the same reason uniform municipal legislation constitutes in a substantial sense evidence of international custom (see, to the same effect, Gianni, *La coutume en droit international* (1931), p 129) The same applies to other manifestations

stated with regard to international decisions, judgments of municipal tribunals are of considerable practical importance for determining what is the right rule of International Law This is now being increasingly recognised, and periodical unofficial collections of decisions of both international and municipal courts are being published [1]

Writings of Authors as a Source of Law

§ 19b The Statute of the International Court of Justice enumerates as a subsidiary source of International Law 'the teachings of the most highly qualified publicists of the various nations' [2] It is indicative of the present potentialities of that particular source that the Court has so far found no occasion to rely on it In pleadings before international tribunals the disputants still fortify their arguments by reference to writings of international jurists, but with the growth of international judicial activity and of the practice of States evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of International Law should tend to diminish [3] For it is as evidence of the law and not as a law-creating factor that the usefulness of teachings of

of the views of competent State organs on questions of International Law in so far as they partake of an undoubted degree of uniformity, *e g* governmental instructions, State papers, etc The difference between custom and evidence of custom is not in practice as clear cut as may appear at first sight

[1] See in particular *Annual Digest of Public International Law Cases* and *Fontes Juris Gentium* (see below, p 108, n 1) Verbatim reports or digests of the more important decisions of municipal and international tribunals in matters of International Law are included in the *Zeitschrift für ausländisches öffentliches Recht und Volkerrecht*, *Revue générale de droit international public*, and, to a smaller extent, in the *British Year Book of International Law*, *Journal de Droit International* (Clunet), *American Journal of International Law*, *Rivista di diritto internazionale*, *Zeitschrift für Volkerrecht*, and *Zeitschrift für Internationales Recht* See also Dickinson in *Hague Recueil*, vol 40 (1932) (II), pp 372 392, for a critical survey of the contribution of English and American courts, Pergler, *Judicial Interpretation of International Law in the United States* (1928), Hyde in *B Y*, 18 (1937), pp 1 16 And see Challine, *Le droit international public dans la jurisprudence française de* 1789 *a* 1848 (1934) As to the interpretation and application of treaties by English courts see McNair in *Hague Recueil*, vol 43 (1933) (I), pp 251 302 As to Germany see Bruns, *Fontes Juris Gentium*, Series A, No 2 (1), for digests of decisions of the German *Staatsgerichtshof* from 1879 to 1929 See also below, p 108, n 1

[2] For an example of direct reference to judicial writings as a source of law see Article 1 of the Swiss Civil Code which instructs the judge, when filling the gaps of the law, to follow, among others, recognised legal authorities

[3] For a comparison of the authority of writers on International Law in the early period with the *responsa* of the Roman jurists see Buckland and McNair, *Roman Law and Common Law* (1936), p 13

writers has been occasionally admitted in judicial pronouncements [1] But inasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinise critically the practice of States by reference to legal principle

International Comity.

§ 19c A factor of a special kind which also influences the growth of International Law is the so-called *Comity* (*Comitas Gentium, Convenance et Courtoisie Internationale, Staatengunst*) [2] In their intercourse with one another, States observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill Such rules of international conduct are not rules of law, but of Comity Thus, for instance, it is as the result of a rule of Comity and not of International Law that States grant to diplomatic envoys exemption from customs

[1] See *Queen* v *Keyn*, 2 Ex Div 63, 202, *West Rand Central Gold Mining Co* v *The King* [1905] 2 K B 391, 401, *The Paquete Habana and The Lola*, 175 U S Reports 677 (where Mr Justice Gray discussed the matter in some detail) And see further references in Dickinson, *Cases*, p 32 On the other hand, where owing to the scarcity of actual practice judges find it necessary to decide a matter by reference to principle and analogy, they do not hesitate to avail themselves of published work See *e g* the copious references to writers in *New Jersey* v *Delaware* (1934) 291 U S 361, and in *Re Piracy Jure Gentium* [1934] A C 586

[2] Meaning of the word *comity* this word is or has been used from time to time in connection with International Law in the following not easily reconcilable senses

(1) (as in the text and in Hall, p 15 (n)) the rules of politeness, convenience, and goodwill observed by States in their mutual intercourse without being legally bound by them It is probably in this connection that some English judges have expressed the view that it 'would be contrary to our obligations of international comity as now understood' to enforce in England a contract made abroad with a view to deriving profit from the commission of a criminal act in a foreign country and that a decision to enforce it would furnish a just cause of complaint on the part of the foreign government *Foster* v *Driscoll* [1929] 1 K B 470, and *Annual Digest*, 1927 1928, Case No 10 and Note, *Walkerville Brewing Co*, *Ltd* v *Maynard* (1928 1929), *Ontario Law Reports*, pp 5-12 and 573, *Westgate* v *Harris* (1929), *ibid*, p 358, *Harwood and Cooper* v *Wilkinson* (1929), *ibid*, p 392 And see on these cases Webber in *New York University Law Quarterly Review* 7 (1929-1930), pp 674 682, and Marjorie Owen in *Canadian Bar Review*, 8 (1930), pp 413 419,

(2) as equivalent to private International Law, *e g* Phillimore, IV § 1 But see the definition of Gray J in *Hilton* v *Guyot*, 159 U S 113, Hudon, *Cases*, p 987,

(3) to quote the *New English Dictionary* (Murray) 'Apparently misused for the company of nations mutually practising international comity (in some instances erroneous association with L *comes*, "companion," is to be suspected)',

(4) as equivalent to International Law see above in the text

duties [1] In the sphere of the law of war chivalry fulfils the same function The Comity of Nations is not a source of International Law But many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law The transition, although clear cut in logic, is not always observed in practice English and American courts often refer to 'international comity' in situations to which there ought to be more properly applied the term 'international law' [2] It is probable that many a present rule of International Comity will in future become one of International Law [3]

Not to be confused with the rules of comity are the rules of morality,[4] which ought to apply to the intercourse of States as much as to the intercourse of individuals

[1] See below, § 394

[2] See *e g* Brett L J in *The Parlement Belge*, L R 5 P D 197, 214, 217, who refers to the rules concerning the jurisdictional immunities of foreign ambassadors and sovereigns as being the consequence of 'international comity', *The Luigi* (D C) 230 Fed 495 In *Russian Socialist Federated Soviet Republic* v *Cibrario*, 235 N Y 255, 139 N E 259, the Court said 'Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others Rules of comity are a portion of the law that they [the courts] enforce'

[3] The matter is discussed in Stoerk, *Volkerrecht und Volkercourtoisie* (1908) See also Heilborn, *Grundbegriffe des Volkerrechts* (1912), pp 107 110, Praag, § 24, Dimitch, *La courtoisie internationale et le droit des gens* (1930), Walz, *Das Wesen des Volkerrechts und Kritik der Volkerrechtsleugner* (1930), pp 229-237, Jordan in *Répertoire*, v pp 324-330, Rousseau, pp 8 11, Lauterpacht in *Cambridge Law Journal*, 9 (1947), pp 330-332

[4] On international morality see Sidgwick, *Elements of Politics*, ch xvii, 'International Law and Morality,' and his two lectures on 'Public Morality' and the 'Morality of Strife,' reprinted in 1918 from *Practical Ethics*, Hobhouse, *Metaphysical Theory of the State* (1918), Galliard, *La morale des nations* (1920), Bosanquet, *The Philosophical Theory of the State* (4th ed) (1923), pp 298 311, Meinecke, *Die Idee der Staatsrason* (1924, 3rd ed 1929), McDougall, *Ethics and Some Modern World Problems* (1924), pp 1-170, Kraus, *Gedanken über Staatsethos im internationalen Verkehr* (1925), Roemer, *The Ethical Basis of International Law* (1929), Stratton, *Social Psychology of International Conduct* (1929), Walz, *Das Wesen des Volkerrechts und Kritik der Volkerrechtsleugner* (1930), pp 220 229, Dombrowski Ramsy, *La morale humaine et la Société des Nations* (1930), Hocking, *The Spirit of World Politics* (1932), pp 470 519, Laun, *Der Wandel der Ideen Staat und Volk* (1933), pp 327 344, Beard, *The Idea of National Interest* (1934), especially pp 358 406, Mowat, *Public or Private Morality* (1934), Folliet, *Morale internationale* (1935), Alvarez, *La psychologie des peuples et la reconstruction du droit international* (1936), Carr, *The Twenty Years' Crisis, 1919 1939* (1939), pp 186 215, Politis, *La morale internationale* (1942), Gooch, *Studies in Diplomacy and Statecraft* (1942), pp 311 340, Benoist in *Hague Recueil*, 1925 (iv), pp 131 303, Ponsonby in *International Journal of Ethics*, 25 (1915), pp 143 164, Woolf, *ibid*, 26 (1916), pp 11 22, Mayer in *Archiv des offentlichen Rechts*, xxviii Pt 1, pp 1 37, Bourgeois in *R G*, 29 (1922) pp 5 22, Higgins in *Contemporary*

IV

RELATION BETWEEN INTERNATIONAL AND MUNICIPAL LAW

Holtzendorff in *Holtzendorff*, I pp 49 53, 117 120—Heilborn, *Grundbegriffe des Volkerrechts* (1912), § 17—Guggenheim, pp 19-26—Strupp, *Éléments*, § 2, B—Anzilotti, pp 29 38—Cavaglieri, pp 18 26—Nys, I pp 194-199—Taylor, § 103—Hershey, § 10—Hyde, I § 5—Fenwick, ch v —Holland, *Studies*, pp 176 200—Praag, §§ 17 22, 276 281—Hold Ferneck, I pp 77-120—Scelle, I pp 27 42—Keith's Wheaton, pp 23 30—Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899)—Triepel, *Volkerrecht und Landesrecht* (1899) (translated by Brunet, *Droit international et droit interne* (1920)), and in *Hague Recueil*, 1923, pp 77 121—Anzilotti, *Il Diritto internazionale nei Giudizi interni* (1905) and pp 49 65—Oppenheim, *The Panama Canal Conflict* (1913), pp 38 44—Picciotto, *The Relation of International Law to the Law of England and the United States* (1915)—Wenzel, *Juristische Grundprobleme* (1920), pp 359 421, 444 459—Wright, *The Enforcement of International Law through Municipal Law in the United States* (1916), in *A J*, 11 (1917), pp 1 21, and 17 (1923), pp 234-244—Verdross, *Die volkerrechtliche Kriegshandlung und der Strafanspruch der Staaten* (1920), pp 34 43, and in *Hague Recueil*, vol 16 (1927) (I), pp 262 275, and vol 30 (1929) (v), pp 301 311—Kelsen, *Das Problem der Souveranitat und die Theorie des Volkerrechts* (1920), pp 102 241, *General Theory of Law and State* (1945), pp 363 380, in *Hague Recueil*, 1926 (IV), pp 231 326, in *Z o R*, 4 (1924), pp 207 222, and in *R G*, 43 (1936,) pp 5 49 — Kosters in *Bibliotheca Visseriana*, vol IV (1925), pp 261 273, and in *Bulletin de l'Institut Intermédiaire International* (I) (1923), pp 1 31—Walz, *Die Abanderung volkerrechtsgemassen Landesrechts* (1927), and the same, *Volkerrecht und staatliches Recht* (1933) (a comprehensive treatise)—Strisower in *Z o R*, 4 (1924), pp 272 298—Spiropoulos, *Théorie général du droit international* (1930), pp 71 83—Gentile in *Nuovi Studi de Diritto*, vol II (1929), pp 326 352—Monaco, *L'ordinamento internazionale in rapporti all' ordinamento statuale* (1932)—Masters, *International Law in National Courts* (1932) (a useful study) — Grassetti, *Diritto interno e diritto internazionale nell' ordinamento giuridico anglo americano* (1934)—Chailley, *Le problème de la nature juridique des traités internationaux* (1932), pp 283-327—Laun, *Der Wandel der Ideen Staat und Volk* (1933), pp 3 62—Kohler in *Z V*, 2 (1908), pp 209 230 — Wilkinson in *Law Magazine and Review*, 40 (1914-1915), pp 447-463—Potter in *A J*, 19 (1925), pp 315 326—Baumgarten in *Z o V*, 2 (1) (1930), pp 305 334—Mirkine Guetzévitch in *Hague Recueil*, vol 38 (1931) (IV), pp 311 325—Blondeau in *R I (Paris)*, 9 (1932), pp 579 616—Dickinson in *A J*, 26 (1932), pp 239 260, and in *Hague Recueil*, 40 (1932) (II), pp 328-349—Sprout in *A J*, 26 (1932),

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Review, No 711 (1925), pp 314 322, Scott in *A S. Proceedings*, 1932, pp 10-29, Siotto Pintor in *Rivista internazionale di filosofia del diritto*, 15 (1935), No 6, pp 639 648, Réglade in *Archives de philosophie de droit*, 1936, pp 176-197, Ginsberg in *Papers of the Aristotelian Society*, 1942 See also Ornstein, *Macht, Moral und Recht* (1946) and Keeton and Schwar

pp 280 295—Redslob in *Théorie du droit* (VII) (1932 1933), pp 151 171—Salvioli in *Hague Recueil*, vol 46 (1933) (IV), pp 30 37—Decencière-Ferrandière in *R G*, 40 (1933), pp 45-70—Svoboda in *Z o R*, 14 (1934), pp 487 531—Strupp in *Hague Recueil*, vol 47 (1934) (I), pp 389 418—Kaufmann, *ibid*, vol 54 (1935) (IV), pp 436 461—Guggenheim in *Théorie du droit*, IX (1935), pp 90 100—Balladore Pallieri in *Rivista*, 27 (1935), pp 24 82—Chiron, *ibid*, 30 (1938), pp 3 55—Lauterpacht in *Grotius Society*, 25 (1939), pp 51 88, and in *Hague Recueil*, vol 62 (1937) (IV), pp 129 148—Tenékidès in *Friedenswarte*, 41 (1941), pp 1 23—Holdsworth in *Minnesota Law Review*, 26 (1942), pp 141 152—McNair in *Grotius Society*, 30 (1944), pp 11-21 And see the authors cited below, § 519

International and Municipal Law

The Dualist View

§ 20 According to what may be called the dualistic view,[1] the Law of Nations and the Municipal Law of the several States are essentially different from each other They differ, first, as regards their sources The sources of Municipal Law are custom grown up within the boundaries of the State concerned and statutes enacted by the law-giving authority The sources of International Law are custom grown up within the Family of Nations and law-making treaties concluded by the members of that family

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate Municipal Law regulates relations between the individuals under the sway of a State and the relations between this State and those individuals International Law, on the other hand, regulates relations between the member-States of the Family of Nations

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law whereas Municipal Law is a law of a sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between, sovereign States, and is therefore a weaker law

If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law Just as Municipal Law lacks the power of altering or creating rules of Inter-

zenberger, *Making International Law Work* (2nd ed , 1946), pp 49 69

[1] This view was shared emphatically by the author of this treatise and his exposition of it in § 20 has been left unchanged The formulation of that doctrine will be found in the works of Triepel, cited at p 34 See also Hold-Ferneck, Strupp, Anzilotti (in a somewhat modified form), and Walz, cited on the same page For a suggestion of a 'third intermediary law' lying half way between International and Municipal Law see Scrimali in *R I*, 3rd ser, vol 20 (1939), pp 339-410

national Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered to be the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption become at the same time rules of Municipal Law Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, *per se*, no power over municipal courts And if it happens that a rule of Municipal Law is in indubitable conflict with a rule of the Law of Nations, municipal courts must apply the former

The Monistic Doctrine

§ 21 The above dualistic view is opposed by what may conveniently be called the monistic doctrine [1] The latter rejects all three premises of the dualists It denies, in the first instance, that the subjects of the two systems of law are essentially different and maintains that in both it is ultimately the conduct of the individuals which is regulated by law, the only difference being that in the international sphere the consequences of such conduct are attributed to the State Secondly, it asserts that in both spheres law is essentially a command binding upon the subjects of the law independently of their will Thirdly, it maintains that International Law and Municipal Law, far from being essentially different, must be regarded as manifestations of a single conception of law This is so not only for the terminological reason that it would be improper to give the same designation of law to two fundamentally different sets of rules governing the same conduct The main reason for the essential identity of the two spheres of law is, it is maintained, that some of the fundamental notions of International Law cannot be comprehended without the assumption of a superior legal order from which the various systems of Municipal Law are, in a sense, derived by way of delegation It is International Law which determines the jurisdictional

[1] See *e g* the writings of Kelsen, Verdross, Scelle, Bourquin, Wright, Kunz, Mirkine Guetzévitch, and Rundstein referred to above at p 34

limits of the personal and territorial competence of States Similarly, it is only by reference to a higher legal rule in relation to which they are all equal, that the equality and independence of a number of sovereign States can be conceived Failing that superior legal order, the science of law would be confronted with the spectacle of some sixty sovereign States each claiming to be the absolutely highest and underived authority [1] It is admitted that municipal courts may be bound by the law of their States to enforce statutes which are contrary to International Law. But this, it may be said, merely shows that, in view of the weakness of International Law and organisation, States admit and tolerate what is actually a conflict of duties within the same legal system—a phenomenon not altogether unknown in other spheres of Municipal Law [2] In any case, from the point of view of International Law, the validity of a pronouncement of a municipal court is in such cases purely provisional It still leaves intact the international responsibility of the State It is a well recognised rule that a State is internationally responsible for the decisions of its courts, even if given in conformity with the law of the State concerned, whenever that law happens to be contrary to International Law [3]

Law of Nations as part of Municipal Law

§ 21a In view of this wide divergence of doctrine it is necessary to inquire into the actual legal position in the principal countries in the matter of International Law and Municipal Law

(1) As regards Great Britain, the following points must be noted (a) all such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are *per se* part of the law of the land To that extent there is still valid in England the common law doctrine, to which Blackstone gave expres-

[1] This seems also to be the principal objection to the theory which, while being monistic, asserts the supremacy not of International Law but of Municipal Law See *e g* Zorn, *Grundzüge des Volkerrechts* (1903), pp 7, 151, Wenzel, *Juristische Grundbegriffe* (1920), p 387, De-cencière Ferrandière in *R G*, 40 (1933), pp 45 70, and, for trenchant criticism, Kelsen, *Souveranitat*, pp 151 204 See also Rousseau, pp 55 68

[2] See Jones in *B Y*, 16 (1935), p 14

[3] See below, p 42 And see Hyde, I §§ 5, 5A

sion in a striking passage,[1] that the Law of Nations is part of the law of the land It has been repeatedly acted upon by courts [2] Apart from isolated *obiter dicta* [3] it has never been denied by judges The unshaken continuity of its observance suffered a reverse as the result of the dicta of some judges in *The Franconia* case in 1876,[4] but *West Rand Central Gold Mining Co* v *The King*,[5] decided in 1905, must be regarded as a reaffirmation of the classical doctrine

(*b*) Such treaties as affect private rights and, generally, as require for their enforcement a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament [6] To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the legislature That departure from the traditional common law rule is largely due to the fact that, according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown which would otherwise be in a position to legislate for the subject without obtaining parliamentary assent [7]

[1] *Commentaries on the Laws of England*, iv chap 5, Westlake, *Collected Papers*, pp 498 518 But see Picciotto, *op cit*, and Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp 238 243

[2] See *e g Triquet and Others* v *Bath*, 3 Burr 1478, *Heathfield* v *Chilton*, 4 Burr 2015, 2016, *Viveash* v *Becker*, 3 M & S 284, 292, 298, *De Wütz* v *Hendricks*, 2 Bing 314, 315, *Emperor of Austria* v *Day*, 2 Giff 628, 678 (a striking application of the doctrine), and many other cases enumerated in Dickinson, *Cases*, pp 56, 57, and Lauterpacht in *Grotius Society*, 25 (1939), pp 52 67, 77 84 See also Lord Finlay's emphatic affirmation of that view in the *Lotus* case, P C I J, Series A, No 10, p 54, and Judge Moore's reference, *ibid*, p 75, to 'the majestic stream of the common law, united with international law'

[3] See *e g Mortensen* v *Peters* (1906), 14 S L R 227, 43 S L R 872 (a Scottish case), *per* Atkin L J in *Commercial and Estates Co of Egypt* v *Board of Trade*, L R [1925] 1 K B. 271, at p 295, *per* Lord Atkin in *Chung Chi Cheung* v *The King* [1939] A C 160, 168, *per* Lord Macmillan in *The Cristina* [1938] A C 485, 497 In the last three cases International Law was in fact relied upon to a substantial degree

[4] *R* v *Keyn* (1876), 2 Ex D 63 For comment on this aspect of that case see Lauterpacht, *Analogies*, p 76 (n)

[5] [1905] 2 K B 391

[6] See Westlake, *op cit*, and in particular McNair in *B Y*, 9 (1928), pp 59 68 And see *The Parlement Belge* [1880] 5 P D 197, *Walker* v *Baird* [1892] A C 491 See also *Porter* v *Freudenberg* [1915] 1 K B 857 There are cases in which courts have applied the rule that, in the absence of an enabling Act of Parliament, no effect can be given to treaties affecting private rights See *Re Arrow River Tributaries Slide & Boom Co, Ltd* [1932] 2 D L R 250 *Annual Digest*, 1931, 1932, Case No 2, *Administrator of German Property* v *Knoop* [1933] Ch 439

[7] For an interesting example of the

(c) English statutory law is absolutely binding upon English courts, even if in conflict with International Law, although in doubtful cases there is a presumption that an Act of Parliament did not intend to overrule International Law [1] The fact that International Law is part of the law of the land and is binding directly on courts and individuals does not mean that English law recognises in all circumstances the supremacy of International Law [2]

(2) In the United States the principle that International Law is part of the law of the land has been adopted even more clearly [3] Such customary International Law as is

treaty making power being effectively used for (legislative) action which might otherwise be impossible under the Constitution see the American case of *State of Missouri* v *Holland, United States Game Warden* (1920) 252 U S 416, Dickinson, *Cases*, p 1037, *Annual Digest*, 1919-1922, Case No 1 (with further references) And see Black in *Illinois Law Review*, 25 (1930, 1931), pp 911 928, for a criticism of the decision See also, to a similar effect, *R* v *Burgess, ex L Henry*, decided in 1936 by the High Court of Australia (1936), 55 C L R, *Annual Digest*, 1935-1937, Case No 19 With these judgments may be contrasted the important decision of the Judicial Committee of the Privy Council in *Attorney-General for Canada* v *Attorney-General for Ontario* [1937] A C 326, *Annual Digest*, 1935-1937, Case No 17 For comment hereon see a symposium in *Canadian Bar Review*, 15 (1937), pp 393-507, see, in particular, the articles by Mackenzie, pp 436 454, Jennings, pp 455-463, and Jenks, pp 464 477 See also Stewart in *A J*, 32 (1938), pp 36-62 The effect of the decision was to deny the legislative competence of the Dominion Parliament to give effect to certain International Labour Conventions assented to and ratified by the Dominion legislature

[1] See below, § 23 In particular, the rules of International Law are binding upon British prize courts unless they be in conflict with an Act of Parliament Orders in Council which are not in conformity with International Law are not binding upon British prize courts unless they amount to a mitigation of the rights of the Crown in favour of the enemy or a neutral, or unless they order reprisals which are justified by the circumstances of the case and do not entail upon neutrals an unreasonable degree of inconvenience See below, vol II § 434, for further details

[2] It is of importance not to confuse, as many do, the question of the supremacy of International Law and of the direct operation of its rules within the municipal sphere It is possible to deny the former while fully affirming the latter

[3] See Picciotto, *op cit*, pp 109-124, Holdsworth, *A History of English Law*, vol x (1938) p 373, Wright, *op cit*, and in *A J*, 11 (1917, pp 1 21, Oppenheim, *The Panama Conflict* (1913), pp 40 42, Scott in *A J*, 1 (1907), pp 852 866, Potter, *ibid*, 19 (1925), pp 315-326, Sprout, *ibid*, 26 (1932), pp 280 295, Dickinson, *ibid*, pp 239 260, and in *Hague Recueil*, vol 40 (1932) (II), pp 328 349, who—rightly, it is believed—arrives at the conclusion that the doctrine is not only fully valid, but that it has had an influence which is far-reaching and beneficent And see Dickinson, *Cases*, p 57, for an enumeration of the relevant cases Of these the following may be mentioned *The Nereide* (1815) 9 Cranch 388, *United States* v *Smith* (1820) 5 Wheaton 153, *The Scotia* (1871) 14 Wallace 170, *The Paquete Habana* (1899) 175 U S 677, *Respublica* v *De Longchamps*, 1 Dall 111 It seems to follow that the residuary power of a final and authoritative interpretation of Inter

universally recognised or has at any rate received the assent of the United States, and further all international conventions ratified by the United States, are binding upon American courts, even if in conflict with previous American statutory law, for according to the practice of the United States customary as well as conventional International Law overrule previous Municipal Law, provided, apparently, that they do not conflict with the Constitution of the United States On the other hand, American statutory law is binding upon the courts of the United States even if in conflict with previous customary or conventional International Law, for a statute passed by Congress overrules previous International Law, although in doubtful cases there is a presumption that Congress did not intend to overrule International Law [1]

(3) Contrary to a widespread view, the incorporation of customary International Law as part of the law of the land, although it was first formulated in Anglo-American countries, is not confined to England and the United States For the position has for a long time been essentially the same in France, Belgium, Switzerland, and, for a time, Germany [2]

national Law is within the jurisdiction of the supreme legislative and judicial organs of the Union as distinguished from those of the States See Jessup in *A J*, 33 (1939), pp 740 743 It is in the application of that principle that lies to some extent the explanation of the occasional refusal of the courts of the United States to exercise jurisdiction following upon seizure or arrest contrary to International Law See *The Mazel Tov*, reported as *Cook* v *The United States* (1933) 288 U S 102 And see, for comment thereon, Dickinson in *A J*, 27 (1933), pp 305 310, and *ibid*, 28 (1934), pp 231 245 As to the position in the American Republics see Moore and Wilson in *A S Proceedings*, 1916, pp 11 30

[1] *In re Dillon*, see Wharton, 1 p 667, Moore, v p 78 See also *Santovincenzo* v *Egan* (1931) 284 U S 30 As to the effects of the President's proclamation of a treaty see Reiff in *A J*, 30 (1936), pp 63 79 For a clear affirmation of the principle that a subsequent treaty supersedes a prior conflicting statute and that a treaty will not be deemed to have been abrogated or modified by a later statute unless the legislature clearly expressed itself to that effect see *Cook* v *The United States* (1933) 288 U S 102, *A J*, 27 (1933), pp 559 569 See also, to the same effect, *Minerva Automobiles Inc* v *United States*, decided in 1938 by the United States Court of Customs and Patent Appeals *Annual Digest*, 1938 1940, Case No 196 On the problems raised, in the United States, by a conflict between a treaty and the provisions of the Constitution see Cowles, *Treaties and Constitutional Law Property Interferences and Due Process of Law* (1941) In *Steenworden* v *Société des auteurs* the Swiss Federal Court seems to have held that it would be bound by a subsequent statute inconsistent with a treaty *Annual Digest*, 1935 1937, Case No 4

[2] See Ruth Masters, *International Law in National Courts* (1932) This was the position in Germany even before the adoption of Article 4 of the

(4) Since the First World War a number of countries have expressly adopted in their constitutions the Anglo-American doctrine of International Law being part of the law of the land [1]

It follows from the foregoing survey of the practice of various States that, unless we abandon ourselves to pure dialectics,[2] it is impossible to accept the view that rules of International Law cannot, without express municipal adoption, operate as part of Municipal Law. The doctrine that International Law is part of the law of the land is a rule of positive law For that reason alone, it ought not to be lightly abandoned From a more general point of view it must be regarded as a beneficent doctrine inasmuch as it brings into prominence the fact that the obligations of

Constitution of 1919 (see below, n 1) Thus in the case *Hellfeld* v *Russland*, decided in 1910, a high German tribunal rejected the view that International Law is applicable only in so far as it has been adopted by German customary law The decision is printed in *A J*, 5 (1911), p 514

[1] See, in particular, Article 4 of the German Constitution of 1919 which provided as follows 'The universally recognised rules of International Law are valid as binding constituent parts of German Federal Law' See Wenzel, *op cit*, Walz, *op cit*, Stier Somlo, *Die Verfassung des deutschen Reichs* (1920), pp 95 *et seq* In the *Reparations Levy (Aliens in Germany)* case the German Reichsgericht held in August 1928 that, notwithstanding Article 4 of the Constitution, it was bound to act on the principle *lex posterior derogat priori* and to apply a statute which was contrary to the provisions of the Treaty of Versailles *Annual Digest*, 1927-1928, Case No 225 During the National Socialist régime there was a tendency to give a restricted interpretation to that Article in the sense of making it apply to such rules only as have received the specific consent of Germany see *e g* Walz in *Z V*, 18 (1934), pp 150, 151 See also Mohr, *Die Transformation des Volkerrechts ins deutsche Reichsrecht* (1934), and Schule in *Z ö V*, 6 (1936), pp 269 285 See also, to the same effect, Article 8 of the Austrian Constitution of 1934 re-enacting Article 9 of the Constitution of 1920 (as to the latter see Kelsen, *Die Verfassungsgesetze der Republik Osterreich*, Part 5 (1920), pp 75 *et seq*, Verdross, *Die Einheit des rechtlichen Weltbildes* (1923), pp 111 118, Wittmayer in *Z V*, 13 (1926), pp 1 5, Métall, *ibid*, 14 (1927), pp 161 187), Steiner in *A J*, 29 (1935), pp 125 129) As to Article 9 of the Spanish Constitution of 1931 see Strupp in *Friedenswarte*, xxxii (1932) pp 264, 265, Perassi in *Rivista*, 24 (1932), pp 453-456, Morelli, *ibid*, 25 (1933), pp 3 23, Mirkine Guetzevitch in *Théorie du droit*, vii (1932 1933), pp 115 132, Lacambra in *R I (Paris)*, 15 (1935), pp 72 89

[2] Thus it may be pointed out that it is only by virtue of the general reception *en bloc* of International Law by Municipal Law that the former affects *per se* municipal courts and individuals See *e g* Triepel, *Volkerrecht und Landesrecht* (1899), p 134, Strupp in *Hague Recueil*, vol 47 (1934) (1), pp 409 412 Whatever may be the [illegible] cal value of that argument, it does not deny the fact of the direct operation of the whole body of customary International Law, unless expressly modified, upon the law of the land On the analogy of States and individuals see Scott in *A S Proceedings*, 1930, pp 15 33, and *ibid*, 1932, pp 10 29 See also Dickinson in *Yale Law Journal*, vol 26, p 564, Lauterpacht, *Analogies*, pp 303 306

International Law are, in the last resort, addressed to individual human beings To that extent it serves as yet another explanation of the reason why the general principles of law and morality must also lie at the basis of rules of International Law

Certain Rules of Municipal Law necessitated or interdicted

§ 22 In order to fulfil their international obligations, States are under a duty to possess certain rules, and are prevented from having certain other rules, as part of their Municipal Law Thus, for instance, on the one hand, the Municipal Law of every State is compelled to possess rules granting the necessary privileges to foreign diplomatic envoys, protecting the life and liberty of foreign citizens residing on its territory, threatening punishment for certain acts committed on its territory in violation of a foreign State On the other hand, the Municipal Law of every State is prevented by the Law of Nations from having rules, for instance, conflicting with the freedom of the high seas, or prohibiting the innocent passage of foreign merchantmen through its maritime belt, or refusing justice to foreign residents with regard to injuries committed on its territory to their lives, liberty, and property by its own citizens If a State does nevertheless possess such rules of Municipal Law as it is prohibited from having by the Law of Nations, or if it does not possess such municipal rules as it is compelled to have by the Law of Nations, it violates an international legal duty, but its courts [1] cannot by themselves alter the Municipal Law to meet the requirements of the Law of Nations

Presumption against Conflicts between International and Municipal Law

§ 23 Even those who are inclined to adopt the so-called dualistic point of view admit a number of presumptions enabling and obliging municipal courts to apply rules of International Law which have not been expressly incorporated in the Municipal Law of the State These presumptions will now be considered (1) Although municipal courts must apply Municipal Law even if it conflicts with the Law of

[1] This became quite apparent in the Moray Firth case (*Mortensen* v *Peters*)—see below, § 192—in which the court had to apply English Municipal Law See also *Croft* v. *Dunphy* (1933) 1 *D L R* 225, [1933] A C 156, where the same view was expressed, *obiter*, with regard to the right of Canada to legislate outside Canadian territorial waters

Nations, there is a presumption against the existence of such a conflict As the Law of Nations is based upon the common consent of the different States, it is improbable that a civilised State would intentionally enact a rule conflicting with the Law of Nations A rule of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as to avoid such conflict.

Presumption of the Existence of certain necessary Municipal Rules

§ 24 (2) In case of a gap in the statutes [1] of a civilised State regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the courts to have been tacitly adopted by such Municipal Law It may be taken for granted that a State does not intentionally want its Municipal Law to be deficient in such rules If, for instance, the Municipal Law of a State does not by a statute [2] grant the necessary privileges to diplomatic envoys, the courts ought to presume that such privileges are tacitly granted

Presumption of the Existence of certain Municipal Rules in conformity with the Law of Nations

§ 25 (3) There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws expressly renounce the whole or partial use of such rights, provided always that it is ready to fulfil such duties, if any, as are connected with those rights However, when no such renunciation has taken place, municipal courts ought, if the interests of justice demand it, to presume that their State has tacitly consented

[1] It is hardly necessary to add that a State when charged with an international delinquency cannot validly plead as a defence that its Municipal Law is defective or contains rules in conflict with International Law, see, for instance, the *Alabama* award, Lapradelle et Politis, II (1924), at p 891, Advisory Opinion of the Permanent Court concerning the treatment of Polish nationals in the Danzig Territory P C I J, Series A/B, No 44, pp 23 25 For an affirmation of the superiority (apparently in the international sphere) of International Law over conflicting constitutional provisions see the decision of the French Mexican Claims Commission in the *Georges Pinson* case of October 19, 1928 *Annual Digest*, 1927-1928, Case No 4 See also the Advisory Opinion of the Permanent Court of International Justice of February 4, 1932, in the matter of the Treatment of Polish Nationals in Danzig pointing out that a State cannot adduce against another State its own constitution in order to evade obligations incumbent upon it under International Law Series A/B, No 44 On the relations of International and Constitutional Law see Mirkine Guetzévitch, *Droit constitutionnel international* (1933), pp 13-94 Useful collections of modern constitutions will be found in Delpech and Laferrière, *Les constitutions modernes*, 6 vols (1928-1934), Mirkine Guetzévitch, *Les constitutions de l'Europe nouvelle* (1930), and the same, *Les constitutions des nations américaines* (1932) See also *Constitutional Provisions Concerning Social and Economic Policy* (International Labour Office, 1944)

[2] Or by common or customary law

to make use of such rights If, for instance, the Municipal Law of a State does not by a statute extend its jurisdiction over its maritime belt, its courts ought to presume that, since by the Law of Nations the jurisdiction of a State does extend over its maritime belt, their sovereign has tacitly consented to that wider range of its jurisdiction

A remarkable case bearing on this question occurred in England in 1876 The German vessel *Franconia*, while passing through the British maritime belt within three miles of Dover, negligently ran into the British vessel *Strathclyde*, and sank her As a passenger on board the latter was thereby drowned, the commander of the *Franconia*, the German Keyn, was indicted at the Central Criminal Court and found guilty of manslaughter The Court for Crown Cases Reserved, however, to which the Central Criminal Court referred the question of jurisdiction, held by a majority of one judge that, according to the law of the land, English courts had no jurisdiction over crimes committed by foreigners in the British maritime belt Keyn's conviction, therefore, could not be sustained [1] To provide for future cases of a like kind, Parliament passed, in 1878, the Territorial Waters Jurisdiction Act

V

DOMINION OF THE LAW OF NATIONS

Lawrence, § 44—Phillimore, 1 §§ 27 33—Twiss, 1 § 62—Taylor, §§ 60 64—Westlake, 1 p 40—Bluntschli, §§ 1-16—Heffter, § 7—Holtzendorff in *Holtzendorff*, 1 pp 13 18—Nys, 1 pp 121 137—Rivier, 1 § 1—Fauchille, §§ 40 44 (15)—Despagnet, §§ 51-53—Martens, 1 § 41—Fiore, *Code*, §§ 43 48—Ullmann, § 10—Praag, §§ 4, 5—De Louter, 1 pp 34 41—Cruchaga, §§ 84 93—Holland, *Lectures*, pp 37 46—Schwarzenberger, pp 29 33—Smith, 1 pp 14 36—Verdross in *Strupp, Wort*, III pp 181 183—Heilborn, *Grundbegriffe des Volkerrechts* (1912), §§ 10 12—Decleva, *Concetti di 'Civiltà' e di 'Nazioni Civili' nel diritto internazionale* (1937)

[1] *R* v *Keyn* (1876), 2 Ex D 63 See Phillimore, 1 § 198*b*, Maine pp 39 45, Stephen, *History of the Criminal Law of England* (1883), II pp 29-42, Lauterpacht in *Grotius Society*, 25 (1939), pp 60 62 See also below, § 189, where the controversy is discussed whether a littoral State has jurisdiction over foreign vessels that merely pass through its maritime belt It will be noted that the decision of the majority was due not so much to their doubts with regard to the propriety of exercising jurisdiction without authority of Parliament as to the uncertain position in International Law in the matter of a State's jurisdiction in its territorial waters see the judgment of Cockburn C J, pp 192, 193

—Nippold in *Z V*, 2 (1908), pp 441 443—Cavaglieri in *R G*, 18 (1911), pp 259-292—Wright in *A J*, 20 (1926), pp 265-268—Kunz in *Z o R*, 7 (1927), pp 86 99, and the same, *Staatenverbindungen* (1929), pp 258 273 —Kelsen in *Hague Recueil*, vol 42 (1932) (4), pp 178 181—Basdevant, *ibid*, vol 58 (1936) (iv), pp 484 496—Lauterpacht, *ibid*, vol 62 (1937) (iv), pp 188 206

Range of Dominion of International Law controversial

§§ 26 and 27 The modern Law of Nations is a product of Christian civilisation [1] It originally arose between the States of Christendom only, and for hundreds of years was confined to these States Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries And no constant intercourse existed in former times between Christian and Buddhistic States But from about the beginning of the nineteenth century matters gradually changed Many interests, which knit Christian States together, knit likewise some non-Christian and Christian States Positive International Law no longer recognises any distinctions in the membership of the community of nations based on religious or cultural differences

Present Range of Dominion of the Law of Nations

§ 28 The present range of the dominion of International Law is a product of historical development, in which epochs are distinguishable, marked by successive entrances of various States into the Family of Nations

(1) The old Christian States of Western Europe are the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties Whenever afterwards a new Christian State made its appearance in Europe, it was received into the existing society by the old members of the Family of Nations It is for this reason that this law was in former times frequently called 'European Law of Nations' But this name has nowadays historical value only, as it has been changed into 'Law of Nations,' or 'International Law' pure and simple.

(2) The next group of States which entered into the Family of Nations was the body of Christian States which grew up outside Europe All the American States which

[1] See Eppstein, *The Catholic Tradition of the Law of Nations* (1935) See also Wright, *Medieval Internationalism* (1930), and Bentwich, *The Religious Foundations of Internationalism* (1933), pp 83-158 For an exposition of International Law from the catholic point of view see Pasquazi, *Jus internationale publicum*, 1 (1935)

arose out of colonies of European States belong to this group. Of these States the United States of America have contributed largely to the growth of the rules of International Law.[1] The two Christian Negro Republics of Liberia in West Africa and Haiti on the island of San Domingo belong to this group

(3) With the reception of Turkey into the Family of Nations in 1856 International Law ceased to be a law between Christian States only This reception took place expressly through Article 7 of the Peace Treaty of Paris of 1856.[2] From that time until the outbreak of the First World War Turkey was invited to send delegates to every general congress which took place But her position as a member of the Family of Nations was anomalous, because her civilisation was deemed to fall short of that of the Western States It was for that reason that the so-called Capitulations remained in force until 1923 [3]

(4) Another non-Christian member of the Family of Nations is Japan

(5) Before the First World War the position of such States as Persia, Siam, China,[4] Abyssinia, and the like, was to some extent doubtful [5] Their civilisation had not yet

[1] See Westengard in *J C L*, 18 (1918), pp 2-14 This is particularly true in regard to the law of neutrality

[2] In which the five Great European Powers of the time, namely, France, Austria, Great Britain, Prussia, and Russia, and besides those Sardinia, the nucleus of the future Great Power Italy, expressly 'declarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens' But see Smith, 1 pp 16-18, who points out that even prior to 1856 rules of International Law were held to be applicable to Turkey That view is supported by McKinnon Wood—*A J*, 37 (1943), pp 262 274—who regards Article 7 as 'an act of admission to what to day might be called a regional understanding' (at p 274) And see on the Islamic contribution to International Law Armanazi, *Les principes islamiques et les rapports internationaux en temps de paix et de guerre* (1929), Bentwich, *The Religious Foundations of Internationalism* (1933), pp 159 180, Khadduri, *The Law of War and Peace in Islam* (1941), Rechid in *Hague Recueil*, vol 60 (1937) (II), pp 375 502

[3] In September 1914, shortly before she became a belligerent, Turkey denounced the Capitulations (see *A J*, 8 (1914), p 873) 'The complete abolition of the Capitulations in Turkey in every respect' was assented to by the other parties to the Treaty of Lausanne, 1923, Article 28, see below, § 318

[4] See Escarra, *La Chine et le droit international* (1931)

[5] A State of quite a unique character, the former Congo Free State (see below, § 101), was, after the Berlin Conference of 1884 1885, a member of the Family of Nations But it lost its membership in 1908, when it merged in Belgium by cession

reached that condition which was necessary to enable their Governments and their population in every respect to understand, and to carry out, the rules of International Law On the other hand, international intercourse had widely arisen between these States and the States of the so-called Western civilisation Many treaties had been concluded with them, and there was full diplomatic intercourse between them and the Western States China, Persia, and Siam had even taken part in the Hague Peace Conferences Since the Second World War China has acquired the status of a Great Power

(6) After the First World War the Capitulations and some other restrictions upon the territorial sovereignty of most of these States were abolished [1] These and other non-Christian States were admitted to membership of the League of Nations [2] In addition to these States, other non-Christian States, such as Egypt, Iraq, Saudi Arabia, Lebanon, and Syria, participated in the San Francisco Conference of 1945 and are among the original members of the United Nations Religion and the controversial test of degree of civilisation have ceased to be, as such, a condition of recognition of Statehood In general, the question of the membership of the 'Family of Nations,' as distinguished from the position of a State as a subject of International Law, is now a matter of purely historical interest

Treatment of States outside the Family of Nations

§ 29 The Law of Nations, as a law between States based on the common consent of the members of the Family of Nations, naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle That this intercourse and treatment ought to be regulated by the principles of Christian morality

[1] See below, § 318

[2] As to the position of non-Christian States and peoples at different stages in the development of International Law see Westlake, 1 p 40, Phillimore, 1 §§ 27-33, Bluntschli, §§ 1-16, Heffter, § 7, Gareis, § 10, Rivier, 1 pp 13 18, Fauchille, §§ 40 44 (1), Martens, § 41, Nys, 1 pp 126 137, Westlake, *Papers*, pp 141 143, Lindley, pp 10 47, and *passim*, Smith, 1 pp 14 33, Plantet, *Les Consuls de France a Alger avant la Conquête* (1579 1830) (1930), Irwin, *The Diplomatic Relations of the United States with the Barbary Powers*, 1776 1816 (1931), Scott, *The Spanish Origin of International Law Francisco de Vitoria and his Law of Nations* (1934).

is obvious [1] The United States of America apply, as far as possible, the rules of International Law to their relations with the Red Indians [2]

Universal and Regional International Law

§ 29a International Law is based on the assumption that there exists an international community embracing all independent States and constituting a legally organised society From this assumption there necessarily follows the acknowledgment of a body of rules of a fundamental character universally binding upon all the members of that society In view of the wide geographic, economic, and cultural differences obtaining between States, the scope of rules capable of universal application must necessarily be more limited than in the relations of individuals within the State [3] These diversities between States may render necessary developments and adjustments on the basis of a regional community of interests, but such particular International Law between two or more States presupposes the existence and must be interpreted in the light of principles of International Law binding on all States

The existence of universal rules of International Law has, on the one side, been denied by some of the adherents to the rigid positivist doctrine who see in the express will of States the only source of obligation in the sphere of International Law [4] It has, on the other side, been obscured by the

[1] As to the application of the laws of war to non civilised States and savage tribes see Wright in *A J*, 20 (1926), pp 265 268, and Colby, *ibid*, 21 (1927), pp 279 288

[2] See Rice in *J C L*, 3rd ser, 16 (1934), pp 78 95 For a discussion of the rights of aboriginal tribes in lands inhabited by them see *In re Southern Rhodesia* [1919] A C 211 See also generally Snow, *The Question of Aborigines in the Law and Practice of Nations* (1921), Octavio, *Les sauvages Américains devant le droit* in *Hague Recueil*, vol 31 (1920) (i), pp 181 289, Scott, cited above, p 47, n 2, and the Award of the American British Claims Arbitration Tribunal in the case of the *Cayuga Indians*, *A J*, 20 (1926), pp 574 594 See also *Totus* v *United States* *Annual Digest*, 1941 1942, Case No 1, *Ex parte Green*, *ibid*, Case No 128

[3] This is so largely for the reason that the operation of the law must be limited to matters capable of uniform regulation See, for a somewhat different explanation, Brierly in *Nordisk T A*, 7 (1936), *Acta Scandinavica*, p 9 See also Schindler in *Hague Recueil*, vol 46 (1933) (iv), p 265

[4] See *e g* Bluhdorn, *Einführung in das angewandte Volkerrecht* (1934), pp 95, 96, Anzilotti, p 89, Strupp in *Hague Recueil*, vol 47 (1934) (i), pp 317 324 See also Fedozzi, *Trattato di diritto internazionale* (2nd ed, 1933), pp 69 *et seq* But see Bustamante, i pp 33, 34, Verdross, *Verfassung*, p 92, Scott, 'L'universalité du droit des gens,' in *Le progrès du droit des gens* (1931), vol i pp 151 *et seq*, in *Annuaire*, 33 (1927), pp 61, 62, and in *A S Proceedings*, 1929, pp 48 54

exaggerated emphasis on the so-called American International Law, by the insistence on the difference between the so-called Anglo-American and Continental Schools of International Law, and by the various nationalist conceptions of the Law of Nations These will now be considered in turn

So called American International Law

§ 29b The historical circumstances accompanying the rise of the various American Republics as independent States caused them to stress certain principles like those of self-determination, the right to independence, freedom from intervention on the part of European States, freedom of expatriation and migration, and so on Some of these doctrines were subsequently taken over by European nations and played a prominent part in the history of Europe, others, like freedom of immigration, have now been abandoned, at least temporarily, by most of the American States In addition, the States of the American Continent, with the exception of Canada, have created a permanent organ of non-political co-operation in the form of the Pan-American Union and periodical Pan-American Conferences [1] They have also adopted, subject to numerous reservations, a series of general conventions codifying *inter se* various topics of public and private International Law [2] The principles underlying these conventions do not, in so far as they have secured the general consent of all American States, differ in substance from those binding on States in other parts of the world It is possible that the special problems of the American Continent may necessitate in the future a clear departure from some of the rules and principles obtaining elsewhere However, up till now, American International Law, although looming large in discussions of writers, does not seem to have developed any distinctive peculiarities of its own [3] Geographical propinquity may usefully serve as a basis for more developed forms of international co-operation and mutual political assistance in the preservation of peace than is possible between all States at large, it may also

[1] See Appendix A below, p 897

[2] See below, p 61, n 1

[3] Many writers refer to the doctrine *uti possidetis* (see below, § 201) as an example of American International Law, but this is often the only example given See *e g* Urrutia, *Le Continent Américain et le droit international* (1928), p 199

necessitate the adoption of special rules of International Law with regard to particular interests and situations But the controversy surrounding the question of the existence of an American International Law shows that it is of importance not to magnify either the extent or the significance of such regional peculiarities [1]

The so-called Anglo-American and Continental Schools of International Law

§ 29c The differences in the notions and methods of various systems of Municipal Law have equally given rise to an attitude questioning, in a different sphere, the universal character of International Law Thus it has been maintained that there exist fundamental differences on essential questions of International Law between the so-called Anglo-

[1] The author of this treatise expressed the view that 'it ought not to be maintained that there is—in contradistinction to the European—an American International Law' (§ 28) The existence of an American International Law has been asserted in particular by Alvarez in a series of able writings beginning with his *Le droit international américain* (1909), in *A J*, 3 (1909), pp 269 353, and in *R G*, 20 (1913), pp 48 52, Preface to Strupp, *Éléments du droit international public, universel, européen et américain* (1927), *La reconstruction du droit international et sa codification en Amérique* (1928), and the works referred to above, p 4, n 2 However, it appears that the learned writer, far from denying the existence of universal rules of International Law, stresses 'the existence of particular rules relating to special American problems with regard to matters which have not yet been regulated by general international law' Institut Américain de Droit International, *Historique, Notes, Opinions* (1916), p 111

The term 'American International Law' was adopted in the Draft Code of American International Law which has been presented by the Pan American Union to the Governments of all the American States In Project 2 of this Code (*A J*, 20 (1926), Suppl 2, p 302), American International Law is defined as 'all of the institutions, principles, rules, doctrines, conventions, customs, and practices which, in the domain of international relations, are proper to the Republics of the New World,' thus giving a very wide significance to the term *law*, and comprising apparently principles of policy such as the Monroe Doctrine, which is not a rule of law (see below, §§ 139, 140) This Project was not amongst those adopted by the International Commission of American Jurists at Rio de Janeiro in April May 1927 (see Scott in *A J*, 21 (1927), at p 437)

See also, in support of the thesis that there exists an American International Law, Urrutia, *Le Continent américain et le droit international* (1928), Yepes, *La contribution de l'Amérique Latine au développement du droit international public et privé* (1931) and in *Hague Recueil*, vol 32 (1930) (II), pp 697 792, and *ibid*, vol 47 (1934) (I), pp 5 137, Baak in *R I*, 3rd ser, 13 (1932), pp 367 397 See, on the other hand, Vianna, *De la non existence d'un droit international américain* (1912), Leger, *La codification du droit des gens et les conférences des juristes américains* (1929), pp 88 *et seq*, Guerrero, *La codification du droit international* (1930), p 12 See also Lamas, *La crise de la codification et la doctrine argentine du droit international* (1931), and Fauchille, §§ 44 (2) 44 (12) See also Cereti, *Panamericanismo e diritto internazionale* (1939), and Savelberg, *Le problème du droit international américain* (1946) And see below, § 36, n, on the numerous attempts at regional codification of parts of International Law on the American Continent, and §§ 140, 167*oo* on American regionalism

American and Continental Schools [1] However, there are in fact at present no such divergencies, either in the law of peace or of war [2] With regard to supposed differences in basic notions and methods of approach resulting from divergencies in municipal systems, international practice has, in the few relevant cases, resulted in an assimilation and mutual approximation of apparently opposed conceptions This is shown, for instance, in the manner in which the practice of the Permanent Court of International Justice has combined the formal elimination of the doctrine of judicial precedent with constant and fruitful regard for its previous decisions [3] Moreover, a comparative study of the principal systems of private law tends to show that the differences between them lie often in the domain of terminology, language, and procedure rather than of substantive law. In so far as substantive differences exist they affect rules of conduct lying specifically within the field of Municipal Law and are not, therefore, of a nature likely to render impossible or difficult a uniform development and administration of International Law [4]

National Conceptions of International Law

§ 29*d* Finally, the universality of the Law of Nations has been assailed by some national conceptions of International Law developed in the abnormal period following the First World War Thus writers in Soviet Russia denied for a time

[1] See *e g* Keith's Wheaton, I p 34, Fischer Williams, *Chapters*, p 58, Pearce Higgins, *International Law and Relations* (1928), pp 30, 31, Lord Hailsham, then Lord Chancellor, in the House of Lords on May 1, 1929 *House of Lords*, 74, cols 303, 304 With regard to *travaux préparatoires*, see below, § 554*a*

[2] With regard to the laws of war, the undoubted divergence between the Anglo American and Continental view as to the subjects of the relations of war (see vol II § 57) has probably been rendered obsolete by the changes in the character and scope of modern warfare See Lauterpacht in *B Y*, 12 (1931), pp 31 62, for a discussion of the whole question

[3] See the same, *The Development of International Law by the Permanent Court of International Justice* (1934), pp 3 12 There is no pronouncement of the Permanent Court referring to any difference between the two schools of thought in International Law

[4] There has probably been in recent years a weakening of the tendency to assume the existence of differences between the Anglo American and Continental schools as a ready explanation of difficulties On the contribution of Great Britain and the United States to International Law see Dickinson in *Hague Recueil*, vol 40 (1932) (II), pp 309 393, but it is probably not inconsistent with the view of the learned author to point out that that contribution is not, in most matters there referred to, exclusively confined to Anglo-American countries and that it is not connected with the peculiarities of the common law as distinguished from Continental law.

the possibility of a permanent and general International Law [1], they spoke of an International Law of transition, based on particular as distinguished from general agreements, pending the extension of the Russian system to other countries. Similarly, with the advent of the new political régime in Germany in 1933, German writers stressed the idea of an 'inter-corporative international law of co-ordination' of States built on the principle of racial consanguinity [2], and, animated by the desire to assist in the termination of the régime of political subjection of Germany as the result of the Treaty of Versailles, they elevated the notion of equality of States to the authority of the basic principle of International Law [3]. These and similar intrusions of national policies into the sphere of International Law are essentially transient [4]. On the other hand, in so far as the internal and

[1] See Korovin, *Das Volkerrecht der Übergangszeit* (transl. from Russian, 1929), pp. 7, 24. And see, generally, on the relation of Soviet Russia to International Law, Hrabar in *Z V*, 14 (1927-1928), pp. 188-214, Mirkine-Guetzevitch in *R I (Paris)*, 2 (1928), pp. 1012-1049, Alexiew and Zaitzeff in *Z V*, 16 (1931-1932), pp. 72-99, Hazard in *A J*, 32 (1938), pp. 244-252, Florin in *Revue internationale de la théorie du droit*, 12 (1938), pp. 97-115. See also Taracouzio, *The Soviet Union and International Law* (1935), and in *A S Proceedings*, 1934, pp. 105-120, the same, *War and Peace in Soviet Diplomacy* (1940), Stoupnitzky, *Statut international de l'U R S S. État commerçant* (1936). As to the conduct of foreign relations see below, p. 169, n. 4.

[2] The following selection from the literature on the German National Socialist conception of International Law may be of historical interest: Guerke, *Volk und Volkerrecht* (1935), Wolgast in *Z V*, 18 (1934), pp. 129-132, and the same, *Volkerrecht* (1934), § 545, Ruhland in *Z V*, 18 (1934), pp. 133-144, Walz, *ibid*, pp. 145-154, Toròk, *ibid*, pp. 249-294, Preuss in *R G*, 41 (1934), pp. 661-674, *ibid*, 42 (1935), pp. 668-677, in *American Political Science Review*, 29 (1935), pp. 596-609, and in *J C L*, 3rd ser., 16 (1934), pp. 268-280, Bumiller in *Deutsches Recht*, 4 (1934), pp. 201-206, Tartarin Turnheyden in *Archiv für Rechts und Sozialphilosophie*, 29 (1936), pp. 295-319, Gott in *A J*, 32 (1938), pp. 704-718, Bristler, *Die Volkerrechtslehre des Nationalsozialismus* (1938), Fournier, *La conception national socialiste du droit des gens* (1939), Bonnard, *Le droit et l'État dans la doctrine national socialiste* (2nd ed., 1939), Schmitt, *Volkerrechtliche Grossraumordnung* (1939), Janssens, *Le droit des gens d'après le national-socialisme* (1940), Walz in *Z V*, 23 (1939), pp. 129-164, Beckhoff in *National Soz. Monatschrifte*, 13 (1942), pp. 773-786. As to Fascism see Baak in *Z o R*, 9 (1929), pp. 1-31, and Sereni, *The Italian Conception of International Law* (1943), pp. 269-278.

[3] See Bruns, *Deutschlands Gleichberechtigung als Rechtsproblem* (1934), and in *Z o V*, 5 (1935), pp. 326 *et seq.*, Keller in *Z V*, 17 (1933), pp. 342-372, Bilfinger in *Z o V*, 4 (1934), p. 485. Walz, *op. cit*, p. 153, insisted that the duty of courts to interpret Municipal Law in accordance with International Law does not apply to the provisions of the Treaty of Versailles imposed upon Germany in derogation of her equality among States.

[4] As to the change of the Russian attitude in connection with her entry into the League see Mannzen, *Sovietunion und Volkerrecht* (1932), Davis, *The Soviet Union and the League of Nations (Geneva Special Studies*, 5,

international practice of such States is based on notions radically opposed to conceptions prevailing in the large majority of States, a situation is unavoidably created in which the society of States is deprived of that community of political, juridical, and ethical outlook which is the necessary condition of both the normal functioning and the full development of International Law However, while in such periods the growth of International Law is necessarily impeded, its principal function of regularising intercourse and of maintaining and enforcing peace continues to be capable of fulfilment and gains in practical importance

VI

CODIFICATION OF THE LAW OF NATIONS

Holtzendorff in *Holtzendorff*, 1 pp 136 151—Ullmann, § 11—Despagnet, §§ 67 68—Fauchille, §§ 153 (5) 153 (22)—Merignhac, 1 pp 26 28—Nys, 1 pp 174 193—Rivier, 1 § 2—Fiore, 1 §§ 124 127—Cavaglieri, pp 74 81—Guggenheim, pp 152 159—Cruchaga, §§ 112 121—Holland, *Studies*, pp 79 95—Scelle, II pp 526 543—Rousseau, pp 862 885—Bustamante, pp 81 113—*Répertoire*, III pp 520 561—Bergbohm, *Staatsvertrage und Gesetze als Quellen des Volkerrechts* (1877), pp 44 77—Bulmerincq, *Praxis, Theorie und Codification des Volkerrechts* (1874), pp 167 192—Heilborn, *Grundbegriffe des Volkerrechts* (1912), § 16—Alvarez, *La codification du droit international* (1912), *Méthodes de la codification du droit international public* (1947), and in *R G*, 20 (1913), pp 24 52, 725-747—Politis, *Les nouvelles tendances du droit international* (1927), pp 193 229—Maresh, *La codification du droit international* (1932)—Roszkowski in *R I*, 21 (1889), pp 521 531—Cavalcanti in *R G*, 21 (1914), pp 183 204—*Proceedings of the American Society of International Law*, 4 (1910), pp 208 227, 5 (1911), pp 256 337, 10 (1916), pp 149 167, 1923, pp 55 61, 1926, pp 27 57, 108 121—Nys in *A J*, 5 (1911), pp 871 900—Crocker in *A J*, 18 (1924), pp 38 55—Scott, *ibid*, pp 260 280—Baker in *B Y*, 5 (1924), pp 38 65—Visscher in *Hague Recueil*, 1925 (I), pp 329 452—Garner, *Developments*, pp 708 774, and in *A J*, 19 (1925), pp 327 333—Root, *ibid*, pp 675 684—Hudson, *ibid*, 20 (1926), pp 655 669—Bellot in *J C L*, 3rd ser, 8

No 1, 1934), Kleist, *Die volkerrechtliche Anerkennung Sovietrusslands* (1934), Mihokov, *La politique extérieure des Soviets* (1936), Hartlieb, *Das politische Vertragssystem der Sowjetunion*, 1920 1935 (1936), Makarov in *Z o V*, 5 (1935), pp 34 60 (with a bibliography), and 6 (1936), pp 479 495, Maurach in *Z V*, 21 (1937), pp 19 45 (a German attempt to show that in view of the tendency to world revolution, inherent in the Soviet system, the value of Soviet Russia as a member of the international community is highly problematic), and (to a similar effect) Beckhoff, *Volkerrecht gegen Bolschewismus* (1937) See also Prince in *A J*, 36 (1942), pp 425 445 (on the participation of Soviet Russia in international organisation), *ibid*, 39 (1945), pp 450 485, and Hazard in *Yale Law Journal*, 55 (1946), pp 1016 1035

(1926), pp 137-141—Niemeyer in *Z I*, 37 (1926), pp 1 10—Montluc in *R I* (*Geneva*), 5 (1927), pp 109 121—Alvarez in *Annuaire*, 35 (1) (1929) pp 1-113, and (the same article) in *R I* (*Paris*), 4 (1929), pp 179-263, and 8 (1931), pp 7 85—Saavedra Lamas, *ibid*, 7 (1931), pp 26 106—Brierly in *B Y*, 12 (1931), pp 1 12—Garner in *Hague Recueil*, vol 35 (1931) (1), pp 676 693—Cosentini in *R G*, 42 (1935), pp 411 430—Liang in *A J*, 42 (1948) And see below, p 60, n 2, on the Codification Conference of 1930

Movement in favour of Codification

§ 30 The lack of precision which is natural to a large number of the rules of the Law of Nations on account of its slow growth has created a movement for its codification [1] That movement has been strengthened by the desire to put at the disposal of international tribunals a body of ascertained and agreed rules and thus to stimulate the willingness of States to submit disputes to judicial determination

The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century It was Bentham who first suggested such a codification He did not, however, propose codification of the existing positive Law of Nations, but thought of a utopian International Law which could be the basis of an everlasting peace between the civilised States [2]

A similar project was due to the French Convention, which resolved in 1792 to proclaim a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind of 1789 For this purpose the Abbé Grégoire was charged with the drafting of such a declaration In 1795 Abbé Grégoire produced a draft of twenty-one articles, which, however, was rejected by the Convention, and the matter was dropped [3]

[1] 'Codification' has at least two distinct meanings (1) the process of translating into statutes or conventions customary law and the rules arising from the decisions of tribunals with little or no alteration of the law, this is what the English lawyer means when he says that the Sale of Goods Act, 1893, codified the law as to sale of goods, (2) the process of securing, by means of general conventions, agreement among the States upon certain topics of International Law, these conventions being based upon existing International Law, both customary and conventional, but modified so as to reconcile conflicting views and render agreement possible See Brierly in *B Y*, 12 (1931), pp 1 6, and Politis, *Les nouvelles tendances du droit international* (English transl, 1928), p 70

[2] See Bentham's *Works*, ed by Bowring, viii p 537. Nys in *L Q R*, 1 (1885), pp 226 231

[3] See Rivier, i p 40, where the full text of these twenty one articles is given They do not contain a real code, but certain principles only See also Redslob, *Volkerrechtliche Ideen der franzosischen Revolution* (1916)

It was not until 1861 that a real attempt was made to show the possibility of a codification This was done by an Austrian jurist, Alfons

Work of the First Hague Peace Conference

§ 31 At the end of the nineteenth century, in 1899, the so-called Peace Conference at The Hague, convened on the personal initiative of the Emperor Nicholas II of Russia, showed that parts of the Law of Nations might be codified.[1] In addition to three declarations of minor value, and the convention concerning the adaptation of the Geneva Convention to naval warfare, this conference succeeded in producing two important conventions which may well be called codes—

von Domin Petruschévecz, who published in that year at Leipzig a *Précis d'un code de droit international* In 1863 Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army (see below, vol II § 68 (4), and see Scott in *R I (Paris)*, 4 (1929), pp 393 408) In 1868 Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published *Das moderne Volkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* This draft code has been translated into the French, Greek, Spanish, and Russian languages In 1872 the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay, *Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti* Likewise in 1872 appeared at New York David Dudley Field's *Draft Outlines of an International Code* In 1873 the Institute of International Law was founded at Ghent in Belgium This association of jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of International Law (In 1912 the American Institute of International Law was founded at Washington as a pendant of the Institute of International Law) In 1873 was founded the Association for the Reform and Codification of the Law of Nations, which also meets periodically and which styles itself now the International Law Association In 1874 the Emperor Alexander II of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare At this conference jurists, diplomatists, and military men were united as delegates of the invited States, and they agreed upon a body of sixty articles which goes under the name of the Declaration of Brussels But the Powers have never ratified these articles In 1880 the Institute of International Law published its *Manuel des lois de la guerre sur terre* In 1887 Leone Levi published his *International Law with Materials for a Code of International Law* In 1890 the Italian jurist Fiore published his *Il diritto internazionale codificato e la sua sanzione giuridica*, of which a fifth edition appeared in 1915 A French translation of the fourth edition appeared in 1911, and an English translation of the fifth edition appeared in 1916 In 1906 E Duplessix published his *La loi des nations projet d'institution d'une autorité nationale, législative, administrative, judiciaire projet de code de droit international public* In 1911 Jerome Internoscia published his *New Code of International Law* in English, French, and Italian In the same year Epitacio Pessoa published his *Projecto de codigo de direito internacional publico* (see Alvarez, *La codification du droit international* (1912), p 276 (n)) In 1913 the Institute of International Law published its *Manuel de la guerre maritime* See also Alvarez, *Exposé de motifs et Déclaration des grands principes du Droit international moderne* (1936), and for comment thereon Redslob, *Les principes du droit des gens moderne* (1937), *passim*, and Le Fur in *Hague Recueil*, vol 54 (1935) (IV), pp 132, 133

[1] Upon the initiative of the Dutch Government six conferences have already been held at The Hague for the purpose of codifying various topics of private International Law, namely in 1893, 1894, 1900, 1904, 1925, 1928 (see below, Appendix A, p 893)

namely, first, the 'Convention for the Pacific Settlement of International Disputes,' and, secondly, the 'Convention with respect to the Laws and Customs of War on Land' The first-named convention is of great practical importance, as the various tribunals acting as the Permanent Court of Arbitration have given awards in a number of cases. Nor can the great practical value of the second-named convention be denied Although the latter contains many gaps, even in the amended form given to it by the second Hague Peace Conference of 1907, it represents a model the very existence of which teaches that codification of parts of the Law of Nations is practicable The first Hague Peace Conference therefore marked an epoch in the history of International Law [1]

Work of the Second Hague Peace Conference

§ 32 The second Hague Peace Conference of 1907 [2] produced no less than thirteen conventions,[3] some of which are codifications of parts of maritime law Three of the thirteen conventions, namely, that for the pacific settlement of international disputes, that concerning the laws and customs of war on land, and that concerning the adaptation of the principles of the Geneva Convention to maritime war, took the place of three corresponding conventions of the first Hague Peace Conference But the other ten conventions were entirely new Apart from the conventions on the limitation of the employment of force for the recovery of contract debts [4] and the opening of hostilities,[5] they were devoted to the regulation of rules of warfare and neutrality in war on land and sea [6]

Codification in the period after the First World War

§ 33 In the domain of the law of war the period after the First World War produced in 1929 general conventions on the treatment of prisoners of war [7] and sick and wounded [8]

[1] For a general account of the work of the Hague Conferences see Wehberg in *Hague Recueil*, vol 37 (1931) (III), pp 533 664

[2] Shortly after the Hague Peace Conference of 1899, the United States of America took a step with regard to sea warfare similar to that taken by her in 1863 with regard to land warfare She published on June 27, 1900, a body of rules for the use of her navy under the title, *The Laws and Usages of War at Sea*—the so called *United States Naval War Code*—which was drafted by Captain Charles H Stockton, of the United States Navy

Although, on February 4, 1904, this code was by authority of the President of the United States withdrawn, it provided the starting point of a movement for codification of maritime International Law

[3] For an enumeration of these Conventions see below, vol II § 68

[4] See below, § 135

[5] See vol II § 94

[6] See vol II § 68

[7] See vol II §§ 126-132

[8] See vol II §§ 119 124*a*

and, in 1925, on the use of poisonous and asphyxiating gases [1] In the field of the law of peace that period produced important pieces of partial codification through general instruments like the Covenant of the League of Nations, the Statute of the Permanent Court of International Justice,[2] the General Act for the Pacific Settlement of International Disputes of 1928,[3] the General Treaty for the Renunciation of War,[4] conventions concerning air navigation [5] and inland [6] and maritime navigation,[7] and a great number of conventions of a scientific, economic, and humanitarian [8] character, including the imposing series of conventions concluded under the aegis of the International Labour Organisation [9] But these conventions are concerned with specific matters and can only metaphorically be described as constituting codification It was left to the League of Nations to approach in a systematic manner the problem of codification properly so called

Codification under the Auspices of the League of Nations

§ 34 To stress what they believed to be the close connection between the judicial settlement of international disputes and codification, the Committee of Jurists, who in 1920 drafted the Statute of the Permanent Court of International Justice, adopted a resolution urging the calling of an international conference charged with reconciling divergent views on particular topics of International Law and the consideration of those which were not adequately regulated [10] In September 1924 the fifth Assembly of the League adopted a Resolution requesting the Council to convene a committee of experts to prepare a provisional list of topics the regulation of which by international agreement was deemed desirable and practicable [11] In December 1924 the Council appointed a committee of sixteen jurists to report on the codification of International Law [12] The Committee was not instructed

[1] See vol II § 113
[2] See vol II § 25*ac*
[3] See vol II § 25*aj*
[4] See vol II § 52*i*
[5] See below, § 197*c*
[6] See below, § 178*b*
[7] See below, § 265
[8] See below, Appendix A And see generally, on the part played by so called law making conventions, Hudson, *Legislation*, I (1931) pp. xvii and xviii, and V (1936) pp viii-x, and the same in *A J*, 22 (1928), pp 330 349, and *ibid*, Suppl, pp 90-108, Ruhland, *System der volkerrechtlichen Kollektivvertrage als Beitrag zur Kodifikation des Volkerrechts* (1929) See also above, § 18
[9] See below, Appendix B
[10] *Procès-Verbaux* of the Meetings of the Committee, p 747
[11] *Off J*, 1925, p 120
[12] *Ibid*, p 274

to prepare codes, but to report to the Council on the questions which it regarded as ripe for codification, and also as to how their codification could best be achieved The Committee then considered a number of reports prepared by its sub-committees on various topics, it examined the replies of the Governments on these reports, and in April 1927 reported to the Council that the following seven topics were ripe for codification (i) Nationality, (ii) Territorial Waters, (iii) Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners, (iv) Diplomatic Privileges and Immunities, (v) Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties, (vi) Piracy, (vii) Exploitation of the Products of the Sea [1]

In September 1927 the Assembly took into consideration the Committee's Report to the Council and the Council's observations thereon and decided that a conference should be held at The Hague for the purpose of codifying the subjects mentioned under (i), (ii), and (iii) The Council then instructed a preparatory committee to consider and recommend to the Council what action it should take in execution of the Assembly's Resolution The Committee examined the replies made by the Governments to the various questions covering the principal topics of the three proposed subjects of codification and drew up bases of discussion for the use of the Conference (The replies of the Governments, the bases

[1] For the Report of the Committee see Doc C 196 M 70 1927 V As to topics (v) and (vii) the Committee recommended a procedure more technical than an international conference In June 1928 the Committee reported two more topics as being ripe for codification, namely, the Legal Position and Functions of Consuls and the Competence of Courts in regard to Foreign States

The Committee, after examining reports upon (i) Nationality of Commercial Corporations and their Diplomatic Protection, and (ii) the Recognition of the Legal Personality of Foreign Commercial Corporations, reported to the Council that these topics were ripe for regulation by international agreement, and might usefully be left to a Conference upon Private International Law

The Committee examined and reported as not being ripe for international regulation the following topics (i) Criminal Competence of States in respect of Offences committed outside their territory, (ii) Extradition, (iii) Interpretation of the Most Favoured Nation Clause (The Committee also studied, and considered to be ripe for international regulation, the 'Legal Status of Government Ships Employed in Commerce', but in view of the conferences which had already been held under the direction of the International Maritime Committee and the Convention prepared by that body (see below, § 451*a*), recommended the Council to take no further action for the present)

of discussion and the Committee's final report are printed in three separate volumes which are an authoritative and invaluable source of information [1])

The Hague Codification Conference of 1930

§ 35 The first Conference on the Progressive Codification of International Law was held at The Hague from March 13 to April 12, 1930 It resolved itself into three Committees for each of the three topics for the consideration of which the Conference had been convened As the result of the work of the First Committee the Conference adopted (*a*) a Convention concerning Certain Questions relating to the Conflict of Nationality Laws, (*b*) a Protocol relating to Military Obligations in certain cases of Double Nationality, (*c*) a Protocol relating to a Certain Case of Statelessness, and (*d*) a Special Protocol concerning Statelessness [2] These Conventions, although falling short of a comprehensive codification of international aspects of nationality, covered important questions and have subsequently been ratified by a number of States, including Great Britain [3] With regard to Territorial Waters, the Conference was unable to adopt a convention as no agreement could be reached on the question of the extent of territorial waters and the problem of a 'contiguous zone' adjacent thereto There was, however, some measure of agreement on such questions as the legal status of territorial waters, including the right of innocent passage, and the base line for measuring the territorial waters The views of the Conference on these matters were embodied in a Report submitted by the Second Committee of the Conference [4] With regard to State responsibility, the Con-

[1] They are Vol I Nationality C 73 M 38 1929 V, Vol II Territorial Waters C 74 M 39 1929 V, Vol III Responsibility of States, etc C 75 M 69 1929 V For an account of the preparatory work of the Conference up to 1930 see Hudson in *A J*, 20 (1926), pp 656 669, Wickersham in *A S Proceedings*, 1926, pp 121 135, Reeves in *A J*, 21 (1927), pp 659-667, and 24 (1930), pp 52 57, McNair in *Grotius Society*, 13 (1928), pp 129 140 Reference may also be made here to a series of valuable publications in the form of draft conventions stimulated by the proposed codification of International Law and prepared under the auspices of the Harvard Law School The comment accompanying these draft conventions is based on comprehensive and pains taking research These publications are enumerated above, p xv, in the List of Abbreviations

[2] As to all these see below, §§ 299 (p 595, n 2), 310*a* and 313.

[3] The Convention and the three Protocols came into force in 1937 following upon the receipt of the tenth ratification The States bound by the Convention are Brazil, Great Britain, Canada, India, China, Monaco, The Netherlands, Norway, Poland and Sweden

[4] See *A J*, 24 (1930), Suppl, p 234

ference disclosed complete disagreement on the question, *inter alia*, of responsibility for the treatment of aliens in cases in which there is no discrimination against the aliens as compared with the nationals of the State [1]

Merits of Codification in general

§ 36 Before assessing the merits and prospects of the codification of International Law in the light of the Hague Conference it is useful to discuss the merits of codification in general It cannot be maintained that codification is everywhere, at all times, and in all circumstances opportune Codification certainly interferes with the so-called organic growth of the law through usage into custom. It is true that a law, once codified, cannot so easily adapt itself to the individual merits of particular cases which come under it It is further a fact, which cannot be denied, that together with codification there frequently enters into courts of justice, and into the area of juridical literature, a hair-splitting tendency and an interpretation of the law which often clings more to the letter and the word of the law than to its spirit and its principles And it is not at all a fact that codification does away with controversies altogether Codification certainly clears up many questions of law which have been hitherto debatable, but it creates at the same time new controversies And, lastly, all jurists know very well that the art of legislation is still in its infancy and not at all highly developed The hands of legislators are very often clumsy, and legislation often does more harm than good Yet, on the other hand, the fact must be recognised that history has given its verdict in favour of codification There is no civilised State in existence whose Municipal Law is not to a greater or lesser extent codified The growth of the law

[1] See below, § 155*d* On the various aspects of the Hague Codification Conference of 1930 see Alvarez, *Les résultats de la 1ère Conférence de codification de droit international* (1931), Reeves in *A J*, 24 (1930), pp 52 57, 486 499, Hudson, *ibid*, pp 447-466, Flournoy, *ibid*, pp 467 485, Hackworth, *ibid*, pp 500-516, Borchard, *ibid*, pp 517 540, Hunter Miller, *ibid*, pp 674 693, Guerrero in *R I* (*Paris*), 5 (1930), pp 478 491, Niemeyer in *Z I*, 42 (1930), pp 1-26, Rolin in *R I*, 3rd ser, 11 (1930), pp 581-599, Hunter Miller in *A S Proceedings*, 1930, pp 213-221, Borchard, *ibid*, pp 221-229, Hudson, *ibid*, pp 229 234, Rauchberg in *Z o R*, 10 (1931), pp 481-522 For the texts of the Final Act, the Convention on Nationality, the three Protocols adopted by the Conference and the Reports of the Committees on Nationality and Territorial Waters see *A J*, 24 (1930), Suppl, pp 169 258 See also Hudson, *Legislation*, vol v pp 359 394, League Doc A 19 1931 V, C 351 M. 145 1930 V (the Final Act)

through custom goes on very slowly and gradually, very often too slowly to be able to meet the demands of the interests at stake New interests and new inventions very often spring up with which customary law cannot deal Circumstances and conditions frequently change so suddenly that the ends of justice are not met by the existing customary law of a State Thus, legislation, which is, of course, always partial codification, becomes a necessity, in the face of which all hesitation and scruple must vanish Whatever may be the disadvantages of codification, there comes a time in the development of every civilised State when it can no longer be avoided And great are the advantages of codification, especially of a codification that embraces a large part of the law Many controversies are done away with The science of law receives a fresh stimulus A more uniform spirit enters into the law of the country New conditions and circumstances of life become legally recognised Mortifying principles and branches are cut off with one stroke A great deal of fresh and healthy blood is brought into the arteries of the body of the law in its totality If codification is carefully planned and prepared, if it is imbued with true and healthy conservatism, many disadvantages can be avoided And interpretation on the part of good judges can deal with many a fault that codification has brought about If the worst comes to the worst, there is always a Parliament or other law-giving authority of the land to mend by further legislation the faults of previous codification [1]

[1] In §§ 33, 35, and 36 of the previous editions of this book the author discussed some current objections to codification and the answers to them Most of the argument is now merely of historical importance and it is not deemed necessary to reproduce it here With regard to the argument that codification of International Law would cut off its organic growth, the author pointed out that codification does not cut off the growth of customary law although it interferes with it to a certain extent Any such disadvantage, he said, can be met by periodical revisions of the Code, and by its gradual enlargement and improvement through the acceptance of additional rules rendered necessary by the changes in international conditions

A variety of partial codification is regional codification, for instance, on the American continent As long ago as the Panama Congress of 1826 the movement for the codification of International Law among the States of the New World made itself heard In 1906 the Pan American Conference at Rio de Janeiro (at which the United States of America were represented) decided to establish a commission of jurists for the purpose of preparing codes both of public and of private International Law for submission to a future conference After the interruption caused by the First World War th . task was actively

These arguments in favour of codification apply in general also to codification of the Law of Nations

resumed, with the close co operation of the new American Institute of International Law founded in 1912, and in 1925 this Institute transmitted to the Pan American Union the texts of thirty projects of conventions for a code of public International Law (printed in *A J*, Special Suppl, October 1926) These projects were considered at a meeting of an International Commission of American Jurists in Rio de Janeiro in April and May 1927, and twelve of them were adopted and recommended for consideration by a Sixth Pan American Conference, which was held in January and February 1928 For the twelve projects referred to see *A J*, 22 (1928), Special Suppl of January 1928 The Conference adopted, on February 20, 1928, the following seven codifying conventions (1) On the Status of Aliens, (2) On Treaties, (3) On Diplomatic Officers, (4) On Consular Agents, (5) On Maritime Neutrality, (6) On Asylum, (7) On Duties and Rights of States in the Event of Civil Strife For the texts of these conventions see *A J*, 22 (1928), Suppl, pp 124 *et seq*, Hudson, *Legislation*, IV pp 2374 2419 The Seventh Pan American Conference adopted on December 26, 1933, the following conventions (1) On the Nationality of Women, (2) On Nationality, (3) On Extradition, (4) On Political Asylum, (5) On Rights and Duties of States For the texts of these conventions see *A J*, 28 (1934), Suppl, pp 61 *et seq* The Conference adopted a number of resolutions on a number of subjects including the question of offences committed on board aircraft (*ibid*, p 51), on industrial and agricultural use of international rivers (*ibid*, p 59), and on the international responsibility of States (*ibid*, p 60) The Conference also passed a resolution on methods of codification to be pursued in the future (*ibid*, p 55) The resolution proposes, *inter alia*, (*a*) the establishment of a permanent commission whose members are to serve both as experts and as official representatives of their Governments with full powers to sign conventions, and (*b*) the elimination of codification from the agenda of future Pan American conferences For comment on the resolution see Reeves in *A J*, 28 (1934), pp 319 321 See also Borchard in *A J*, 31 (1937), pp 471 473, and the same, *ibid*, 33 (1939), pp 268 282, on the work of the Committe of experts created by the resolution of 1933 As to the Anti War Treaty of October 10, 1933 see vol II § 52*q* On the efforts of the Pan American Conference of December 1936, to codify the treaties of pacific settlement see Jessup in *A J*, 31 (1937), pp 89 91 For the various conventions codifying, to some extent, the previous conventions as to pacific settlement and adopted by that Conference see *International Conciliation* (Pamphlet No 238), March 1937 See Alvarez, *La Codification du droit international* (1912, a work which was considered in some detail by the Codification Commission of American Jurists in that year), *La codificación del derecho internacional en América* (1923), *Le nouveau droit international et sa codification en Amérique* (1924), and in *R G* (1913), pp 24 52 and 725 747, Rauchhaupt, *Volkerrechtliche Eigenthumlichkeiten Amerikas* (1924), Scott in *Proceedings of American Society of International Law*, 1925, pp 14 48, in *A J*, 19 (1925), pp 333 337, *ibid*, 20 (1926), Suppl No 2, pp 284 293, and *ibid*, 21 (1927), pp 417 450, Bustamante in *Proceedings of American Society of International Law* (1926), pp 108-121, Wickersham in *American Bar Journal*, October 1925, pp 654 661, Healy in *Georgetown Law Review*, March and November 1925, *Revista de Derecho Internacional*, March 1925, special number, Morris in *University of Pennsylvania Law Review*, March 1926, pp 452 463, Brierly in *B Y*, 7 (1926), pp 14 23 On American efforts to codify International Law see Leger, *La codification du droit des gens et les conférences des juristes américains* (1929), Urrutia in *Hague Recueil*, vol 22 (1928) (II), pp 85 230 The Conference of American States at Lima adopted, on December 21, 1938, a Resolution concerning the methods for the gradual and progressive codification of international law through

The Limits and Prospects of the Codification of International Law

§ 37 Those participating in the Hague Conference of 1930 apparently assumed that it was the first of a series of conferences for pursuing the work of codification under the auspices of the League For the Conference adopted detailed recommendations concerning the methods of preparation and of summoning of future conferences [1] In October 1930, the Eleventh Assembly reaffirmed the great interest of the League in the work of codification and invited the observations of member-States concerning the recommendations of the Conference [2] These observations were on the whole not unfavourable [3] to continuing the task of codification, but the Twelfth Assembly, while deciding in principle to continue that work, laid down elaborate details governing the future procedure in the matter [4] Their main effect was to transfer the formal initiative from the League and its organs to the members of the League and thus to lessen the chances of codification in the near future

In any case the experience and results of the Hague Conference of 1930 made it possible to assess the desirability and the prospects of codification In the first instance, that Conference revealed clearly the difference between codification conceived as a systematisation and unification of agreed principles and codification regarded as agreement on hitherto divergent views and practices Its progress and results showed that different methods may be required for the achievement of either of the two purposes, and that, in particular, the securing of agreements on existing differences

the following agencies (*a*) national committees in each American State, three permanent committees, appointed by governments, in Rio de Janeiro (for public international law), in Montevideo (for private international law), and in Habana (for the unification of legislation), a committee of experts at Washington with functions similar to those of the Committee of Experts appointed by the League of Nations in 1924, an international conference of American jurists composed of persons appointed by governments and entrusted with plenipotentiary powers for the purpose of adopting conventions to be deposited with the American Union for appropriate action by the members of the Union *A J*, 34 (1940), Suppl, p 194, *The International Conferences of American States First Supplement*, 1933 1940 (1940), p 246 See also literature cited above, § 30, and § 29*b* above, on 'American International Law'

[1] See the Final Act of the Conference Doc C 351 M 145 1930 V p 138, *A J*, 24 (1930), Suppl, p 257

[2] *Off J*, Special Suppl No 83, p 9

[3] See A 12 1931 V, A 12 (*a*) 1931 V, and A 12 (*b*) 1931 V

[4] *Off J*, Special Suppl, No 92, p 9 For comment see Hudson in *A J*, 26 (1932), pp 137-143 And see Brierly in *B Y*, 12 (1931), pp 1-12

is primarily a matter of policy and cannot well be settled by conferences of juridical experts Secondly, in view of the fact that international conferences are governed by the rule of unanimity, there is a danger that attempts to reach agreement in the form of codified rules may result in reducing the value of the rules eventually agreed upon for the reason that the issue may be unduly determined by the most persistent or least progressive State or States The product of codification may thus retard instead of advancing the progress of International Law [1] Thirdly, there is the danger that, given the cautious attitude of Governments, attempts at codification may in many cases reveal and emphasise differences in cases where agreement was hitherto supposed to exist Fourthly, it appears that in so far as codification implies uniform regulation, its scope must necessarily be limited for the reason that in many cases the diversity of interests and conditions render uniformity difficult or undesirable Fifthly, the Conference showed that even with regard to generally non-controversial matters the work of codification requires lengthy preparation and discussion which cannot always usefully take place in the hurried atmosphere of an international conference Thus the programme of the Hague Conference in 1930 was probably too ambitious inasmuch as it attempted within the space of one month to codify three important branches of International Law

On the other hand, it would be a mistake to regard these obstacles as a sufficient reason for abandoning the task of introducing, through general conventions, uniformity and certainty in those branches of International Law which are sufficiently developed for that purpose It is true that the absence of codified rules has not seriously impeded the work of the Permanent Court of International Justice or of other tribunals, and that, on the contrary, their work has shown that International Law may be developed indirectly and given a degree of certainty through decisions of international tribunals [2] But there is no doubt that the codification of suitable portions of International Law may add both to its clarity and authority and, to a smaller extent, to the

[1] Even before the Conference met the Preparatory Committee which drafted the Bases of Discussion uttered a warning to that effect See Doc C 73 M 38 1929 V

[2] See above, § 19*a*

willingness of States to submit disputes to obligatory judicial or arbitral settlement The danger of failure, or even of retrogression, in consequence of the operation of the unanimity rule, may be circumvented by the adoption of conventions by the majority of the States represented at the Conference The scope of conventions thus adopted is likely to become enlarged as the result of subsequent adhesions The very fact of their continued validity among large groups of States cannot fail to exercise considerable influence The Charter of the United Nations lays down, in Article 13, that the General Assembly shall initiate studies and make recommendations for the purpose, *inter alia*, ' of encouraging the progressive development of international law and its codification ' [1] The Second General Assembly decided, in November 1947, to set up an International Law Commission, to be elected in 1948, charged with the task of the restatement of rules of International Law on specific subjects [2] The Commission is to be composed of persons of recognised competence in International Law and representing as a whole the chief forms of civilisation and the basic legal systems of the world

Inter-national Legislation and Revision of Inter-national Law

§ 37a The primary object of codification of International Law is to give clear expression to those branches of Inter-

[1] See Jessup in *A J*, 39 (1945), pp 755 757 For the recommendations of the Inter American Juridical Committee of October 1944, on the reorganisation of agencies engaged in the codification of International Law see *A J*, 39 (1945), Suppl, pp 231 245

[2] See Liang in *A J*, 42 (1948) (January) The decision was adopted in pursuance of the recommendations of a committee composed of representatives of Governments, which sat in June 1947 See Finch in *A J*, 41 (1947), pp 611 616, and the Report of Professor Jessup, the American representative, in *Bulletin of State Department*, 17 (1947), p 121 In other Resolutions the General Assembly instructed the Commission to prepare a draft declaration on the rights and duties of States—a proposal for such a declaration having been previously submitted by Panama—and directed it to formulate the principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, and to prepare a draft code of offences against the peace and security of mankind (Doc A/505 and A/508) See also the Resolutions of the International Law Association of 1947 based on the Report of a Committee of the Association under the chairmanship of Judge McNair, and emphasising the importance of a restatement—not amounting to official codification in the form of conventions—of selected portions of International Law (Report of the Session of the International Law Association held in Prague in 1947) It is believed that any efforts of that nature, however authoritative, must be regarded as merely preliminary to the task of codification proper For a useful survey, prepared by the Division of Development and Codification of International Law of the United Nations, of the development and codification of International Law by international conferences see *A J*, 41 (1947), Supplement, pp 29 147

national Law with regard to which there is already a common measure of agreement From the codification of International Law thus conceived there must be distinguished the deliberate revision and change of existing rules of and rights enjoyed under International Law with a view to adapting it to changed conditions and removing causes of international friction Such changes may apply either to territorial and other provisions of treaties, or to customary rules of International Law, for instance, those relating to the sovereignty over the air or the exclusive competence of States to regulate tariffs or migration There is at present no machinery of international legislation [1] for effecting changes of this nature against the dissent of a minority of interested States [2] The establishment of such machinery would amount, to a substantial degree, to setting up an international legislature [3] That development, while possible in itself and while fully consistent with the nature and objects of International Law, is not one which Governments are at present prepared to accept Its realisation must be a matter of gradual transition from the existing principle of unanimity to a process of legislation adapted to the requirements and to the tradition of International Law Article 19 of the Covenant which authorised the Assembly to recommend the consideration of treaties and international situations in accordance with changed conditions could well have provided the starting-point for a development of that nature [4] Although no corresponding provision has been adopted in the Charter of the United Nations, the wide powers of discussion and recommendation which Article 11 of the Charter confers upon the General Assembly may properly be used for the same purpose [5]

[1] On the metaphorical use of that term see above, p 26, n 3

[2] On the existing and possible substitutes for international legislation see Lauterpacht, *The Function of Law*, pp 245 347

[3] This is not always realised by those who speak of the necessity of providing effective institutions of peaceful change as a condition of progress in other fields of international organisation

[4] See § 167*o* below, and the literature there cited See also Kunz in *A J*, 33 (1939), pp 33 55, Bourquin, *Dynamism and the Machinery of International Institutions* (1940), Gihl, *International Legislation* (1937), Brierly, *The Outlook for International Law* (1944), pp 95-108

[5] See below, § 168*s*.

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

DEVELOPMENT OF THE LAW OF NATIONS BEFORE GROTIUS

Lawrence, §§ 13-22—Manning, pp 8 21—Halleck, I pp 1 11—Walker, *History*, I pp 30 137—Taylor, §§ 6 29—Hershey, §§ 16 53—Fenwick, pp 3-18—Ullmann, §§ 12 14—Holtzendorff in *Holtzendorff*, I pp 159 386—Kohler, §§ 7-19—De Louter, I pp 77 95—Nys, I pp 1-22—Martens, I §§ 8 20—Fiore, I §§ 3 31—Calvo, I pp 1 32—Fauchille, §§ 71 86—Despagnet, §§ 1 19—Mérignhac, I pp 38 43—Laurent, *Histoire du droit des gens*, etc , 14 vols (2nd ed , 1861-1868)—Ward, *Enquiry into the Foundation and History of the Law of Nations*, 2 vols (1795)—Osenbruggen, *De Jure Belli et Pacis Romanorum* (1836)—Muller Jochmus, *Geschichte des Volkerrechts im Alterthum* (1848)—Hosack, *Rise and Growth of the Law of Nations* (1882), pp 1 226—Nys, *Le droit de la guerre et les précurseurs de Grotius* (1882), and *Les origines du droit international* (1894)—Hill, *History of Diplomacy in the International Development of Europe*, vol I (1905), and vol II (1906)—Cybichowski, *Das antike Volkerrecht* (1907)—Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols (1910)—Strupp, *Urkunden zur Geschichte des Volkerrechts*, 2 vols (1911)—Raeder, *L'arbitrage international chez les Hellènes* (1912)—Conner, *The Development of Belligerent Occupation* (1912)—Tod, *International Arbitration amongst the Greeks* (1913)—Redslob, *Das Problem des Volkerrechts* (1917), and *Histoire des grands principes du droit des gens* (1923)—Lange, *Histoire de l'internationalisme*, vol I (1919)—Vinogradoff in *Bibliotheca Visseriana*, I (1923), pp 13-45—Kosters, *ibid*, IV (1925), pp 7 63—Butler and Maccoby, *The Development of International Law* (1928)—Schnurer, *Die Anfange der abendlandischen Volkergemeinschaft* (1932)—Bentwich, *The Religious Foundations of Internationalism* (1933)—Wegner, *Die Geschichte des Volkerrechts* (1936), pp 1 164—Van Vollenhoven, *The Law of Peace* (transl from Dutch, 1936), pp 6 80—Scott, *Law, the State, and the International Community*, vol I (1939)—Pearce Higgins in *Cambridge History of the British Empire*, vol I (1929), ch VI —Hershey in *A J*, 5 (1911), pp 901 933—Audinet in *R G*, 21 (1914), pp 29-63—Boak in *A J*, 15 (1921), pp 375 383—Korff, *ibid*, 18 (1924), pp 246 259, and (the same article) in *Hague Recueil*, 1923, pp 5 23—Goyau, *ibid*, 1925 (I), pp 125 198—Boegner, *ibid*, 1925 (I), pp 245 324—Lange, *ibid*, vol 13 (1926) (III), pp 175 248—Le Fur, *ibid*, vol 41 (1932) (III),

pp 505 601—Trelles, *ibid*, vol 17 (1927) (II), pp 113 337, and vol 43 (1933) (I), pp 389 551—Zimmermann, *ibid*, vol 44 (1933) (II), pp 319 437—Kosters in *R I*, 3rd ser, 14 (1933), pp 31 61, 282 317, 634 676—Hrabar in *R I* (*Paris*), 18 (1936), pp 2 39, 373 439—van Kan in *Hague Recueil*, vol 66 (1938) (IV), pp 318 558

No Law of Nations in Antiquity

§ 37*b* International Law as a law between sovereign and equal States based on the common consent of those States is a product of modern Christian civilisation, and may be said to be about four hundred years old However, the roots of this law go very far back into history Such roots are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations But it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world Each nation had its own religion and gods, its own language, law, and morality International interests of sufficient vigour to wind a band around all the civilised States, bring them nearer to each other, and knit them together into a community of nations, did not spring up in antiquity On the other hand, however, no nation could avoid coming into contact with other nations War was waged and peace concluded Treaties were agreed upon Occasionally ambassadors were sent and received International arbitration was resorted to International trade sprang up Political partisans whose cause was lost often fled their country and took refuge in another And, just as in our days, criminals often fled their country for the purpose of escaping punishment

Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly consistent rules and usages to be observed with regard to external relations These rules and usages were considered to be under the protection of the gods, their violation called for religious expiation It will be of interest to take a glance at the respective rules and usages of the Jews, Greeks, and Romans [1]

[1] As to India see Viswanatha, *International Law in Ancient India* (1925), which reveals some interesting anticipations of rules and institutions commonly regarded as exclusively European See also Bentwich, *The Religious Foundations of Internationalism* (1933), pp 159 180 As to ancient Egypt see Rey in *R G*, 48 (1) (1941-1945), pp 35-52

§ 38 Although they were monotheists and although the standard of their ethics was much higher than that of their heathen neighbours, the Jews did not in fact raise the standard of the international relations of their time except in so far as they afforded foreigners living on Jewish territory equality before the law Proud of their monotheism and despising all other nations on account of their polytheism, they found it totally impossible to recognise other nations as equals If we compare the different parts of the Bible concerning the relations of the Jews with other nations, we are struck by the fact that the Jews were sworn enemies of some foreign nations, such as the Amalekites, for example, with whom they declined to have any relations whatever in peace When they went to war with those nations, their practice was extremely cruel They killed not only the warriors on the battlefield, but also the aged, the women, and the children in their homes [1] With those nations, however, of which they were not sworn enemies the Jews used to have international relations Ambassadors were considered sacrosanct, and treaties were faithfully observed And when they went to war with those nations, their practice was in no way exceptionally cruel, if looked upon from the standpoint of their time and surroundings [2] Comparatively mild also were the Jewish rules regarding their foreign slaves Such slaves were not without legal protection The master who killed a slave was punished (Exodus xxi 20), if the master struck his slave so severely that he lost an eye or a tooth, the slave became a free man (Exodus xxi 26 and 27) The Jews, further, allowed foreigners to live among them under the full protection of their laws 'Love the stranger for ye were strangers in the land of Egypt,' says Deuteronomy x 19, and in Leviticus xxiv 22 there is the command. 'Ye shall have one manner of law, as well for the stranger, as for one of your own country.' The Jews.

Of the greatest importance, however, for the International Law of the future, are the Messianic ideals and hopes of the Jews, as these Messianic ideals and hopes are not national

[1] See *e g* 1 Samuel xv 3 [2] See *e g* Deut xx 10-14

only, but fully *inter*national [1] Thus we see that the Jews, at least at the time of Isaiah, had a presentiment of a future when all the nations of the world should be united in peace. And the Jews have given this ideal to the Christian world Although the Jewish State did practically nothing to realise that ideal, yet it sprang up among them and has never disappeared [2]

The Greeks

§ 39 Totally different from this Jewish contribution to a future International Law is that of the Greeks [3] The broad and deep gulf between their civilisation and that of their neighbours necessarily made them look down upon those neighbours as barbarians, and thus prevented them from raising the standard of their relations with neighbouring nations above the average level of antiquity But the Greeks before the Macedonian conquest were never united into one powerful national State They lived in numerous more or less small city States, which were totally independent of one another It is this very fact which, as time went on, called into existence a kind of International Law between these independent States They could never forget that their inhabitants were of the same race The same blood, the same religion, and the same civilisation of their citizens united these independent and—as we should say nowadays —sovereign States into a community of States which in time of peace and war held themselves bound to observe certain rules as regards the relations between one another The consequence was that international arbitration [4] was frequently resorted to, and that the practice of the Greeks in their wars among themselves was a very mild one It was a rule that war should never be commenced without a declara-

[1] See Isaiah (II 2 4) where the prophet foretells the state of mankind when the Messiah shall have appeared

(v 4) 'And he shall judge among the nations, and shall rebuke many people and they shall beat their swords into plowshares, and their spears into pruning hooks nation shall not lift up sword against nation, neither shall they learn war any more'

[2] Mention should also be made of the contribution of Judaism to the conception of the Law of Nature see Isaacs in *The Legacy of Israel* (Oxford, 1927) and Bentwich, *The Religious Foundations of Internationalism* (1933), pp 59 82 Selden published in 1640 his *De Jure Naturali et Gentium juxta Disciplinam Ebraeorum*

[3] See Tod, *op cit*, and Boak in *A J*, 15 (1921), pp 375 383

[4] See Raeder, *op cit* See also Ténékidès in *R G*, vol 38 (1931), pp 5-20

tion of war Heralds were inviolable Warriors who died on the battlefield were entitled to burial If a city was captured, the lives of all those who took refuge in a temple had to be spared Prisoners of war could be exchanged or ransomed, their lot was, at the utmost, slavery. Certain places, as, for example, the temple of the god Apollo at Delphi, were permanently inviolable. Even certain persons in the armies of the belligerents were considered inviolable, as, for instance, the priests, who carried the holy fire, and the seers

Thus the Greeks left to history the example that independent and sovereign States can live, and are in reality compelled to live, in a community which provides a law for the international relations of the member-States, provided that there exist some common interests and aims which bind these States together It is very often maintained that this kind of International Law of the Greek States could in no way be compared with our modern International Law, as the Greeks did not consider their international rules as legally, but only as religiously, binding We must not forget, however, that the Greeks never made the same distinction between law, religion, and morality which the modern world makes The fact itself remains unshaken that the Greek States set an example to the future that independent States can live in a community in which their international relations are governed by certain rules and customs based on the common consent of the members of that community [1]

The Romans

§ 40 Totally different again from the Greek contribution to a future International Law is that of the Romans As far back as their history goes, the Romans had a special set of twenty priests, the so-called *fetiales*, for the management of functions regarding their relations with foreign nations. In fulfilling their functions the *fetiales* did not apply a purely secular, but a divine and holy law, a *jus sacrum*, the so-called *jus fetiale* The *fetiales* were employed when war was declared or peace was made, when treaties of friendship or of alliance were concluded, when the Romans had an international claim against a foreign State, or *vice versa*

[1] See Kahrstedt, *Staatsgebiet und Staatsangehörige in Athen* (1934)

According to Roman Law the relations of the Romans with a foreign State depended upon whether or not there existed a treaty of friendship between Rome and that State In case no such treaty was in existence, persons or goods coming from the foreign land into the land of the Romans, and likewise persons and goods going from the land of the Romans into the foreign land, enjoyed no legal protection whatever Such persons could be made slaves, and such goods could be seized, and became the property of the captor Should such an enslaved person ever come back to his country, he was at once considered a free man again according to the so-called *jus postliminii* [1] An exception was made as regards ambassadors They were always considered inviolable, and whoever violated them was handed over to the home State of those ambassadors to be punished according to discretion

Different were the relations when a treaty of friendship existed Persons and goods coming from one country into the other stood then under legal protection So many foreigners came in the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium* [2] in contradistinction to the *jus civile* And a special magistrate, the *praetor peregrinus*, was nominated for the administration of that law Of such treaties with foreign nations there were three different kinds, namely, of *friendship* (*amicitia*), of *hospitality* (*hospitium*), or of *alliance* (*foedus*) It is not proposed to go into details about them It suffices to remark that, although the treaties were concluded without any such provision, notice of termination could be given Very often these treaties used to contain a provision according to which future controversies could be settled by arbitration of the so-called *recuperatores*

Very precise legal rules existed as regards war and peace Roman law considered war a legal institution There were four different just reasons for war, namely (1) violation

[1] See below, vol II § 279

[2] Upon the connection of this term with the *jus inter gentes* or Law of Nations see Westlake, I pp 11 13

of the Roman dominions, (2) violation of ambassadors, (3) violation of treaties, (4) support given during war to an opponent by a hitherto friendly State But even in such cases war was only justified if satisfaction was not given by the foreign State Four *fetiales* used to be sent as ambassadors to the foreign State from which satisfaction was asked If such satisfaction was refused, war was formally declared by one of the *fetiales* throwing a lance from the Roman frontier into the foreign land For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the Romans Legal rules existed, however, for the end of war War could be ended, first, through a treaty of peace, which was then always a treaty of friendship War could, secondly, be ended by surrender (*deditio*) Such surrender spared the enemy their lives and property War could, thirdly and lastly, be ended through conquest of the enemy's country (*occupatio*) It was in this case that the Romans could act according to discretion with the lives and the property of the enemy

From this sketch of their rules concerning external relations, it becomes apparent that the Romans gave to the future the example of a State with *legal* [1] rules for its foreign relations As the legal people *par excellence*, the Romans could not leave their international relations without legal treatment And though this legal treatment can in no way be compared to modern International Law, yet it constitutes a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations

No need for a Law of Nations during the Middle Ages

§ 41 The Roman Empire gradually absorbed nearly the whole civilised ancient world, so far as it was known to the Romans They hardly knew of any independent civilised States outside the borders of their Empire There was, therefore, neither room nor need for an International Law as long as this Empire existed It is true that at the borders of this World Empire there were always wars, but these

[1] But essentially municipal rather than international

wars gave opportunity for the practice of a few rules and usages only And matters did not change when under Constantine the Great (306-337) the Christian faith became the religion of the Empire and Byzantium its capital instead of Rome, and, further, when in 395 the Roman Empire was divided into the Eastern and the Western Empires [1] The Western Empire disappeared in 476, when Romulus Augustulus, the last emperor, was deposed by Odoacer, the leader of the Germanic soldiers, who made himself ruler in Italy The land of the extinct Western Roman Empire came into the hands of different peoples, chiefly of Germanic extraction In Gallia the kingdom of the Franks springs up in 486 under Chlodovech the Merovingian In Italy the kingdom of the Ostrogoths under Theodoric the Great, who defeated Odoacer, rises in 493 In Spain the kingdom of the Visigoths appears in 456 The Vandals had, as early as 429, erected a kingdom in Africa, with Carthage as its capital The Saxons had already gained a footing in Britannia in 449

All these peoples were barbarians in the strict sense of the term Although they had adopted Christianity, it took hundreds of years to raise them to the standard of a more advanced civilisation And, likewise, hundreds of years passed before different nations came to light out of the amalgamation of the various peoples that had conquered the old Roman Empire with the residuum of the population of that Empire It was in the eighth century that matters became more settled Charlemagne built up his vast Frankish Empire, and was, in 800, crowned Roman Emperor by Pope Leo III Again the whole world seemed to be one empire, headed by the Emperor as its temporal and by the Pope as its spiritual master, and for an International Law there was therefore no room and no need. But the Frankish Empire did not last long According to the Treaty of Verdun it was, in 843, divided into three

[1] On some aspects of the law of nations of that period as expressed in the writings of St Augustin see De Brière in *Revue de philosophie*, xxx (1930) pp 566 *et seq* , Kosters in *R I* , 3rd ser , 14 (1933), pp 31-61, 282 317, 634 676 See also Hrabar in *R I (Paris)*, 18 (1936), pp 2 39, 373 439, and Wright, *Medieval Internationalism* (1930)

parts, and with that division the process of development set in, which led gradually to the rise of the several States of Europe

In theory the Emperor of the Germans remained for hundreds of years to come the master of the world, but in practice he was not even master at home, as the German Princes, step by step, succeeded in establishing their independence And although, theoretically, the world was well looked after by the Emperor as its temporal and the Pope as its spiritual head, there were constantly treachery, quarrelling, and fighting going on The practice in war was the most cruel possible It is true that the Pope and the Bishops succeeded sometimes in mitigating such practice, but as a rule there was no influence of the Christian teaching visible

The Fifteenth and Sixteenth Centuries

§ 42 The necessity for a Law of Nations did not arise until a multitude of States absolutely independent of one another had successfully established themselves That process of development, starting from the Treaty of Verdun of 843, reached its climax with the reign of Frederic III, Emperor of the Germans from 1440 to 1493 He was the last of the Emperors crowned in Rome by the hands of the Popes At that time Europe was, in fact, divided up into a great number of independent States, and thenceforth a law was needed to deal with the international relations of these sovereign States Seven factors of importance prepared the ground for the growth of principles of a future International Law

(1) There were, first, the Civilians and the Canonists Roman Law was, in the beginning of the twelfth century, brought back to the West through Irnerius, who taught this law at Bologna He and the other *glossatores* and *post-glossatores* considered Roman Law the *ratio scripta*, the law *par excellence* These Civilians maintained that Roman Law was the law of the civilised world *ipso facto* through the Emperors of the Germans being the successors of the Emperors of Rome Their commentaries on the *Corpus Juris Civilis* touch upon many questions of the future International Law, which they discuss from the basis of Roman Law

The Canonists, on the other hand, whose influence was

unshaken till the time of the Reformation, treated from a moral and ecclesiastical point of view many questions of the future International Law concerning war [1]

(2) There were, secondly, collections of maritime law of great importance which made their appearance in connection with international trade From the eighth century world trade, which had totally disappeared in consequence of the downfall of the Roman Empire and the destruction of the old civilisation during the period of the migration of the peoples, began slowly to develop again The sea trade specially flourished, and fostered the growth of rules and customs of maritime law, which were collected into codes, and gained some kind of international recognition The more important of these collections are the following The *Consolato del Mare*, a private collection made at Barcelona in Spain in the middle of the fourteenth century [2], the *Laws of Oléron*, a collection, made in the twelfth century, of decisions given by the maritime court of Oléron in France, the *Rhodian Laws*, a very old collection of maritime laws which probably was put together between the seventh and the ninth centuries [3], the *Tabula Amalfitana*, the maritime laws of the town of Amalfi in Italy, which date at latest from the tenth century, the *Leges Wisbuenses*, a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century

The growth of international trade caused also the rise of the controversy regarding the freedom of the high seas (see below, § 248), which indirectly influenced the growth of an International Law (see below, §§ 248-250)

(3) A third factor was the numerous leagues of trading towns for the protection of their trade and trading citizens The most celebrated of these leagues was the Hanseatic, formed in the thirteenth century These leagues stipulated for arbitration on controversies between their members

[1] See Holland, *Studies*, pp 40 58, Walker, *History*, 1 pp 204 212, Vanderpol, *La doctrine scolastique du droit de guerre* (1919), and Delos in *R G*, 34 (1927), pp 505-519 And see below, § 52, for the various appreciations of the forerunners of Grotius

[2] See Nys, *Le droit des gens et les anciens jurisconsultes espagnols* (1914), pp 125 138

[3] See Ashburner, *The Rhodian Sea Law* (1909), Introduction, p cxii

towns. They acquired trading privileges in foreign States. They even waged war, when necessary, for the protection of their interests [1]

(4) A fourth factor was the growing custom on the part of the States of sending and receiving permanent legations In the Middle Ages the Pope alone had a permanent legation, at the court of the Frankish kings Later, the Italian Republics, Venice and Florence for instance, were the first States to send out ambassadors, who took up their residence for several years in the capitals of the States to which they were sent At last, from the end of the fifteenth century, it became a universal custom for the kings of the different States to keep permanent legations at one another's capitals The consequence was that an uninterrupted opportunity was given for discussing and deliberating upon common international interests And since the position of ambassadors in foreign countries had to be taken into consideration, international rules concerning inviolability and exterritoriality of foreign envoys gradually grew up

(5) A fifth factor was the custom of the great States of keeping standing armies, a custom which also dates from the fifteenth century The uniform and stern discipline in these armies favoured the rise of more universal rules and practices of warfare

(6) A sixth factor was the Renaissance and the Reformation [2] The Renaissance of science and art in the fifteenth century, together with the resurrection of the knowledge of antiquity, revived the philosophical and aesthetical ideals of Greek life and transferred them to modern life Through their influence the spirit of the Christian religion took precedence of its letter The conviction awoke everywhere that the principles of Christianity ought to unite the Christian world more than they had done hitherto, and that these principles ought to be observed in matters international as much as in matters national The Reformation, on the other hand, put an end to the spiritual mastership of the Pope over the civilised world Protestant States could not

[1] See Christoph, *Die Hansestadte und die Habsburgische Ostseepolitik im 30-jahrigen Kriege* (1935)

[2] See Boegner, *op cit* at p 67

recognise the claim of the Pope to arbitrate as of right in their conflicts either between one another or between themselves and Catholic States

(7) A seventh factor made its appearance in connection with the schemes for the establishment of eternal peace which arose from the beginning of the fourteenth century. Although these schemes were utopian, they nevertheless must have had great influence by impressing upon the princes and the nations of Christendom the necessity for some kind of organisation of the numerous independent States into a community The first of these schemes was that of the French lawyer, Pierre Dubois, who, as early as 1305, in *De Recuperatione Terre Sancte*, proposed an alliance between all Christian Powers for the purpose of the maintenance of peace and the establishment of a permanent court of arbitration for the settlement of differences between the members of the alliance [1] Another project arose in 1461, when Podiebrad, King of Bohemia from 1420 to 1471, adopted the scheme of his Chancellor, Antoine Marini, and negotiated with foreign courts the foundation of a Federal State to consist of all the existing Christian States with a permanent Congress, seated at Basle, of ambassadors of all the member-States as the highest organ of the Federation [2] A third plan was that of Sully, adopted by Henry IV of France, which proposed, in 1603, the division of Europe into fifteen States and the linking together of these into a Federation with a General Council as its highest organ consisting of Commissioners deputed by the member-States [3] A fourth project was that of Émeric Crucé, who, in 1623, proposed the establishment of a Union consisting not only

[1] See Meyer, *Die staats und volkerrechtlichen Ideen von Pierre Dubois* (1908), Schucking, *Die Organisation der Welt* (1909), pp 28-30, Vesnitch, *Deux précurseurs français du pacifisme*, etc (1911), pp 1 29, Zeek, *Der Publizist Pierre Dubois* (1911), Knight in *Grotius Society*, 9 (1924), pp 1-16 (with bibliography)

[2] See Schwitzky, *Der europaeische Fürstenbund Georgs von Podébrad* (1907), Schucking, *Die Organisation der Welt* (1909), pp 32 36, and Darby in *Grotius Society*, 4 (1919), pp 169-198 See also Bagdat, *La Querela Pacis d'Erasme*, 1517 (1924)

[3] See Kukelhaus, *Der Ursprung des Planes vom ewigen Frieden in den Memoiren des Herzogs von Sully* (1893), Nys, *Études de droit international et de droit politique* (1896), pp 301 306, Darby, *International Tribunals* (4th ed, 1904), pp 10 21, Butler, *Studies in Statecraft* (1920), pp 65 90

of the Christian States, but of all States then existing in the whole of the world, with a General Council as its highest organ, seated at Venice, and consisting of ambassadors of all the member-States of the Union.[1]

II

DEVELOPMENT OF THE LAW OF NATIONS AFTER GROTIUS

Lawrence, §§ 22 33, and *Essays*, pp 147 190—Halleck, 1 pp 14 49—Walker, *History*, 1 pp 138 202—Taylor, §§ 65 95—Hershey, §§ 62 86*l*—Fenwick, pp 19 33—Nys, 1 pp 23 50—Martens, 1 §§ 21 33—Fiore, 1 §§ 32 52—

[1] See Balch, *Le Nouveau Cynée de Émeric Crucé* (1909), Darby, *International Tribunals* (4th ed, 1904), pp 22 33, Vesnitch, *Deux précurseurs français du pacifisme*, etc (1911), pp 29-54, Butler, *op cit*, pp 91-104

The schemes enumerated in the text are those which were advanced before the appearance of Grotius' work, *De Jure Belli ac Pacis* (1625) The numerous plans which made their appearance afterwards—that of the Landgrave of Hesse Rheinfels, 1666, of Charles, Duke of Lorraine, 1688, of William Penn, 1693, of John Bellers, 1710, of the Abbé de Saint Pierre (1658 1743), of Kant, 1795, and of others—are for the most part discussed in Schucking, *Die Organisation der Welt* (1909), in Darby, *International Tribunals* (4th ed, 1904), in Lorimer, II pp 216 239, who himself develops a scheme (pp 240 299), in Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung*, vol I, 1300 1800 (1917), vol II (I) (1789 1870) (1929), and vol II (II) (1940), by Lange in *Hague Recueil*, 1926 (III), pp 175-411, Hemleben, *Plans for World Peace through Six Centuries* (1943) See also Kao Lou, *Conception d'une Fédération Mondiale* (1930), and Alvarez, *L'organisation internationale* (1931) See on the scheme of Cardinal Alberoni (1736), Vesnitch, *Le Cardinal Alberoni Pacifiste* (1912), and in *A J*, 7 (1913), pp 51 107, and Darby in *Grotius Society*, 5 (1920), pp 71-81, see on the scheme of the Abbé de Saint Pierre, Seroux d'Agincourt, *Exposé des projets de paix perpétuelle de l'Abbé de Saint Pierre et Bentham et Kant*, etc (1905), Borner, *Über das Weltstaatsprojekt des Abbé de Saint Pierre* (1913), Dupuis in *R I* (*Paris*), 2 (1928), pp 989-1011, Post, *ibid*, 11 (1933), pp 218 234 As to Guillaume Aubert, a precursor of Crucé, see Lejeune Dehousse in *R I* (*Paris*), 15 (1935), pp 104 119 See also Bourgeois, *La théorie du droit international chez Proudhon* (1927) As to Kant see Moog, *Kant's Ansichten über Krieg und Frieden* (1917), Vorlander, *Kant und der Gedanke des Volkerfriedens* (1919), Kraus, *Das Problem internationaler Ordnung bei Kant* (1931), Hoor in *Nordisk T A*, *Acta Scandinavica*, 5 (1934), pp 82-89 See also Gargaz, *A Project of Universal and Perpetual Peace*, 1782, edited in New York, 1922 See also Ladd, *An Essay on a Congress of Nations* (1840) (reprinted in 1916 with an Introduction by Scott) For Lord Beauvalé's project in 1840 for a 'League' to preserve peace see Rodkey in *American Historical Review*, 35 (1929 1930), pp 308 316 The Grotius Society published in 1927 the following texts containing reprints of peace projects with notes No 4, *Quakers and Peace*, No 5, the Abbe de Saint-Pierre's *Abrégé du Projet de Paix Perpétuelle*, No 6, Bentham's *Plea for an Universal and Perpetual Peace*, No 7, Kant's *Perpetual Peace* The outbreak of the First World War in 1914 caused the appearance of numerous further plans for the establishment of eternal peace (see below, § 167*a*) As to the literature in the course of the Second World War see below, § 168.

Calvo, I pp 32 101—Fauchille, §§ 87 146 (10)—Despagnet §§ 20 27 —Mérignhac, I pp 43 79—Ullmann, §§ 15 17—Liszt, §§ 3 (II), 4—De Louter, I pp 96 159—Laurent, *Histoire du droit des gens*, etc, 18 vols (2nd ed 1861 1868)—Wheaton, *Histoire des progrès du droit des gens en Europe* (1841)—Pierantoni, *Storia del Diritto internazionale nel Secolo xix* (1876)—Hosack, *Rise and Growth of the Law of Nations* (1882), pp 227 319—Brie, *Die Fortschritte des Volkerrechts seit dem Wiener Congress* (1890)—Gareis, *Die Fortschritte des internationalem Rechts im letzten Menschenalter* (1905)—Dupuis, *Le principe d'équilibre et le concert européen de la Paix de Westphalie à l'Acte d'Algésiras* (1909)—Strupp, *Urkunden zur Geschichte des Volkerrechts*, 2 vols (1911)—Conner, *The Development of Belligerent Occupation* (1912)—Hill, *History of Diplomacy in the International Development of Europe*, vol III (1914)—Muir, *Nationalism and Internationalism* (1916)—Phillimore, *Three Centuries of Treaties of Peace and their Teaching* (1917), pp 13 111—Dupuis, *Le droit des gens et les rapports des Grandes Puissances avec les autres états avant le pacte de la Société des Nations* (1920)—Nippold in *Hague Recueil*, 1924 (I), pp 5 121—Reeves, *ibid*, (II), pp 19 42—Lange, *ibid*, 1926 (III), pp 249 411—Vinogradoff in *Bibliotheca Visseriana*, I (1923), pp 46 70—Kosters, *ibid*, IV (1925) pp 65 251—Redslob, works cited above, § 37—Goldschmid in *Strupp, Wort*, III pp 484 496—Butler and Maccoby, *The Development of International Law* (1928), pp 193 502—Ter Meulen, cited above at p 79, n —Dickinson, *The International Anarchy*, 1904 1914 (1926)—Mirkine Guetzevitch, *Les traités internationales de l'Europe orientale* (1929)—the same in *Hague Recueil*, vol 22 (1928) (II), pp 299 457 (on the influence of the French Revolution)—Headlam Morley, *Studies in Diplomatic History* (1930)—Mowat, *The Concert of Europe* (1930)—Simons, *The Evolution of International Public Law in Europe since Grotius* (1931)—Schaeder, *Die dritte Koalition und die heilige Allianz* (1934)—Van Vollen hoven, *The Law of Peace* (transl from the Dutch, 1936), pp 81 112—Wegner, *Die Geschichte des Volkerrechts* (1936), pp 166 300—Hershey in *A J*, 6 (1912), pp 30 67—Pearce Higgins in *Cambridge History of the British Empire*, vol I (1929) ch VI —Le Fur in *Hague Recueil*, vol 41 (1932) (III), pp 505 601—van Kan, *ibid*, vol 66 (1938) (IV), pp 558 597 —Lauterpacht in *B Y*, 23 (1946), pp 1 53

The Time of Grotius

§ 43 The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe Many interests and aims knitted these States together into a community of States International lawlessness was henceforth an impossibility This was the reason for the fact that Grotius' work, *De Jure Belli ac Pacis, libri III*, which appeared in 1625, won the ear of the different States, their rulers, and their writers on matters international Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied

a legal basis to most of those international relations which were at the time considered as lacking such a basis, the book of Grotius obtained such a world-wide influence that he is correctly styled the 'Father of the Law of Nations' It would be very misleading, and in no way consistent with the facts of history, to believe that Grotius' doctrines were as a body at once universally accepted No such thing happened, or could have happened What did soon take place was that, whenever an international question of legal importance arose, Grotius' book was consulted, and its authority was so overwhelming that in many cases its rules were considered right How those rules of Grotius, which have more or less quickly been recognised by the common consent of the writers on International Law, have gradually received similar acceptance at the hands of the Family of Nations, is a process of development which in each single phase cannot be ascertained It can only be stated that at the end of the seventeenth century the civilised States considered themselves bound by a Law of Nations, the rules of which were to a great extent the rules of Grotius This does not mean that these rules have from the end of that century never been broken On the contrary, they have frequently been broken Although the several Governments recognised the Law of Nations when its rules suited their interests, consciously or unconsciously they violated it in many cases, when they thought that a rule was opposed to their interests But whenever this occurred, the Governments concerned maintained either that they did not intend to break these rules, or that their acts were in harmony with them, or that they were justified by just causes and circumstances in breaking them And the development of the Law of Nations did not come to a standstill with the reception of the bulk of the rules of Grotius More and more rules were gradually required, and therefore gradually grew up All the historically important events and facts of international life from the time of Grotius down to our own have, on the one hand, given occasion to the manifestation of the existence of a Law of Nations, and, on the other hand, in their turn made the Law of Nations constantly and gradually

develop into a more perfect and more complete system of legal rules [1]

Four Lessons of the History of the Law of Nations.

§ 51 In particular, there are certain lessons which may be derived from a study of that period [2]

(1) The first moral is that the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or, what is the same thing, of democracy over autocracy

[1] In §§ 44 50c of the first four editions of this treatise there followed a survey of the principal historical events from 1648 to 1928 For various reasons, including reasons of space, these sections have now been omitted But it has been useful to retain and to bring up to date the bibliography relating to the development of International Law during that period As to the period up to the First World War see the bibliography on p 79 As to the period during and since the First World War see Garner, *International Law and the World War*, 2 vols (1920) (cited as 'Garner'), *Recent Developments in International Law* (1925) (cited as 'Garner, *Developments*'), and *Prize Law during the World War* (1927), Fauchille, §§ 146 146 (10), Mérignhac et Lémonon, *Le droit des gens et la guerre de* 1914 1918, 2 vols (1921), Liszt, § 4, B-F, Schucking, *Die volkerrechtliche Lehre des Weltkrieges* (1917), *Volkerrecht im Weltkrieg*, 4 vols (1919-1928), by the Investigation Committee of the German Reichstag, Nippold in *Hague Recueil*, 1923, pp 78 117, *Strupp, Wort*, in pp 36-148, 204 211, 227 292, 544-635 As to the impulse given to the restatement of International Law see above, § 1, p 4 As to the Peace Conference and the resettlement of the world after the First World War see Temperley, *History of the Peace Conference*, 6 vols (1920 1924) (cited as 'Temperley'), *La Documentation Internationale La Paix de Versailles*, 12 vols (1930), Toynbee's annual *Survey of International Affairs* from 1920 onwards (cited as 'Toynbee, *Survey*') and Toynbee, *The World after the Peace Conference* (1925), Hershey, §§ 86c-86*l*, Mowat, *A History of European Diplomacy*, 1914 1925 (1927) For literature upon the causes of the war see below, vol II § 62 (n), and Gooch, *Recent Revelations of European Diplomacy* (1927) (a survey of post war literature) The following are bibliographies Prothero, *Select Analytical List of Books concerning the Great War* (1923), Hall, *British Archives and the Sources for the History of the World War* (1925), Wegerer, *Bibliographie zur Vorgeschichte des Weltkrieges* (1934) See also Gathorne Hardy, *A Short History of International Affairs*, 1920 1934 (1934), Wegner, *Die Geschichte des Volkerrechts* (1936), pp 301-353, Van Vollenhoven, *The Law of Peace* (translated from Dutch), 1936, pp 160 221, Rappard, *The Quest for Peace* (1940)

[2] No change has been made by the present editor in the wording of this section except that certain passages have been omitted, namely, those relating to dynastic wars and to the balance of power As to the latter see Bulmerincq, *Praxis, Theorie und Codification des Volkerrechts* (1874), pp 40 50 On the balance of power see Donnadieu, *Essai sur la théorie de l'équilibre* (1900), Kaeber, *Der Idee des europaischen Gleichgewichts* (1907), Dupuis, works cited above, § 43, Tardieu, *La France et les alliances, la lutte pour l'équilibre* (1909), Hoijer, *La théorie de l'équilibre et le droit des gens* (1917), Ter Meulen, *Der Gedanke der internationalen Organisation* (1917), pp 38 60, Vestal, *The Maintenance of Peace* (1920), Scott, *The Development of Modern Diplomacy* (1921), Wright, *The Causes of War and Conditions of Peace* (1935), pp 49 72, and the same, *A Study of War* (1942), pp 743 766 See also Triepel, *Die Hegemonie, Ein Buch von führenden Staaten* (1938), Spencer in *A J*, 9 (1915), pp 45 71, Wistrand, *ibid*, 15 (1921), pp 523 529

Autocratic government, not being responsible to the nation it dominates, has a tendency to base the external policy of the State, just as much as its internal policy, on brute force and intrigue, whereas constitutional government cannot help basing both its external and its internal policy ultimately on the consent of the governed And although it is not at all to be taken for granted that democracy will always and everywhere stand for international right and justice, so much is certain, that it excludes a policy of personal aggrandisement and insatiable territorial expansion, which in the past has been the cause of many wars.

(2) The second moral is that the principle of nationality [1] is of such force that it is fruitless to try to stop its victory Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a State of their own, in which they can live according to their own ideals, and can build up a national civilisation, they will certainly get that State sooner or later What international politics can, and should do, is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority.[2] States embracing a population of several nationalities can exist and will always exist, as many examples show.

(3) The third moral is that the progress of International Law depends to a great extent upon whether the legal school of international jurists prevails over the diplomatic school [3] The legal school desires International Law to develop more or less on the lines of Municipal Law, aiming

[1] See Le Fur in *R I*, 3rd ser, II (1921), pp 193 224, 385-414 And see Holland Rose, *Nationality in Modern History* (1916), Hayes, *Essays on Nationalism* (1926), and *The Historical Evolution of Modern Nationalism* (1931), Quincy Wright, *A Study of War* (1942), vol II pp 986-1011, *Nationalism* A Report by a Study Group of the Royal Institute of International Affairs (1940), Friedmann, *The Crisis of the National State* (1943), Kohn, *The Idea of Nationalism* (1944), Hertz, *Nationalism in History and Politics* (1944), Carr, *Nationalism and After* (1945), Cobban, *National Self Determination* (1945)

[2] See below, §§ 340*b*-340*d*

[3] These schools are here referred to as 'diplomatic' and 'legal' for want of better denomination They must, however, not be confounded with the three schools of the 'Naturalists,' 'Positivists,' and 'Grotians,' details concerning which will be given below, §§ 55-57

at the codification of firm, decisive, and unequivocal rules of International Law, and working for the establishment of international courts for the purpose of the administration of international justice The diplomatic school, on the other hand, considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules The diplomatic school opposes the establishment of international courts, because it considers diplomatic settlement of international disputes, and, failing this, arbitration, preferable to international administration of justice by international courts composed of permanently appointed judges There is, however, no doubt that international courts are urgently needed, and that the rules of International Law require now an authoritative interpretation and administration such as only an international court can supply

(4) The fourth, and last, moral, is that the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests The higher the standard of public morality rises, the more will International Law progress And the more important international economic interests grow, the more International Law will grow For, looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors, and at the same time the basis for a favourable development of moral and economic interests This being an indisputable fact, it may, therefore, fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour

III

THE SCIENCE OF THE LAW OF NATIONS

Phillimore, 1 Preface to the first edition—Lawrence, §§ 22-29—Manning, pp 21 65 —Halleck, 1 pp 18 21, 25 27, 30 33, 35 38, 46 49—Walker, *History*, 1 pp 203-337, and *The Science of International Law* (1893), *passim*—Taylor, §§ 37 48 — Wheaton, §§ 4 13 — Hershey, §§ 54 62 — Fenwick, ch III —Rivier in *Holtzendorff*, 1 pp 395 523—Nys, 1 pp 224-351—Martens, 1 §§ 34 38—Fiore, 1 §§ 53-88, 164-185, 240 272—Anzilotti, pp 1-40—Brierly, pp 9-33—Calvo,1 pp 27-34, 45 46, 51-55, 61-63,

70-73, 101-137—Fauchille, §§ 35 37, 147-153 (2)—Despagnet, §§ 28 35—Ullmann, § 18—Liszt, §§ 5, 6—Kohler, §§ 1, 21—Cruchaga, 1 §§ 122 127—Kaltenborn, *Die Vorlaufer des Hugo Grotius* (1848)—Holland, *Studies*, pp 1 58, 168 175—Westlake, *Papers*, pp 23 77—Ward, *Enquiry into the Foundation and History of the Law of Nations*, 2 vols (1795)—Reddie *Enquiries in International Law*, 2nd ed (1851), pp 27-108—Bulmerincq, *Die Systematik des Volkerrechts* (1858)—Nys, *Le droit de la guerre et les précurseurs de Grotius* (1882), *Notes pour servir à l'histoire du droit international en Angleterre* (1888), *Les origines du droit international* (1894), *Le droit des gens et les anciens jurisconsultes espagnols* (1914), and in *A J*, 6 (1912), pp 1 29, 279 315—Wheaton, *Histoire des progrès du droit des gens en Europe* (1841)—Figgis, *From Gerson to Grotius* (1907)—Vanderpol, *Le droit de guerre d'après les théologiens et les canonistes du moyen âge* (1911) and *La doctrine scolastique du droit de guerre* (1919)—Focherini, *La dottrina canonica del diritto della guerra da S Agostino a Balthazar d'Ayala* (1912)—Schilling, *Das Volkerrecht nach Thomas von Aquin* (1919)—Stier Somlo in *Strupp, Wort*, III pp 212 227—Knubben, *ibid*, pp 227 292 (with ample bibliography)—Holdsworth, *History of English Law*, vol v (1924), pp 25-60—Wright, *Research in International Law since the War* (1930)—Scott, *The Spanish Origin of International Law Francisco de Vitoria and his Law of Nations* (1934), and the same, *The Catholic Conception of International Law* (1934)—Eppstein, *The Catholic Tradition of the Law of Nations* (1935)—Oppenheim in *A J*, 1 (1908), pp 313 356—Pollock in *The Cambridge Modern History*, XII (1910), pp 703 729—Nys in *R I*, 2nd ser, 14 (1912), pp 360, 494, 614, and 16 (1914), pp 245 286—Scelle in *R G*, 30 (1923), pp 116 142—Brierly in *B Y*, 5 (1924), pp 4 16—Lauterpacht, *ibid*, 8 (1927), pp 89 107—Wehberg in *Friedens warte*, XXIX (1929) pp 163-172—Vitta in *Rivista*, 21 (1929), pp 501 525—Kunz in *Z ö R*, 14 (1934), pp 318-335 (as to the United States)—Akzin in *Iowa Law Review*, 20 (1935), pp 774 784—Castberg in *Hague Recueil*, vol 43 (1933) (I), pp 313 381—Catellani, *ibid*, 46 (1933) (IV), pp 709 825—Pearce Higgins, *ibid*, 40 (1932) (II), pp 5 85—Lunstedt in *New York University Law Quarterly Review*, 10 (1932 1933), pp 326 340—Brierly in *L Q R*, 51 (1935), pp 24 35—Moore in *H L R*, 50 (1937), pp 395 448—Kelsen in *O Z o R*, 1 (1946), pp 20 83—Schwarzenberger in *H L R*, 60 (1947), pp 539 570—See also the bibliographies enumerated below in § 61, and literature in n 2 on p 4, in n 2 on p 20, and n 6 on p 103

§ 52 The science of the modern Law of Nations commences from Grotius' work, *De Jure Belli ac Pacis, libri III*, because in it a fairly complete system[1] of International Law was for the first time built up as an independent branch of the science of law But there were many writers before Grotius who wrote on special parts of the Law of Nations They are therefore commonly called 'Forerunners of Grotius' The most important of these forerunners are

Forerunners of Grotius

[1] For a good analysis of the work of Grotius see Walker, *History*, pp 284 329

the following (1) Legnano, Professor of Law in the University of Bologna, who wrote in 1360 his book, *De Bello, de Represaliis, et de Duello*, which was, however, not printed before 1477 [1], (2) Belli (1502-1575), an Italian jurist and statesman, who published in 1563 his book, *De Re militari et de Bello* [2], (3) Brunus (1491-1563), a German jurist, who published in 1548 his book, *De Legationibus*, (4) Vitoria (1480-1546), professor in the University of Salamanca, whose *Relectiones theologicae*,[3] which partly deal with the Law of War, were published after his death in 1557, (5) Ayala (1548-1584), of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma He published in 1582 his book, *De Jure et Officiis bellicis et Disciplina militari* [4], (6) Suarez [5] (1548-1617), a Spanish Jesuit and professor at Coimbra, who published in 1612 his *Tractatus de Legibus ac Deo legislatore*, in which (II c 19, n. 8) for the first time the attempt is made to found a law between the States on the fact that they form a community of States, (7) Gentilis (1552-1608), an Italian jurist, who became Professor of Civil Law in Oxford He published in 1585 his work, *De Legationibus*,[6] in 1588 and

[1] Edited in Scott's *Classics of International Law*, by Holland, together with an English translation by Brierly (1917)

[2] Edited in Scott's *Classics of International Law*, with an English translation by Nutting (1937)

[3] See details in Holland, *Studies*, pp 51 52, the analysis in Walker, *History*, pp 215 229, Trelles, *Francisco de Vitoria* (1928), and in *Hague Recueil*, vol 17 (1927) (II), pp 113-337, Scott, Wright, and others in *Addresses in Commemoration of the Fourth Centenary of De Indis and De Jure Belli* (Washington, 1933), Reigada, 'El derecho de gentes segun Vitoria,' in *Anuario de la Associacion F de Vitoria*, VI (1933) pp 37-41, and, in particular, Scott, *The Spanish Origin of International Law Francisco de Vitoria and his Law of Nations* (1934), the same, *The Catholic Conception of International Law* (1934), Heydte in Z o R, 13 (1933), pp 239 268 (with a bibliography), Gasa in *Revista de derecho internacional*, 36 (1939), pp 77-116, 145 169 The parts dealing with the Law of War, namely, *De Indis et de Jure Belli Relectiones*, were re edited in 1917 by Nys in Scott's *Classics of International Law*, with an English translation by Bate See also Benkert, *The Thomistic Conception of International Society* (1942), Muñoz in *The Thomist*, January 1947, Brierly in *Dublin Review*, July 1947

[4] Edited in Scott's *Classics* of *International Law*, by Westlake, with an English translation by Bate (1912) On Ayala see Nys in *R I*, 2nd ser, 15 (1913), pp 225 239, and Knight in *J C L*, 3rd ser, vol 3 (1921), pp 220 227

[5] See Sherwood in *Grotius Society*, 12 (1927), pp 19-28, Schuster in *Z o R*, 16(1936), pp 487 495, Trelles in *Hague Recueil*, vol 43 (1933) (I), pp 389 546, and Scott, *op cit* above, n 2

[6] Edited in Scott's *Classics of International Law*, with an introduction by Nys and a translation by Laing (1924)

1589 his *Commentationes de Jure Belli*, and in 1598 an enlarged work on the same matter under the title, *De Jure Belli, libri tres*.[1] His *Advocatio Hispanica* was edited, after his death, in 1613 by his brother Scipio Gentilis' book, *De Jure Belli*, supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotius' *De Jure Belli ac Pacis* 'The first step' —Holland rightly says—'towards making International Law what it is was taken, not by Grotius, but by Gentilis.'

Grotius

§ 53 Although Grotius owes much to Gentilis, he is nevertheless the greater of the two, and bears by right the title of 'Father of the Law of Nations' Hugo Grotius[2] was born at Delft in Holland in 1583 He was from his earliest childhood known as a 'wondrous child' on account of his marvellous intellectual gifts and talents He began to study law at Leyden when only eleven years old, and at the age of fifteen he took the degree of Doctor of Laws at Orleans in France He acquired a reputation, not only as a jurist, but also as a Latin poet and a philologist He first practised as a lawyer, but afterwards took to politics and became involved in political and religious quarrels which led to his arrest in 1618 and condemnation to prison for life In 1621, however, he succeeded in escaping from

[1] Re edited in 1877 by Holland, and in Scott's *Classics of International Law*, with a translation by Rolfe and an introduction by Phillipson (1933) On Gentilis see Holland, *Studies*, pp 1-39, Westlake, *Papers*, pp 33-36, Walker, *History*, i pp 249 277, Thamm, *Albericus Gentilis und seine Bedeutung für das Volkerrecht* (1896), Bavaj, *Alberico Gentili* (1935), Phillipson in *J C L*, New Ser, 12 (1912), pp 52-80, Balch in *A J*, 5 (1911), pp 665 679, Abbot in *A J*, 10 (1916), pp 737 748

[2] See Vreeland, *Hugo Grotius* (1917), and in *A J*, 11 (1917), pp 580 606 The tercentenary in 1925 of the publication of Grotius' great work was responsible for the output of a mass of new literature of which the following may be mentioned Knight, *The Life and Works of Hugo Grotius* (1925), van Vollenhoven in *Bibliotheca Visseriana*, vi. (1926) pp. 5 44, and in *A J*, 19 (1925), pp 1-11 Lysen, *Hugo Grotius, opinions sur sa vie et ses œuvres* (1925), Ter Meulen, *Concise Bibliography of Hugo Grotius* (1925), Higgins, *The Work of Grotius* in *Cambridge Legal Essays* (1926), Scott in *A J*, 19 (1925), pp 461-468, Roscoe Pound, *ibid*, pp 685 688, van Eysinga in *R I*, 3rd ser, 6 (1925), pp 269 279, Scott, *ibid*, pp 481-527, Hrabar, *ibid*, pp 537-555, Bourquin, *ibid*, 7 (1926), pp 86-125, van der Vlugt in *Hague Recueil*, 1925 (ii), pp 397-506, Geyl in *Grotius Society*, 12 (1927), pp 81-96, Balogh in *New York University Law Quarterly Review*, 7 (1929 1930), pp 261-292 And see Lee in *Proceedings of the British Academy*, 16 (1930), pp 218-279, in *L Q R*, 62 (1946), pp 53 57, and in *Grotius Society*, 31 (1946), pp 193 215, Sandifer in *A J*, 34 (1940), pp 459 472, Lauterpacht in *B.Y*, 23 (1946), pp. 1 53.

prison, and went to live for ten years in France In 1634 he entered into the service of Sweden and became Swedish Minister in Paris He died in 1645 at Rostock in Germany on his way home from Sweden, whither he had gone to tender his resignation

Even before he had the intention of writing a book on the Law of Nations, Grotius took an interest in matters international For in 1609, when only twenty-four years old, he published—anonymously at first—a short treatise under the title *Mare liberum*, in which he contended that the open sea could not be the property of any State, whereas the contrary opinion was generally prevalent [1] But it was not until fourteen years later that Grotius began, during his exile in France, to write his *De Jure Belli ac Pacis, libri iii*,[2] which was published, after a further two years, in 1625, and of which it has rightly been maintained that no other book, with the single exception of the Bible, has ever exercised a similar influence upon human minds and matters

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of the special consent of the single States Long before Grotius, the opinion was generally prevalent that above the positive law, which had grown up by custom or by legislation of a State, there was in existence another law which had its roots in human reason, and which could therefore be discovered without any knowledge of positive law This law of reason was called Law of Nature or Natural Law But the system of the Law of Nature which Grotius built up, and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence, so that Grotius appeared

[1] See, for details with regard to the controversy concerning the freedom of the open sea, below, §§ 248 250 Grotius' treatise, *Mare liberum*, is—as we know now—the twelfth chapter of the work *De Jure Praedae*, written in 1604, but never published by Grotius, it was not printed till 1868 see below, § 250 A new edition by J B Scott, with an English translation by Magoffin, appeared in New York (1917)

[2] Edited in Scott's *Classics* of *International Law*, with a translation by Kelsey and an introduction by Scott (1925)

to posterity as the Father of the Law of Nature as well as that of the Law of Nations [1]

Whatever we may nowadays think of this Law of Nature, the fact remains that for more than two hundred years after Grotius, jurists, philosophers, and theologians firmly believed in it And there is no doubt that, but for the systems of the Law of Nature and the doctrines of its prophets, modern Constitutional Law and the modern Law of Nations would not be what they actually are The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times The modern Law of Nations in particular owes its very existence to the theory of the Law of Nature Grotius took the decisive step of secularising the law of nature and of emancipating it from purely theological doctrine He did not deny that there already existed in his time a good many customary rules for the international conduct of the States, but he expressly kept them apart from those rules which he considered the outcome of the Law of Nature He distinguishes, therefore, between the *Jus Gentium*, the customary Law of Nations—he calls it *Jus voluntarium*, *voluntary* Law—and the *Jus Naturae*, concerning the international relations of the States, afterwards called the *natural* Law of Nations The bulk of Grotius' interest is concentrated upon the natural Law of Nations, since he considered the voluntary of minor importance But, nevertheless, he does not quite neglect the voluntary Law of Nations Although he mainly and chiefly lays down the rules of the natural Law of Nations, he always mentions also voluntary rules concerning the different matters

Grotius' influence was soon enormous, and reached over the whole of Europe His book [2] went through more than

[1] See Pollock, *The History of the Law of Nature*, in *J C L*, New Ser, 2 (1900), pp 418 433, and 3 (1901), pp 204 213 (reprinted in Pollock, *Essays in the Law* (1922)) The 'new' Law of Nature—see Charmant, *La renaissance du droit naturel* (1910)—is something quite different from the Law of Nature taught by Grotius and his followers See below, § 59, p 103, n 6 And see Stapleton, *Justice and World Society* (1943), and Lauterpacht, *An International Bill of the Rights of Man* (1945), pp 26 53

[2] See Rivier in *Holtzendorff*, 1 p 412 An English translation was published in 1854 by William Whewell See Reeves in *A J*, 19 (1925), pp 251 262, for a bibliographical account

forty-five editions, and many translations have been published

Zouche

§ 54 But the modern Law of Nations has another, though minor, founder besides Grotius, and this is an Englishman, Richard Zouche[1] (1590-1660), Professor of Civil Law at Oxford, and a Judge of the Admiralty Court A prolific writer, the book through which he acquired the title of 'Second founder of the Law of Nations' appeared in 1650, and bears the title *Juris et Judicii fecialis, sive Juris inter Gentes, et Quaestionum de eodem Explicatio, qua, quae ad Pacem et Bellum inter diversos Principes aut Populos spectant, ex Praecipuis historico Jure peritis exhibentur*[2] This little book has rightly been called the first manual of the *positive* Law of Nations The standpoint of Zouche is totally different from that of Grotius, in so far as, according to him, the customary Law of Nations is the most important part of that law, although, as a child of his time, he does not at all deny the existence of a natural Law of Nations It must be specially mentioned that Zouche was the first who used the term, *Jus inter Gentes*, for that new branch of law Grotius knew very well, and says, that the Law of Nations is a law *between* the States, but he called it *Jus Gentium*, and it is due to his influence that until Bentham nobody called the Law of Nations *Inter*national Law

The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche,[3] gave rise in the seventeenth and eighteenth centuries to three different schools[4] of writers on the Law of Nations—namely, the 'Naturalists,' the 'Positivists,' and the 'Grotians'

[1] See Phillipson in *J C L*, New Ser, 9 (1908), pp 281 304

[2] Edited in Scott's *Classics of International Law*, by Holland, with an English translation by Brierly (1911)

[3] It should be mentioned that already before Zouche, another Englishman, John Selden, in his *De Jure naturali et Gentium secundum Disciplinam Ebraeorum* (1640), recognised the importance of the positive Law of Nations The successor of Zouche as a Judge of the Admiralty Court, Sir Leoline Jenkins (1625 1684), ought also to be mentioned His opinions concerning questions of maritime law, and in particular prize law, were of the greatest importance for the development of maritime International Law See Wynne, *Life of Sir Leoline Jenkins*, 2 vols (1740), and Llewelyn Davies in *Grotius Society*, 21 (1935), pp 149 160

[4] These three schools of writers

§ 55 'Naturalists,' or 'Deniers of the Law of Nations,' is the appellation of those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only a part of the Law of Nature The leader of the Naturalists is Samuel Pufendorf [1] (1632-1694), who occupied the first chair which was founded for the Law of Nature and Nations at a university—namely, that at Heidelberg Among the many books written by Pufendorf, three are of importance for the science of International Law (1) *Elementa Jurisprudentiae universalis*, 1666 [2], (2) *De Jure Naturae et Gentium*, 1672 [3], (3) *De Officio Hominis et Civis juxta Legem naturalem*, 1673 [4] Starting from the assertion of Hobbes, *De Cive*, XIV 4, that natural law is to be divided into natural law of individuals and of States, and that the latter is the Law of Nations, Pufendorf [5] adds that outside this natural Law of Nations no voluntary or positive Law of Nations exists which has the force of real law (*quod quidem legis proprie dictae vim habeat, quae gentes tamquam a superiore profecta stringat*) The Naturalists

The most celebrated follower of Pufendorf is the German philosopher Christian Thomasius (1655-1728), who published in 1688 his *Institutiones Jurisprudentiae*, and in 1705 his *Fundamenta Juris Naturae et Gentium* Of English Naturalists may be mentioned Francis Hutcheson (*System of Moral Philosophy*, 1755), and Thomas Rutherforth (*Institutes of Natural Law*, being the Substance of a Course of Lectures on Grotius, read in St John's College, Cambridge, 2 vols 1754-1756) Jean Barbeyrac (1674-1744), the learned French

must not be confused with the division of the present international jurists into the diplomatic and legal schools, see above, § 51

[1] See Phillipson in *J C L*, New Ser, 12 (1912), pp 233 265

[2] Edited in Scott's *Classics of International Law*, with a translation by Zeydel and an introduction by Wehberg (1931)

[3] Edited in Scott's *Classics of International Law*, with a translation by C H Oldfather and W A Oldfather and an introduction by Simons (1934)

[4] Edited in Scott's *Classics of International Law*, with a translation by F G Moore and an introduction by Schucking (1927)

[5] *De Jure Naturae et Gentium*, II c 3, § 22 On Leibnitz as an international lawyer see Walter Jones in *B Y*, 22 (1945), pp 1 10 For a comparison of the teaching of Hobbes and Spinoza in relation to international law see Lange in *Acta Scandinavica*, 7 (1936), pp 83-106 As to Spinoza see Lauterpacht in *B Y*, 8 (1927), pp 89 107

translator and commentator on the works of Grotius, Pufendorf, and others, and, further, Jean Jacques Burlamaqui (1694-1748), a native of Geneva, who wrote *Principes du droit de la nature et des gens*, ought likewise to be mentioned

The Positivists

§ 56 The 'Positivists' are the antipodes of the Naturalists They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche The positivist writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century

Of seventeenth-century writers, the Germans Rachel and Textor must be mentioned Rachel published in 1676 his two dissertations, *De Jure Naturae et Gentium*,[1] in which he defines the Law of Nations as the law to which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States[2] Textor published in 1680 his *Synopsis Juris Gentium*[3] According to him, the Law of Nations is founded on custom and express agreements

In the eighteenth century the leading Positivists, Bynkershoek, Moser, and Martens, gained an enormous influence

Cornelius van Bynkershoek[4] (1673-1743), a celebrated Dutch jurist, never wrote a treatise on the Law of Nations, but gained fame through three books dealing with different parts of this law He published in 1702 *De Dominio Maris*,[5] in 1721 *De Foro Legatorum*, in 1737 *Quaestionum Juris publici, libri ii*[6] According to Bynkershoek the basis of

[1] Edited in Scott's *Classics of International Law*, by von Bar, with an English translation by Bate 1916), see Ruhland in *Z I*, vol 34 (1925), pp 1 112

[2] *Dissertatio altera*, § *xvi*, *Jus igitur gentium est jus plurium liberarum gentium pacto sive placito expressum aut tacite initum, quo utilitatis gratia sibi invicem obligantur*

[3] Edited in Scott's *Classics of International Law*, by von Bar, with a translation by Bate (1916)

[4] See Philipson in *J C L*, New Ser, 9 (1908), pp 27 49

[5] Edited by Scott in Scott's *Classics of International Law*, with a translation by Magoffin (1923)

[6] Edited in Scott's *Classics of International Law*, with a translation by Frank and an introduction by de Louter (1930)

the Law of Nations is the common consent of the nations which finds its expression either in international custom or in international treaties

Johann Jakob Moser (1701-1785),[1] a German Professor of Law, published many books concerning the Law of Nations, of which three must be mentioned (1) *Grundsatze des jetzt ublichen Volkerrechts in Friedenszeiten*, 1750, (2) *Grundsatze des jetzt ublichen Volkerrechts in Kriegszeiten*, 1752, (3) *Versuch des neuesten europaischen Volkerrechts in Friedens- und Kriegszeiten*, 1777-1780 Moser's books are magazines of an enormous number of facts which are of the greatest value for the positive Law of Nations

Georg Friedrich von Martens (1756-1821), Professor of Law in the University of Göttingen, also published many books concerning the Law of Nations The most important is his *Précis du droit des gens moderne de l'Europe*, published in 1789, of which William Cobbett published in 1795 at Philadelphia an English translation, and of which as late as 1864 there appeared a new edition at Paris with notes by Charles Vergé Martens began the celebrated collection of treaties which goes under the title, *Martens, Recueil de traités*, and is continued to our day[2] The influence of Martens was great, and even at the present time is considerable He is not an exclusive Positivist, since he does not deny the existence of the natural Law of Nations, and since he sometimes refers to the latter where he finds a gap in the positive Law of Nations But his interest is in the positive Law of Nations, which he builds up historically on international custom and treaties

The Grotians.

§ 57 The 'Grotians' stand midway between the Naturalists and the Positivists They keep up Grotius' distinction between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike

[1] For an appreciation of Moser see Verdross in *Z o R*, 3 (1923), pp 96-102

[2] Georg Friedrich von Martens is not to be confused with his nephew Charles de Martens, the author of the *Causes célèbres du droit des gens* and of the *Guide diplomatique* There was also F de Martens, Professor of the University of St Petersburg

Grotius' influence was so enormous that the majority of the authors of the seventeenth and eighteenth centuries were Grotians, but only two of them have acquired a European reputation—namely, Wolff and Vattel

Christian Wolff (1679-1754), a German philosopher who was first Professor of Mathematics and Philosophy in the Universities of Halle and Marburg and afterwards returned to Halle as Professor of the Law of Nature and Nations, was seventy years of age, when, in 1749, he published his *Jus Gentium Methodo scientifica pertractatum* [1] In 1750 followed his *Institutiones Juris Naturae et Gentium* Wolff's conception of the Law of Nations is influenced by his conception of the *Civitas Gentium maxima* The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States form a world-State above the component member-States, the so-called *Civitas Gentium maxima*

Emerich de Vattel (1714-1767), a Swiss from Neuchâtel, who entered into the service of Saxony and became her Minister at Berne, did not in the main intend any original work, but undertook the task of introducing Wolff's teachings concerning the Law of Nations into the courts of Europe and to the diplomatists He published in 1758 his work, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* [2] But it must be specially mentioned that Vattel expressly rejects Wolff's conception of the *Civitas Gentium maxima* in the preface to his book Numerous editions of Vattel's book have appeared, and as late as 1863 Pradier-Fodéré re-edited it at Paris An English translation by Chitty appeared in 1834 and went through several editions His influence was very great

Treatises of the Nineteenth and Twentieth Centuries

§ 58 Some details concerning the three schools of the Naturalists, Positivists, and Grotians were necessary in view of the influence which they exercised in the development

[1] Edited in Scott's *Classics of International Law*, with a translation by J H Drake, and an introduction by Nippold (1934)

[2] Edited in Scott's *Classics of International Law*, by Lapradelle, together with a translation by Fenwick (1916), see Staub, *Die volkerrechtlichen Lehren Vattels im Lichte der naturrechtlichen Doktrin* (1922) See also de Montmorency in *J C L*, New Ser, 10 (1909), pp 17-39

of the science of International Law The following list treatises comprises the more important ones only.

(1) British Treatises

William Oke Manning Commentaries on the Law of Nations, 1839, new ed by Sheldon Amos, 1875

Archer Polson Principles of the Law of Nations, 1848, 2nd ed, 1853

Richard Wildman Institutes of International Law, 2 vols, 1849-1850

Sir Robert Phillimore Commentaries upon International Law, 4 vols, 1854-1861, 3rd ed, 1879-1889

Sir Travers Twiss The Law of Nations, etc, 2 vols, 1861-1863, 2nd ed, vol I (Peace) 1884, vol II (War) 1875, French translation, 1887-1889

Sheldon Amos Lectures on International Law, 1874

Sir Edward Shepherd Creasy First Platform of International Law, 1876

William Edward Hall A Treatise on International Law, 1880, 8th ed, 1924 (by Pearce Higgins)

Sir Henry Sumner Maine International Law, 1883, 2nd ed, 1894 (Whewell lectures, not a treatise)

James Lorimer The Institutes of the Law of Nations, 2 vols, 1883-1884, French translation by Nys, 1885

Leone Levi International Law, 1887

Thomas Joseph Lawrence The Principles of International Law, 1895, 7th ed, 1923 (by Winfield)

Thomas Alfred Walker A Manual of Public International Law, 1895

Sir Sherston Baker First Steps in International Law, 1899

Thomas Erskine Holland Lectures on International Law, edited by T A Walker and W L Walker, 1933

F E Smith (later *Lord Birkenhead*) International Law, 1900, 6th ed, 1927 (by R Moelwyn-Hughes)

John Westlake International Law, vol I (Peace) 1904, vol. II (War) 1907, 2nd ed, vol I, 1910, vol II, 1913, French translation, 1924

L Oppenheim International Law, vol I (Peace) 1905, vol II (War) 1906, 2nd ed, vols I and II, 1912, 3rd ed, 1920-1921 (by Roxburgh), 4th ed, 1926-1928 (by McNair), 5th ed, 1935-1937 (by Lauterpacht), 6th ed, 1940-1946 (by Lauterpacht)

Baty The Canons of International Law, 1930

H A Smith Great Britain and the Law of Nations, a Selection of Documents, vol I (1932), vol II (1935)

J L Brierly The Law of Nations, 1928, 3rd ed, 1942

Schwarzenberger International Law, vol I International Law as Applied by International Courts and Tribunals (1945)

(2) North American Treatises

James Kent Commentary on International Law, 1826, English ed by Abdy, 1878

Henry Wheaton Elements of International Law, 1836, 8th American ed by Dana, 1866 (reprinted in 1936 in Scott's Classics of International Law, with an Introduction by George Grafton Wilson), 3rd English ed by Boyd, 1889, 4th English ed by Atlay, 1904, 5th English ed by Coleman Phillipson, 1916, 6th English ed by Berriedale Keith, 2 vols, 1929, 7th ed, by Berriedale Keith, vol II (1944)

Theodore D Woolsey Introduction to the Study of International Law, 1860, 6th ed by Th S Woolsey, 1891

Henry W Halleck International Law, 2 vols, 1861, 4th English ed by Sir Sherston Baker, 1908

Francis Wharton A Digest of the International Law of the United States, 3 vols, 1886

John N Pomeroy Lectures on International Law in Time of Peace, 1886

George B Davis The Elements of International Law, 1887, 4th ed by Sherman, 1916

Hannis Taylor A Treatise on International Public Law, 1901

George Grafton Wilson and George Fox Tucker International Law, 1901, 9th ed, 1935

Edwin Maxey International Law, with illustrative cases, 1906

John Bassett Moore A Digest of International Law, 8 vols, 1906

George Grafton Wilson Handbook of International Law, 1910, 2nd ed, 1927, 3rd ed, 1939

Charles H Stockton (Admiral) A Manual of International Law, 1911, also Outlines of International Law, 1914

Amos S Hershey The Essentials of International Public Law and Organisation, 1912, 2nd ed, 1927

Roland R Foulke International Law, 1920

C C Hyde International Law, chiefly as interpreted and applied by the United States, 2 vols, 1922, 2nd ed, 3 vols, 1945

C G Fenwick International Law, 1924, 2nd ed, 1934

Ellery C Stowell International Law, a Restatement of Principles in Conformity with Actual Practice, 1931

Hackworth Digest of International Law, 7 vols, 1940-1943

(3) French Treatises

Funck-Brentano et Albert Sorel · Précis du droit des gens, 1877, 2nd ed, 1894

P Pradier-Fodéré Traité de droit international public, 8 vols., 1885-1906.

Alfred Chrétien Principes de droit international public, 1893.

Henry Bonfils Manuel de droit international public, 1894, 8th ed by Fauchille, 1922-1926 (referred to in this volume as 'Fauchille')

Georges Bry Précis élémentaire de droit international public, 6th ed, 1910

Frantz Despagnet Cours de droit international public, 1894; 4th ed by De Boeck, 1910

Robert Prédelièvre. Précis de droit international public, 2 vols, 1883-1895

A Mérignhac Traité de droit public international, Part I, 1905, Part II, 1907, Part III, vol 1, 1912

Lapradelle Les principes généraux du droit international (lectures delivered in 1930 before the European Centre of the Carnegie Endowment)

Bonde Traité élémentaire de droit international public, 1926

Foignet Manuel élémentaire de droit international public, 15th ed, 1932

Scelle Précis de droit des gens Principes et systematique, vol 1, 1932, vol II, 1934

Scelle Manuel élémentaire de droit international public, 1943

Devaux Traité élémentaire de droit international public, 1935

Le Fur Précis de droit international public, 3rd ed, 1936

Rousseau Principes généraux du droit international public, vol. 1 1944

(4) German Treatises

Theodor Schmalz Europaisches Volkerrecht, 1817

Julius Schmelzing Systematischer Grundriss des praktischen europaischen Volkerrechts, 3 vols, 1818-1820 Also Lehrbuch des europaischen Volkerrechts, 1821.

Johann Ludwig Kluber Droit des Gens moderne, 1819, German ed under the title of Europaisches Volkerrecht in 1821, last German ed. by Morstadt in 1851, and last French ed by Ott in 1874

Karl Heinrich Ludwig Poelitz Practisches (europaisches) Völkerrecht, 1823, 2nd ed., 1828

Friedrich Saalfeld Handbuch des positiven Volkerrechts, 1833

August Wilhelm Heffter Das europaische Volkerrecht der Gegenwart, 1844, 8th ed by Geffcken, 1888, French translations by Bergson in 1851 and Geffcken in 1883

Heinrich Bernhard Oppenheim System des Volkerrechts, 1845, 2nd ed, 1866

Johann Caspar Bluntschli Das moderne Volkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 1868, 3rd ed, 1878, French translation by Lardy, 5th ed, 1895

Adolph Hartmann Institutionen des praktischen Volkerrechts in Friedenszeiten, 1874, 2nd ed, 1878

Franz von Holtzendorff Handbuch des Volkerrechts, 4 vols, 1885-1889 Holtzendorff is the editor and a contributor, but there are many other contributors

August von Bulmerincq Das Volkerrecht, 1887, 2nd ed, 1889

Karl Gareis Institutionen des Volkerrechts, 1888, 2nd ed, 1901

E Ullmann Volkerrecht, 1898, 2nd ed, 1908

Franz von Liszt Das Volkerrecht, 1898, 12th ed by Fleischmann, 1925

Kohler Grundlagen des Volkerrechts, 1918

Niemeyer Volkerrecht, 1923

Hatschek Das Volkerrecht als System rechtlich bedeutsamer Staatsakte, 1923, English translation by Manning, 1930

Isay Das Volkerrecht, 1924

Strupp Grundzuge des positiven Volkerrechts, 1921, 5th ed, 1932 Theorie und Praxis des Volkerrechts, 1925 French edition in 1927 entitled Éléments du droit international public universel, européen et américain, 2nd ed, 3 vols, 1930

Worterbuch des Volkerrechts und der Diplomatie (an encyclopaedia) begun by Hatschek and continued by Strupp, 3 vols, 1924-1929

Vanselow Volkerrecht, 1931

Wolgast Volkerrecht, 1934

(5) Italian Treatises

Ludovico Casanova Lezioni del diritto internazionale, published after the death of the author by Cabella, 1853, 3rd ed, 2 vols, by Brusa, 1876

Pasquale Fiore Trattato di diritto internazionale pubblico, 1865, 4th ed in 3 vols, 1904, French translation of the 2nd ed by Antoine, 1885

Giuseppe Carnazza-Amari Trattato sul diritto internazionale di pace, 2 vols, 1867-1875, French translation by Montanari-

Revest, 1880-1882 Also Elementi di diritto internazionale, 2 vols , 1866-1874

Antonio del Bon Instituzioni del diritto pubblico internazionale, 1868

Giuseppe Sandona Trattato di diritto internazionale moderno, 2 vols , 1870

Gian Battista Pertile Elementi di diritto internazionale moderno, 2 vols , 1877

Augusto Pierantoni Trattato di diritto internazionale, vol 1 , 1881 (No further volume has appeared)

Giovanni Lomonaco Trattato di diritto internazionale pubblico, 1905

Giulio Diena Principî di diritto internazionale, Parte Prima, Diritto internazionale pubblico, 1908 , 2nd ed , vol 1 , 1914, vol II , 1917 , 3rd ed , 1930

Dionisio Anzilotti Corso di diritto internazionale, vol 1 , 1912 , 3rd ed , 1928 , French translation by Gidel, 1929 , vol III , part 1 , 1915 Vol II and part II of vol III have not yet appeared

G Cavarretta Diritto interstatuale, vol 1 , 1914

Marino Corso di diritto internazionale pubblico, 1917

Gemma Appunti di diritto internazionale, 1923

Perassi Lezioni di diritto internazionale, 1922 , 2 vols , 1934

Cavaglieri Lezioni di diritto internazionale (general part), 1925 , Corso di diritto internazionale, 3rd ed , 1934

Fedozzi Trattato di diritto internazionale, 2nd ed , 1933

Romano Corso di diritto internazionale, 3rd ed , 1933

Olivi Diritto internazionale pubblico, 3rd ed , 1933

Balladore Pallieri Diritto internazionale pubblico (Peace, 1937) , Trattato di diritto internazionale (War, 1935)

(6) Spanish and South American Treatises

Andrés Bello Principios de Derecho de Gentes (internacional), 1832 , last ed in 2 vols by Silva, 1883 (Chilean)

José Maria de Pando Elementos del Derecho internacional, published after the death of the author, 1843-1844 , 2nd ed , 1852 (Peruvian)

Antonio Riquelme Elementos de Derecho público internacional, etc , 2 vols , 1849

Carlos Calvo Le droit international, etc (first edition in Spanish, following editions in French), 1868 , 5th ed in 6 vols , 1896 (Argentinian).

M M Madiedo Tratado de Derecho de Gentes, 1874 (Colombian)

Amancio Alcorta Curso de Derecho internacional público, vol 1 , 1887 , French translation by Lehr, 1887 (Argentinian)

Marquis de Olivart Tratado y Notas de Derecho internacional

público, 2 vols, 1887, 4th ed in 4 vols, 1903-1904, 5th ed (abridged), 1 vol, 1906

Luis Gestoso y Acosta Curso de Derecho internacional público, 1894, 2nd ed, 1898.

H Feltner Manual de Derecho internacional, 2 vols, 1894

Miguel Cruchaga Tocornal Nociones de Derecho internacional, 1899, 3rd ed, 1923-1925

Manuel Torres Campos Elementos de Derecho internacional público, 3rd ed, 1912

Clovis Bevilaqua Direito público internacional, 2 vols, 1911 (Brazilian)

S Planas Suarez Tratado de Derecho internacional público, 2 vols, 1916 (Venezuelan, although published in Madrid)

Antokoletz Tratado de Derecho internacional público en tiempo de paz, 3 vols, 1924-1928

Olivart El derecho internacional público, 2 vols, 1927

Ulloa Derecho internacional público, 2 vols, 1929

González-Hontoria y Fernández-Landreda Tratado de derecho internacional público, 4 vols, 1928, 1930

Accioly Tratado de Direito internacional público, 3 vols, 1933-1935, French translation by Goulé, vol I (1940), vol II (1942), vol III (1942), Spanish translation, 3 vols (1945-1946)

Moreno Lecciones de Derecho internacional público, 2 vols, 1934 (Buenos Aires)

Bustamante Derecho internacional público, vol I, 1933 (French translation, 1934), vol II, 1934 (French translation, 1934), vol III, 1936 (French translation, 1936), vol IV (1937), vol V (1938)

Podesta Costa Manual de derecho internacional público, 2nd ed, 1947

(7) Treatises of Authors of other Nationalities

Frederick Kristian Bornemann Forelaesninger over den positive Folkeret, 1866 (Danish)

Friedrich de Martens Volkerrecht, 2 vols, 1883-1886, a German translation by Bergbohm of the Russian original A French translation by Léo in 3 vols appeared 1883-1887 The Russian original went through its 5th ed in 1905.

Jan Helenus Ferguson Manual of International Law, etc, 2 vols, 1884. The author is Dutch, but the work is written in English

Alphonse Rivier Lehrbuch des Volkerrechts, 1894, 2nd ed, 1899, and a larger work in two vols under the title, Principes du droit des gens, 1896. The author of these two excellent books

was a French Swiss who taught International Law at the University of Brussels

H Matzen Forelaesninger over den positive Folkeret, 1900 (Danish).

Ernest Nys Le droit international, 3 vols, 1904-1906, new edition, 1912 The author of this exhaustive treatise was a Belgian jurist whose researches in the history of the science of the Law of Nations gained him a far-reaching reputation.

J De Louter Het Stellig Volkenrecht, 2 vols, 1910, French translation, 1920

Ulanicky Myeshdonarodnaye Pravo, 1911 (Russian)

Cybichowski Prawo narodów, System prawa międzynarodowego, 1915 (Polish)

Castberg Folkerett, 1937 (Norwegian)

Boye Handboog i Folkerett, 1918 (Norwegian)

Séfériadès Principles of International Law, 1920, 2nd ed., 1925 (in Greek)

Waldkirch Volkerrecht, 1926 (Swiss)

Ehrlich Prawo narodów, 1927 (Polish), 2nd ed, 1932

François Handboek van het Volkenrecht, vol i, 1931, vol ii, 1933 (Dutch)

Moller International Law in Peace and War, 2 vols in Danish, 1st ed, 1928, 2nd ed, 1933 and 1934, English translation, vol i, 1931, vol ii, 1935

Hold-Ferneck Lehrbuch des Volkerrechts, vol i, 1930, vol ii, 1932 (Austrian)

Hobza Úvod do mezinárodního práva mírového, 1933 (Czech)

Spiropoulos Traité théorique et pratique du droit international public, 1933 The author is a Greek scholar

Verdross Volkerrecht, 1937 (Austrian)

Guggenheim Lehrbuch des Volkerrechts, parts I and II, 1947.

Ross A Textbook of International Law General Part, 1947 (translation from the Danish)

The Science of the Law of Nations in the Nineteenth and Twentieth Centuries

§ 59 The science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor was the endeavour, on the whole sincere, of the Powers after the Congress of Vienna to submit to the rules of the Law of Nations The second factor was the many law-making treaties which arose during this century. And the last, but not indeed the least factor, was the rising predominance of positivism over the theory of the Law of

Nature When the nineteenth century opens, the three schools of the Naturalists, the Positivists, and the Grotians are still in the field, but Positivism gains slowly and gradually the upper hand, until at the end it may be said to be victorious, without, however, being omnipotent [1] Writers like Martens, Kluber, Heffter, Phillimore, Calvo, Fiore, Bluntschli, Twiss, Maine, and Westlake, while basing themselves largely on the practice of States, recognised in some form or other a natural Law of Nations But, on the whole, positivism was victorious at the end of the nineteenth century and the beginning of the twentieth In denying the validity of sources of International Law other than the will of States it constituted yet another manifestation of the extreme doctrine of State sovereignty which, at that time, was typical of the science of law and of politics So uncompromising was the positivist attitude that it denied the character of science to any other than the purely positive Law of Nations [2]

In the period after the First World War the science of International Law, in keeping both with the general trend of legal philosophy [3] and with the developments in conventional International Law and arbitral practice, abandoned to a large extent the rigid adherence to the positivist view The great majority of writers now recognise that the triumph of positivism was not accomplished without the loss of certain important factors making for the development of International Law It is now generally admitted that, in the absence of rules of law based on the practice of States, International Law may be fittingly supplemented and fertilised by recourse to rules of justice and to general principles of law, it being immaterial whether these rules are defined as a Law of Nature in the sense used by Grotius, or a modern Law of Nature with a variable content, or as flowing from the 'initial hypothesis' of International Law,[4]

[1] That the triumph of Positivism has not been accomplished without the loss of certain factors making for the development of International Law is shown by Brierly in *B Y*, 1924, pp 4-16

[2] This was also the view of the author of this book, and in § 59 of the former editions there will be found a survey of the treatises of the nineteenth century from the point of view whether they are 'positivist' or not See also Oppenheim in *A J*, 2 (1908), pp 313-356

[3] For a survey of that literature see Lauterpacht, *The Function of Law*, p 61

[4] See above, p 16, n 1

or from the fundamental assumption of the social nature of States as members of the international community,[1] or, in short, from reason.[2] In fact recourse to such rules is a frequent feature of the practice of States, especially as evidenced in arbitration conventions, and of judicial and arbitral decisions.[3] In adopting Article 38 of the Statute of the Permanent Court of International Justice the signatory States sanctioned that practice.[4] Whatever may have been its merits in the past history of International Law, rigid positivism can no longer be regarded as being in accordance with existing International Law. Probably what has been described above as the Grotian[5] school comes nearest to expressing correctly the present legal position.[6]

In so far as the revival of the authority of natural law, in its modern connotation, has tended to undermine the rigid positivism of the nineteenth century, that development is likely to receive an accession of strength as the result of the experience preceding the Second World War. The rise of

[1] See Hall, § 7.

[2] Westlake, I pp. 14, 15.

[3] See above, § 19.

[4] *Ibid.*

[5] See above, § 57.

[6] See on this point Nelson, *Die Rechtswissenschaft ohne Recht* (1917), pp. 211-228; Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Volkerrechtsverfassung* (1923), pp. 120-125; the same, *Die Verfassung der Volkerrechtsgemeinschaft* (1926), pp. 28-33, and in *Strupp, Wort*, III pp. 292-294; Politis, *The New Aspects of International Law* (English translation, 1928), pp. 14-16, who adopts the 'juridical consciousness of peoples' as the primary source of International Law; Haines, *The Revival of Natural Law Concepts* (1930); Keller, *Droit naturel et droit positif en droit international public* (1931); Drucker, *Die Rechtfertigung des Volkerrechts aus dem Staatswillen* (1932); Morgenthau, *La réalité des normes* (1934), in *Mélanges Altamira* (1936), and in *A J*, 34 (1940), pp. 260-284; Lauterpacht, *Analogies*, §§ 26-29, and in *Grotius Society*, 29 (1943), pp. 1-33; Tahsin, *No Man's Land du droit des gens* (1936); Brierly in *B Y*, 5 (1924), pp. 4-16; Kosters in *Bibliotheca Visseriana*, IV (1925) pp. 200-227; Le Fur in *Hague Recueil*, vol. 18 (1927) (III), pp. 263-441; Bruns in *Z o V*, 1 (1929), pp. 1-56; Balladore Pallieri in *Annali dell' istituto di scienze guiridiche della Universita di Messina*, VI (1931-1932); Knubben in *Strupp, Wort*, III pp. 227-292; Birkás in *Z V*, 17 (1933), pp. 13-25; Scelle in *Mélanges Gény*, III (1934); Djuvara in *Hague Recueil*, vol. 64 (1938) (II), pp. 485-616; Rousseau, pp. 15-35; Kelsen, *General Theory of Law and State* (1945), pp. 391-418; Keeton and Schwarzenberger, *Making International Law Work* (2nd ed., 1946), pp. 133-180. See the answers given by a number of international lawyers in reply to the inquiry as to whether and how far the Natural Law conception of International Law as taught by Grotius is valid to-day *Z I*, 34 (1925), pp. 113-189; Le Fur's reply in *R I*, 3rd ser., 6 (1925), pp. 59-79; Bourquin, *ibid.*, 7 (1926), pp. 106-110. Se also above, § 1, p. 4, § 15 (Sources of International Law), § 19 (General Principles of Law), below, § 70 (Sovereignty).

the German and the other totalitarian dictatorships, trampling upon the rights of man and universally accepted notions of law, has once more tended to bring into prominence the importance and the vitality of legal standards which, though they may not be enforceable before municipal courts, are of an enduring validity transcending the positive law of any one sovereign State.[1]

§ 60. COLLECTIONS OF TREATIES [2]

(1) General Collections

Leibnitz Codex Iuris Gentium diplomaticus (1693), Mantissa Codicis Iuris Gentium diplomatici (1700)

Bernard Recueil des traités, etc, 4 vols 1700

Rymer Foedera, etc, inter Reges Angliae et alios quosvis Imperatores ab Anno 1101 ad nostra usque Tempora habita aut tractata, 20 vols 1704-1718 (contains documents from 1101-1654)

Dumont Corps universel diplomatique, etc, 8 vols, 1726-1731

Rousset Supplément au corps universel diplomatique de Dumont, 5 vols 1739

Schmauss Corpus Iuris Gentium academicum (1730)

Wenck Codex Iuris Gentium recentissimi, 3 vols 1781, 1786, 1795

Martens Recueil de Traités d'Alliance, etc, 8 vols 1791-1801, Nouveau recueil de Traités d'Alliance, etc, 16 vols 1817-1842, Nouveaux suppléments au recueil de traités et d'autres actes remarquables, etc, 3 vols 1839-1842, Nouveau recueil général de traités, conventions et autres actes remarquables, etc, 20 vols 1843-1875, Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international, Deuxième Série, 35 vols 1876-1908, Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international, Troisième Série, vol 1 1909, continued up to date Present editor, Heinrich Triepel, professor in the University of Berlin [3]

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[1] See Lauterpacht, *An International Bill of the Rights of Man* (1945), pp 3-53

[2] See a valuable bibliography by Myers, *Manual of Collections of Treaties and of Collections relating to Treaties* (1922)

[3] For a history and appreciation of Martens' *Recueils* see Martitz in *Archiv für öffentliches Recht*, vol 40 (1) (1921), pp 22-72

Ghillany Diplomatisches Handbuch, 3 vols 1855-1868

Martens et Cussy Recueil manuel, etc , 7 vols 1846-1857 , continuation by Geffcken, 3 vols 1885-1888

British and Foreign State Papers (Hertslet) vol 1 1841 , continued up to date

Das Staatsarchiv Sammlung der officiellen Actenstucke zur Geschichte der Gegenwart, vol 1 1861, continued up to date

Archives diplomatiques Recueil mensuel de diplomatie, d'histoire et de droit international, First and Second Series, 1861-1900, Third Series from 1901 continued up to date

Recueil international des traités du XIX^me^ Siècle Edited by Descamps, Renault, and Basdevant, vol 1 1915

Recueil international des traités du XX^me^ Siècle Edited by Descamps and Renault since 1902

Strupp Urkunden zur Geschichte des Volkerrechts, 2 vols 1911

Documents pour servir à l'histoire du droit des gens, 5 vols 1923 (the second enlarged edition of the preceding work)

Albin Les grands traités politiques depuis 1815 jusqu'à nos jours, 2nd ed 1912

Giannini Collezione dei trattati di pace, 6 vols 1922-1924

League of Nations Treaty Series Publication of Treaties and International Engagements registered with the Secretariat of the League in English, French, and any other language in which they may be drawn up [1]

Répertoire général des traités et autres actes diplomatiques , Part I by Tétot, covering the period 1493-1866 , Part II by Ribier, covering the period 1867-1894 , and Part III by the Institut Intermédiaire International, covering the period 1895-1920, continued in the Bulletin of the Institut (Not collections of treaties but indexical volumes)

Hudson International Legislation Washington, Carnegie Endowment for International Peace 7 vols covering the years 1919-1937

Le Fur et Chklaver Recueil de textes de droit international public , 2nd ed , 1934

Strupp, Worterbuch, II pp 663-672, contains a list of Collections of Treaties

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[1] In addition the Secretariat of the League published a Monthly List of Treaties registered with the Secretariat The Library of the League published, from 1929, a Chronology of treaties and legislative measures.

(2) Collections of Treaties of Particular States [1]

China

Treaties and Agreements with and concerning China (1894-1919), ed by Macmurray, 2 vols 1921

France

De Clercq Recueil des traités, etc, conclus par la France avec les puissances étrangères depuis 1713 jusqu'à 1904

Basdevant Traités et conventions en vigueur entre la France et les puissances étrangères, 4 vols 1918-1922 (Published by the French Foreign Office)

Handelsvertrage des Deutschen Reiches (edited by the Ministry for Internal Affairs) 1906, Supplement 1915

Great Britain

Jenkinson Collection of all the Treaties, etc, between Great Britain and other Powers from 1648 to 1783, 3 vols 1785

Chalmers A Collection of Maritime Treaties of Great Britain and other Powers, 2 vols 1790

Hertslet Collection of Treaties and Conventions between Great Britain and other Powers, so far as they relate to Commerce and Navigation, etc (vol 1 1820, continued to date)

Treaty Series vol 1 1892, and a volume every year (referred to in this volume as 'Treaty Series')

Handbook of Commercial Treaties with Foreign Powers 4th ed, 1931

Italy

Trattati e convenzione fra il Regno d' Italia e gli Altri Stati Published since 1861 under the auspices of the Ministry of Foreign Affairs 42 volumes till 1936

[1] This list includes the collections of treaties published in the principal countries only Most countries now publish official or unofficial collections of their treaties

JAPAN

Treaties and Conventions between the Empire of Japan and other Powers compiled by the Foreign Office, Yokohama, 1871, 5th ed, 1908

Traités et conventions entre l'empire du Japon et les puissances étrangères Ministère des affaires étrangères, Tokyo, 2 vols 1908-1912

RUSSIA

Recueil des traités et conventions conclus par la Russie avec les puissances étrangères, publié d'ordre du Ministère des affaires étrangères ed by F de Martens, 15 vols 1874-1909

Freund Russland's Friedens- und Handelsvertrage, 1918-1923 (1924)

Collection of Treaties, Agreements, and Conventions now in force with Foreign States, published in Russian by the People's Commissariat for Foreign Affairs (1924-1925) [1]

Olivart Colección de Tratados de España desde el reinado de Isabel II hasta nuestros días (1911)

UNITED STATES OF AMERICA

Malloy Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and other Powers from 1776 to 1909

Calvo Recueil historique complet des traités de tous les états de l'Amérique latine depuis 1493 jusqu'à 1869 (There are also official collections of treaties of Argentina, Brazil, Colombia, Costa Rica, Guatemala, Peru and some other Latin-American countries)

Manning Arbitration Treaties among the American Nations (up to 1910), 1924

Hunter Miller Treaties and other International Acts of the United States of America Washington, Government Printing Office Since 1931 6 volumes, 1776-1846, published up to 1942

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[1] See also collections of recent Russian Treaties mentioned in Kelmann and Freund, *Die juristische Literatur Sovietrusslands* (1926), pp 99-101, and see Taracouzio, *The Soviet Union and International Law* (1935), pp 450 480 (an exhaustive list of treaties)

§ 61. BIBLIOGRAPHIES [1]

Litteratur des gesammten Volkerrechts, 2 vols 1785

Kamptz Neue Litteratur des Volkerrechts seit 1784 (1817)

Kluber Droit des gens moderne de l'Europe (Appendix) (1819)

Miruss Das europaische Gesandschaftsrecht, vol II 1847

Mohl Geschichte und Literatur des Staatswissenschaften, vol I pp 337-475 (1855)

Woolsey Introduction to the Study of International Law (6th ed , 1891), Appendix I

Rivier pp 393-523 of vol I of Holtzendorff's Handbuch des Volkerrechts (1885)

Stoerk Die Litteratur des internationalen Rechts von 1884-1894 (1896)

Olivart Catalogue d'une bibliothèque de droit international (1899)

[1] A detailed list of digests and collections of judicial decisions, national and international, will be found in Hudson, *Cases*, pp xxii xxv Of the digests and collections of decisions the most important are *Annual Digest and Reports of Public International Law Cases* 1919-1942 (see above, p xiii , List of Abbreviations) , *Fontes Juris Gentium* (ed by Bruns) Series A, Part I , vols 1 and 3, Digest of the Decisions of the Permanent Court of International Justice, 1922 1930 (1931) and 1931 1934 (1935) , Series A, Part I , vol 2, Digest of the Decisions of the Permanent Court of Arbitration, 1902 1928 (1931) , Series A, Part II , vol 1, Decisions of the German Supreme Court relating to International Law, 1879 1929 (1931) , Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 6 vols (1898), and *International Adjudications, Ancient and Modern*, vols 1 and 2, Saint Croix River Arbitration (1929, 1930) , vol 3, Recovery of Pre War Debts Mixed Commission under Article 6 of the Treaty of 1794 (1931) , vol 4, Neutral Rights and Neutral Duties Mixed Commission under Article 7 of the Treaty of 1794 (1931) , vol 5, I Spanish Spoliations, 1795 , II French Indemnity, 1803 , III French Indemnity, 1831 (1933) , vol 6, Title to Islands in Passamaquoddy Bay and the Bay of Fundy Mixed Commission under Article 4 of the Treaty of 1814 (1933) , P C I J Series A, Nos 1 24 Judgments (1923 1930) , Series B, Nos 1 18 Advisory Opinions (1922-1930) , Series A/B, Nos 40 *et seq* Judgments, Orders, and Advisory Opinions from 1931 , Series E, Nos 1 *et seq* Annual Reports from 1925 , Scott, *Hague Court Reports* (1916), Second Series (1932)

Of the case books the following may be mentioned Pitt Cobbett, *Leading Cases and Opinions on International Law* (1st ed , 1885 , 4th ed , 1922 and 1924, by Bellott , 5th ed , vol I , 1931, by Temple Grey, vol II , 1937, by Walker) , Hudson, *Cases and Other Materials on International Law* (1st ed , 1929 , 2nd ed , 1936) , Dickinson, *A Selection of Cases and Other Readings on the Law of Nations* Chiefly as Interpreted and Applied by British and American Courts (1929) , Fenwick, *Cases on International Law* (1935) , Scott and Jaeger, *Cases on International Law* (1937) , Briggs, *The Law of Nations* (1938) , Mac Kenzie and Laing, *Canada and the Law of Nations* (1938) For critical comment on these case books see Hudson in *A J* , 32 (1938), pp 447-456 See also Pfankuchen, *A Documentary Textbook in International Law* (1940), and Schwarzenberger, *International Law*, vol I *International Law as Applied by International Courts and Tribunals* (1945)

Nys Le droit international, 2nd ed vol 1 (1912), pp 224-351

Douma Bibliographical List of Official and Unofficial Publications concerning the Permanent Court of International Justice (1926) Published by the Court

Strupp Bibliographie du droit des gens et des relations internationales, vol 1 (1933-1936) (1938)

Catalogue de la bibliothèque du Palais de la Paix (1916), with Supplements in 1922 and 1930, and Indexes in 1922, 1932, and 1933

Bibliographical List of Official and Unofficial Publications concerning the Permanent Court of International Justice Appeared annually from 1926 in Series E of the Publications of the Court (since 1947 in the *Yearbook* of the Court)

Exhaustive current Bibliographies are supplied in the leading periodicals of International Law, in particular in the American Journal of International Law

§ 62 PERIODICALS[1]

Revue de droit international et de législation comparée Brussels Since 1869

International Law Association's Reports Since 1873

Revue générale de droit international public Paris Since 1894

Zeitschrift fur internationales Recht Munich and Leipzig Since 1891

Annuaire de l'Institut de Droit International Since 1877

Kokusaiho-Zasshi, the Japanese International Law Review Tokyo Since 1903

Rivista de Diritto internazionale Rome Since 1906

Zeitschrift fur Volkerrecht Breslau Since 1906

The American Journal of International Law Washington Since 1907

Proceedings of the American Society of International Law Washington Yearly since 1908

Journal du droit international Mainly devoted to Private International Law Paris Since 1874

Grotius annuaire internationale The Hague Since 1913.

Grotius Society's Transactions London Since 1916

Bulletin de l'Institut Juridique International The Hague Since 1919.

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[1] The details of this list may not be accurate in all cases inasmuch as the Second World War caused a suspension or cessation of the publication of some periodicals

Revista de Derecho Internacional, the organ of the American Institute of International Law. Since 1922

British Year Book of International Law London Since 1920-1921

Revista Argentina de Derecho Internacional Since 1921

Revista Peruana de Derecho Internacional Since 1940

Académie de Droit International, Recueil des Cours, lectures delivered at the Hague Academy of International Law Since 1923 [1]

Revue de droit international de sciences diplomatiques, politiques, et sociales Geneva Since 1923

Revue de droit international Paris Since 1927

Revue internationale française du droit des gens Paris Since 1936

Journal of Comparative Legislation and International Law London Since 1896

Zeitschrift fur offentliches Recht Vienna Since 1919 (Appearing since 1946 as Osterreichische Zeitschrift fur offentliches Recht)

Zeitschrift fur auslandisches offentliches Recht und Volkerrecht Berlin Since 1929

Die Friedenswarte Geneva Since 1899

Séances et travaux de l'Académie diplomatique internationale Paris Since 1927 [2]

Nordisk Tidsskrift for International Ret und Acta Scandinavica Juris Gentium Copenhagen Since 1930

Schweizerisches Jahrbuch fur Internationales Recht Annuaire Suisse de droit international Zurich Since 1944

International Law Quarterly London Since 1947

International Organization Boston 1947

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[1] On the Hague Academy of International Law see Mazel in *Répertoire*, 1 pp 93-102

[2] See also Académie Diplomatique Internationale, *Dictionnaire Diplomatique*, 2 vols (edited by Frangulis, 1933)

PART I

THE SUBJECTS OF THE LAW OF NATIONS

CHAPTER I

INTERNATIONAL PERSONS

I

SOVEREIGN STATES AS INTERNATIONAL PERSONS

Vattel, I §§ 1-12—Hall, § 1—Lawrence, §§ 37-43—Phillimore, I §§ 61-68—Twiss, I §§ 1 11—Taylor, § 117—Walker, § 1—Westlake, I pp 1-5, 20-22—Brierly, pp 86 90—Wheaton, §§ 16-21—Hershey, §§ 87-95—Ullmann, § 19—Heffter, § 15—Holtzendorff in *Holtzendorff*, II pp 5 11—Liszt, §§ 7 (I III), 8—Hatschek, pp 20 23—Fauchille, §§ 160-164, 175-175 (1)—Despagnet, §§ 69 74—Pradier Fodéré, I §§ 43 81—Nys, I pp 352-383—Rivier, I § 3—Calvo, I §§ 39 41—Fiore, I §§ 305-309, and *Code*, §§ 56-82—Martens, I §§ 53 54—Mérignhac, I pp 114 232, and II pp 5, 154-221—Moore, I § 3—Cruchaga, I pp 128-139—Keith's Wheaton, pp 38 42—Stowell, pp 49-52—Baty, pp 6 19—Hold Ferneck, I pp 27-77—Anzilotti, pp 120 131—Scelle, I pp 74 83—Kelsen, *Das Problem der Souveranitat und die Theorie des Volkerrechts* (1920), pp 1 85—Verdross, § 28—Dickinson, *The Equality of States in International Law* (1920)—Sukiennicki, *La souveraineté des états en droit international moderne* (1927)—Knubben, *Die Subjekte des Volkerrechts* (1928), pp 127 190—Kunz, *Die Staatenverbindungen* (1929), pp 1 61—Wright, *Mandates under the League of Nations* (1930), pp 267 309—Korte, *Grundfragen der volkerrechtlichen Rechtsfahigkeit und Handlungsfahigkeit der Staaten* (1934), pp 28-55, 135-186—Brierly in *Hague Recueil*, vol 23 (1928) (III), pp 503 545—Bruns in *Z o R*, 1 (1929), pp 31 40—Dupuis in *Hague Recueil*, vol 32 (1930) (II), pp 5 165—van Zanten in *R I*, 3rd ser, 11 (1930), pp 494 528—Ross, *ibid*, 3rd ser, 12 (1931), pp 652 668, and 13 (1932), pp 112-130, and in *Z o R*, 11 (1931), pp 441 464—Kaufmann in *Hague Recueil*, vol 55 (1935) (V), pp 349-377—Bilfinger, *ibid*, vol 62 (1938) (1), pp 155 203—Aufricht in *Cornell Law Quarterly*, November 1944 and March 1945—Kelsen in *Yale Law Journal*, 53 (1944), pp 207 220 And see the comprehensive literature quoted below, § 70

Real and apparent International Persons

§ 63. The conception of International Persons is derived from the conception of the Law of Nations As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is therefore a member of the Family of Nations, is an International Person There are, however, as will be seen, full and not-full sovereign States Full

sovereign States are perfect, not-full sovereign States are imperfect, International Persons, for not-full sovereign States are only in some respects subjects of International Law

In contradistinction to sovereign States which are real, there are also apparent, but not real, International Persons —such as Confederations of States and insurgents recognised as a belligerent Power in a civil war These are not, as will be seen,[1] real subjects of International Law, but in some points are treated as though they were International Persons, without thereby becoming members of the Family of Nations

Conception of the State

§ 64 A State[2] proper—in contradistinction to colonies and Dominions—is in existence when a people is settled in a country under its own sovereign Government The conditions which must obtain for the existence of a State are therefore four

There must, first, be a *people* A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour

There must, secondly, be a *country* in which the people has settled down A wandering people, such as the Jews were whilst in the desert for forty years before their conquest of the Holy Land, is not a State[3] But it matters not whether the country is small or large, it may consist, as in the case of city States, of one town only

There must, thirdly, be a *Government*—that is, one or more persons who are the representatives of the people, and rule according to the law of the land An anarchistic community is not a State

There must, fourthly and lastly, be a *sovereign* Government Sovereignty is supreme authority, an authority

[1] See below, § 88 (Confederated States), and vol II §§ 59 and 76 (Insurgents)

[2] As to the meaning of the word 'State' considered historically see Dowdall in *L Q R*, XXXIX (1923) pp 98 125

[3] Salmond, *Jurisprudence* (7th ed, 1924), p 145, does not regard a fixed territory as essential in theory to the existence of a State The following writers take the same view Gemma, p 180, Kelsen, *Das Problem der Souveranitat* (1920), pp 70-76, Donati, *Stato e territorio* (1924), pp III, 27, 30, whose view is summarised in Lauterpacht, *Analogies*, § 95 (n 1)

which is independent of any other earthly authority Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country

Not full Sovereign States

§ 65 A State in its normal appearance does possess independence all round, and therefore full sovereignty Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States All States which are under the suzerainty or under the protectorate of another State, or are member-States of a so-called Federal State, belong to this group All of them possess supreme authority and independence with regard to a part of the tasks of a State, whereas with regard to another part they are under the authority of another State Hence it is that the question is disputed whether such not-full sovereign States can be International Persons and subjects of the Law of Nations at all [1]

That they cannot be full, perfect, and normal subjects of International Law there is no doubt But it is wrong to maintain that they can have no international position whatever, and can never be members of the Family of Nations at all They often enjoy in many points the rights, and fulfil in other points the duties, of International Persons They frequently send and receive diplomatic envoys, or at least consuls They often conclude commercial or other international treaties Their monarchs enjoy the privileges which, according to the Law of Nations, the Municipal Laws of the different States must grant to the monarchs of foreign States No other explanation of these and similar facts can be given except that these not-full sovereign States are in some way or another International Persons and subjects of International Law Such imperfect International Personality is, of course, an anomaly, but the very existence of States without full sovereignty is an anomaly in itself

[1] The question will be discussed again below, §§ 89, 91, 93, with regard to each kind of not full sovereign State The object of discussion here is the question whether such States can be considered as International Persons at all Westlake, 1 p 21, answers it affirmatively by stating 'It is not necessary for a state to be independent in order to be a state of International Law.'

Divisibility of Sovereignty contested

§ 66. The distinction between full sovereign States and not-full sovereign States is based upon the opinion that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But some deny the divisibility of sovereignty, and maintain that a State is either sovereign or not It is therefore necessary to face the conception of sovereignty more closely [1]

Meaning of Sovereignty in the Sixteenth and Seventeenth Centuries

§ 67 The term sovereignty was introduced into political science by Bodin in his celebrated work, *De la République*, which appeared in 1577 Before Bodin, at the end of the Middle Ages, the word *souverain* [2] was used in France for an authority, political or other, which had no other authority above itself Thus the highest courts were called *Cours Souveraines* Bodin, however, gave quite a new meaning to the old conception Being under the influence of, and in favour of, the policy of centralisation initiated by Louis XI of France (1461-1483), the founder of French absolutism, he defined sovereignty as ' the absolute and perpetual power within a State ' According to Bodin, such power is the supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature No constitution can limit sovereignty, which is an attribute of the king in a monarchy, and of the people in a democracy A sovereign is above positive law A contract is only binding upon the sovereign, be-

[1] The literature upon sovereignty is extensive The following authors give a survey of the opinions of the different writers Landman, *Der Souveranitätsbegriff bei den franzosischen Theoretikern* (1896), Dock, *Der Souveranitatsbegriff von Bodin bis zu Friedrich dem Grossen* (1897), Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), Rehm, *Allgemeine Staatslehre* (1899), §§ 10-16 See also Maine, *Early Institutions*, pp 342 400, Lansing in *A J*, 1 (1907), pp 105-128 and 297-320, and 15 (1921), pp 13 27, Hobhouse, *Metaphysical Theory of the State* (1918), Laski, *Studies in the Problem of Sovereignty* (1917), *Foundations of Sovereignty* (1921), *A Grammar of Politics* (1925), pp 44 88, and *The State in Theory and Practice* (1935), MacIver, *The Modern State* (1926), pp 165-290, Heller, *Souveranitat* (1927), Mattern, *Concepts of State, Sovereignty and International Law* (1928), Musacchia, *La sovranità e il diritto internazionale* (1938), J W Jones, *Historical Introduction to the Theory of Law* (1940), pp 79 97, Lindsay, *The Modern Democratic State* (1943), pp 212 228, Friedmann, *Legal Theory* (1944), pp 138 143, 386-398 And see below, § 70, and the works of Nelson, Duguit, and others referred to above, §§ 1 (n) and 11 (n)

[2] *Souverain* is derived from the late Latin *superanus*

cause the Law of Nature commands that a contract shall be binding [1]

The conception of sovereignty thus introduced was at once accepted by writers on politics of the sixteenth century, but the majority of these writers taught that sovereignty could be restricted by a constitution and by positive law Thus at once a somewhat weaker conception of sovereignty than that of Bodin made its appearance On the other hand, in the seventeenth century, Hobbes went even beyond Bodin, maintaining [2] that a sovereign was not bound by anything, and had a right over everything, even over religion Whereas a good many writers followed Hobbes, others, especially Pufendorf, denied, in contradistinction to Hobbes, that sovereignty involves omnipotence According to Pufendorf, sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be constitutionally restricted [3] Yet in spite of all the differences in defining sovereignty, all authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible.

Meaning of Sovereignty in the Eighteenth Century

§ 68 In the eighteenth century matters changed again The fact that the several hundred reigning princes of the member-States of the German Empire had in practice, although not theoretically, become more or less independent since the Westphalian Peace enforced the necessity upon writers of recognising a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half sovereignty Absolute and full sovereignty was attributed to those monarchs who enjoyed an unqualified independence within and without their States Relative and not-full sovereignty, or half sovereignty, was attributed to those monarchs who were, in various points of internal or foreign affairs of state, more or less dependent upon other monarchs By this distinction

[1] See Bodin, *De la République*, I c 8 On the influence of Bodin on International Law see Gardot in *Hague Recueil*, vol 50 (1934) (IV), pp 549-740, Buddeberg in *Archiv des öffentlichen Rechtes*, 32 (1941), pp 193-226.

[2] See Hobbes, *De Cive*, c 6, §§ 12-15

[3] See Pufendorf, *De Jure Naturae et Gentium*, VII c 6, §§ 1-13.

the divisibility of sovereignty was recognised And when in 1787 the United States of America turned from a Confederation of States into a Federal State, the division of sovereignty between the sovereign Federal State and the sovereign member-States appeared But it cannot be maintained that divisibility of sovereignty was universally recognised in the eighteenth century It suffices to mention Rousseau, whose *Contrat Social* appeared in 1762, and defended again the indivisibility of sovereignty

Meaning of Sovereignty in the Nineteenth Century

§ 69 During the nineteenth century the old controversy regarding divisibility of sovereignty had by no means died out It acquired a fresh stimulus, on the one hand, through Switzerland and Germany turning into Federal States, and, on the other, through the conflict between the United States of America and her Southern member-States The theory of the concurrent sovereignty of the Federal State and its member-States, as defended by *The Federalist* (Alexander Hamilton, James Madison, and John Jay) in 1787, was in Germany taken up by Waitz,[1] who found many followers The theory of the indivisibility of sovereignty was defended by Calhoun,[2] and many European writers followed him in time In view of the somewhat academic nature of the controversy surrounding this subject it seems preferable to cling to the facts of life and the practical, though abnormal and illogical, condition of affairs As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible

The Problem of Sovereignty in the Twentieth Century

§ 70 While in the nineteenth century the problem of sovereignty was, as has been shown, discussed largely with reference to the question whether sovereignty can be conceived of as divisible,[3] it assumed a different aspect in the twentieth century before and after the First World War The question which is now confronting the science of law and politics is how far sovereignty as it presents itself from the

[1] *Politik* (1862)

[2] *A Disquisition on Government* (1851)

[3] On the divisibility of sovereignty with regard to territory see below, § 171

point of view of the internal law of the State, namely, as the highest, underived power and as the exclusive competence to determine its jurisdictional limits, is compatible with the normal functioning and development of International Law and organisation The very notion of International Law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation, implies the idea of their subjection to International Law and makes it impossible to accept their claim to absolute sovereignty in the international sphere Their mutual independence is indeed a fundamental rule of International Law , but it is only by reference to a higher legal order that the mutual independence of States, viewed as a rule of law, is conceivable On the other hand, owing to the weakness of International Law, its supremacy over the States composing the international community is limited to the duty which it imposes upon them to observe and, within a restricted sphere, to submit to the enforcement of the existing rules created by custom or treaty or flowing from the very existence of the society of States [1] It does not as yet include a competence on the part of the international community to impose fresh obligations upon an unwilling State, or to interfere with its rights in cases in which changed conditions require the adaptation of International Law to the requirements of international peace and progress [2] Neither does it as yet include the duty to submit international disputes to judicial determination [3] The abstract doctrine of equality of States [4] is, to a large extent, yet another manifestation of that conception of sovereignty These aspects of sovereignty have been the principal cause of the criticism levelled against it in the two decades after the First World War It is being increasingly realised that progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty so as to render possible, within a limited sphere, the process of international legislation and, within a necessarily unlimited sphere, the securing of the rule of

[1] See above, § 19
[2] See above, § 37*a*
[3] See vol II § 12
[4] See below, § 116*a*

law as ascertained by international tribunals endowed with obligatory jurisdiction.[1]

II

RECOGNITION OF STATES AS INTERNATIONAL PERSONS

Hall, §§ 2 and 26—Lawrence, §§ 44-47—Phillimore, II §§ 10-22—Taylor §§ 153 160—Walker, § 1—Westlake, I pp 49 58—Wheaton, § 27—Moore, I. §§ 27-75—Hershey, §§ 110-123*b*—Fenwick, ch VII—Hyde, I §§ 35-46—Bluntschli, §§ 28-38—Hackworth, I §§ 21 55—Heffter, § 23—Holtzendorff in *Holtzendorff*, II pp 18 33—Liszt, § 5, IV—Ullmann, §§ 29 30—Strupp, *Éléments*, § 4—Fauchille, §§ 195 213 (9)—Despagnet, §§ 79 85—Pradier Fodéré, I §§ 136 145—Nys, I pp 73 120—Mérignhac, I pp 320 330—Rivier, I pp 57 61, 420-421—Calvo, I §§ 87-98—Fiore, I §§ 310 320, and *Code*, §§ 165-182—Anzilotti, pp 88-102—Cavaglieri, pp 174 201—Gemma, pp 57-70—De Louter, I pp 216 224—Cruchaga, I §§ 179 194—Suarez, I §§ 22, 47, 48—Martens, I §§ 63-64—Hold-Ferneck, vol I, pp 177-198—Bustamante, pp 163 184—Keith's Wheaton, pp 42 56—Stowell, pp 37-48—Baty, pp 203 230—Smith, I pp 77-333—Romano, *Corso di diritto internazionale* (1926), pp 51 *et seq*—Anzilotti, pp 160 177—Balladore Pallieri, pp 190 198—Scelle, I pp 97-105—Le Normand,

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[1] For some recent discussion of the problem of sovereignty from this point of view see Laski, *op cit* above, Nelson, *Die Rechtswissenschaft ohne Recht* (1917), pp 57-76, 192 203, Kelsen, *Das Problem der Souveränität und die Theorie des Volkerrechts* (1920) *passim*, *General Theory of Law and State* (1945), pp 363-390, and his other works referred to above, p 16, Duguit, *Traité de droit constitutionnel* (2nd ed, 1921), I pp 550-565, Krabbe, *The Modern Idea of the State* (translation from Dutch, 1922), pp 12-36, 233-274, Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Volkerrechtsverfassung* (1923), *passim*, and particularly pp 4-13, Politis, *The New Aspects of International Law* (translation from French, 1928), pp 1-17, the same in *Hague Recueil*, vol 6 (1925) (I), pp 10 23, and in *New Commonwealth Quarterly*, I (1935), pp 215 222, 321-327, Ward, *Sovereignty* (1928), Kunz, *Die Staatenverbindungen* (1929), pp 1-41, Tachi, *La souveraineté et l'indépendance de l'Etat et les questions intérieures* (1930), Hawtrey, *Economic Aspects of Sovereignty* (1930), Sohndler, *Verfassungsrecht und soziale Struktur* (1932), pp 104-117, Gurvitch, *Le temps présent et l'idée du droit social* (1932), pp 101-212, Keeton, *National Sovereignty and International Order* (1939), Friedmann, *The Crisis of the National State* (1943), Siotto Pintor, *Souveraineté de la morale* (a lecture, 1936, Cairo), Brierly in *B Y*, 5 (1924), pp 12-14, Garner in *R I*, 3rd ser, 6 (1925), pp 36-58 (with references at p 37 to literature before the war), and in *Hague Recueil*, vol 35 (1931) (I), pp 698 712, Morellet in *R G*, 33 (1926), pp 106 119, Van Zanten in *R I*, 3rd ser, 11 (1930), pp 494 528, Barthélemy in *R I* (*Paris*), 5 (1930), No 14, pp 420 440, Jasçenko in *Nordisk T A*, *Acta Scandinavica*, 3 (1932), pp 3 27, Raestad in *R I* (*Paris*), 17 (1936), pp 26-84, and below, p 345, n 4 See on the other hand Hold Ferneck, I pp 121 143, Heller, *Die Souveranität* (1927), Montluc in *R I* (*Geneva*), 4 (1926), pp 255 268 And see Gurvitch in *Journal of Legal and Political Sociology*, 2 (1943), pp 30 51, Radin, *ibid*, pp 5 29, Aufricht in *Cornell Law Quarterly*, November 1944 and March 1945 See also some of the writers referred to above, p 116, n 1

La reconnaissance internationale et ses diverses applications (1899)—Borchard, § 85—Kelsen, *Das Problem der Souveranität und die Theorie des Volkerrechts* (1920), pp 228 235—Spiropoulos, *Die de facto-Regierung im Volkerrecht* (1926), pp 11 62, 164 171—Kunz, *Die Anerkennung der Staaten und Regierungen im Volkerrecht* (1928)—Knubben, *Die Subjekte des Volkerrechts* (1928), pp 305-349—Hervey, *The Legal Effects of Recognition in International Law* (1928)—Redslob, *Les principes du droit des gens moderne* (1937), pp 48 69—Scalfati Fusco, *Il riconoscimento di stati nel diritto internazionale* (1938)—Venturini, *Il riconoscimento nel diritto internazionale* (1946)—Jiminez de Arechaga, *Reconocimento de Gobiernos* (1947)—Lauterpacht, *Recognition in International Law* (1947), pp 87 174—Jessup, *A Modern Law of Nations* (1948), pp 43 67—Erich in *Hague Recueil*, 1926 (III), pp 431 502—Temperley, V pp 157 162, VI pp 284 309—Sanders in *Z o R*, 1 (1919), pp 132 ff—Larnaude in *R G*, 28 (1921), pp 457 503—McNair in *B Y*, 1921 1922, pp 57 67—Charles de Visscher in *R I*, 3rd ser, 3 (1922), pp 150-170, 300-365—Fraenkel in *Columbia Law Review*, 25 (1925), pp 544 570—Salvioli in *Rivista*, 18 (1926), pp 330 336—Miceli, *ibid*, 19 (1927), pp 169 186—Houghton in *American Law Review* (1928), pp 228-247—Fischer Williams in *Grotius Society*, 15 (1929), pp 53 81, in *H L R*, 47 (1934), pp 776-794, and in *Hague Recueil*, vol 44 (1933) (II), pp 202 312—Marshall Brown in *R I*, 3rd ser, 13 (1932), pp 5 33—Kelsen in *Hague Recueil*, vol 42 (1932) (IV), pp 260 294—Cavaglieri in *Rivista*, 24 (1932), pp 305-345—Diena, *ibid*, pp 465 482—Salvioli in *Hague Recueil*, vol 46 (1933) (IV), pp 44 56—Scelle, *ibid*, pp 373 393, and vol 55 (1936) (I), pp 107-135—Brierly, *ibid*, vol 58 (1936) (IV), pp 48 62—Heuss in *Z V* 18 (1934), pp 37 89, and *ibid*, 19 (1935), pp 1 38—Redslob in *R I* (*Paris*), 13 (1934), pp 429 443—Cavaré in *R G*, 42 (1935), pp 5 99—Ottolenghi in *Rivista*, 28 (1936), pp 3 33, 152 171—Raestad in *R I*, 3rd ser, 17 (1936), pp 257 313—Resolution of the Institute of International Law adopted in 1936, *A J*, 30 (1936), Suppl, p 185—Kelsen in *A J*, 35 (1941), pp 605 617—Lauterpacht in *Hague Recueil*, vol 62 (1937) (IV), pp 244 296, in *Yale Law Journal*, 53 (1944), pp 385 458, and in *Columbia Law Review*, 45 (1945), pp 815 864, and 46 (1946), pp 37 68

Recognition a Condition of Membership of the Family of Nations

§ 71 As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the Family of Nations Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members which have been recognised by the body of members already in existence when they were born [1] A State is, and becomes, an International Person through recognition only and exclusively

Many writers do not agree with this opinion. They maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium

[1] See above, §§ 27 and 28 On the formation of States see Biscottini in *Rivista*, 18 (1939), pp 378 406

did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person [1] They do not deny that in practice such recognition is necessary to enable every new State to enter into official intercourse with other States Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact

Others hold the view that it is a rule of International Law that no new State has a right as against other States to be recognised by them, that no State has a duty to recognise a new State [2], and that a new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members In fact it is difficult to see what the function of recognition could be if the mere claim of a community to be an independent State, in the meaning of International Law, gave it a right to membership of the Family of Nations Through recognition only and exclusively a State becomes an International Person and a subject of International Law [3] However, as will be suggested below (§ 71*a*), while the granting of recognition is within the discretion of States, it is not a matter of arbitrary will and must be given or refused in accordance with legal principle That principle, which applies alike to recognition of States, of Governments, and of belligerency, is that certain conditions of fact, not in

[1] See, for instance, Hall, §§ 2 and 26, Ullmann, § 30, Gareis, p 64, Rivier, 1 p 57, Heilborn in *Stier Somlo*, 1 p 58, Salvioli, *op cit*, Kelsen in *Hague Recueil*, vol 42 (1923) (IV), pp 260 294, and in *R I (Paris)*, 4 (1929), pp 613 641, Verdross, § 30, and in *Strupp, Wort*, 1 pp 283-286, Balladore Pallieri, pp 190 197, Fedozzi, *Trattato di diritto internazionale*, 1 (2nd ed, 1933) pp 101 108, distinguishes between long established States, whose personality is grounded in the fact that they are already members of the international community, and new States, Wegner in *Festgabe für Paul Heilborn* (1931), pp 181 202, Fischer Williams in *Hague Recueil*, vol 44 (1933) (II), pp 203-313, and in *H L R*, 47 (1934), pp 776 780 See also *Deutsche Continental Gas Gesellschaft* v *Polish State*, decided on August 1, 1929, by the Germano Polish Mixed Arbitral Tribunal, *Annual Digest*, 1929 1930, Case No 5, for a pronouncement in favour of the declaratory view But see Herz in *R I*, 3rd ser, 17 (1936), pp 564 590

[2] Rivier, 1 p 57, Fauchille, § 204, Anzilotti, pp 156 168, Strupp in *Hague Recueil*, vol 47 (1934) (I), pp 422 452, Cavaglieri in *Rivista*, 24 (1932), pp 305 345

[3] See below, § 115 As to the status of unrecognised States before the Permanent Court of International Justice see Spiropoulos in *R I (Geneva)*, 5 (1927), pp 35-45

themselves inconsistent with International Law, impose the duty of and confer the right to recognition, that recognition is not an act of arbitrary discretion or a political concession, and that it is constitutive of the rights and duties pertaining to statehood, governmental capacity, or belligerency.

Recognition of States

§ 71a In recognising a new State as a member of the international community the existing States declare that in their opinion the new State fulfils the conditions of statehood as required by International Law In thus acting, the existing States perform, in the full exercise of their discretion, a quasi-judicial duty In the absence of a special organ competent to fulfil that function, they are entrusted by International Law with the task of ascertaining whether the conditions of statehood as laid down by International Law [1] exist in any given case The bulk of the practice of States probably supports the view that Governments do not deem themselves free to grant or refuse recognition [2] to new States in an arbitrary manner, by exclusive reference to their own political interests, and regardless of legal principle Undoubtedly, as the recognising State is in this particular matter both the guardian of its own interests [3] and an agent of International Law, it is unavoidable that political considerations may from time to time influence the act or refusal of recognition [4] However, this duality of function

[1] See above, § 64

[2] It follows that a community may have a legal, although for the time being unenforceable, right to recognition See *e g* the Opinion of Adams, United States Secretary of State, addressed on August 24, 1818, to President Monroe with regard to the Venezuelan struggle for independence 'There is a stage in such contests when the parties struggling for independence have a right to demand its acknowledgment by neutral parties,' Moore, 1 p 78 There is an instance of a State, after its independence had become firmly established, claiming compensation on account of losses suffered as the result of being refused belligerent rights during the struggle for independence See the claims of the United States against Denmark in connection with the *Bergen* prizes, Moore, 1 p 169, *Arbitrations*, v p 4572 See also the case of the *Macedonian*, a claim by the United States against Chile, Lapradelle-Politis, II pp 215-217

[3] In particular, the recognising State must exercise care not to commit a tortious act against the parent State by a precipitate act of recognition See below, § 72

[4] The reader must be warned that a considerable number of writers hold the view that, apart from the duty owed to the parent State, recognition of States, governments, and belligerency is entirely within the political discretion of States For a detailed discussion of the subject see Lauterpacht in *Yale Law Journal*, 53 (1944), pp 385 458

does not affect its essential legal nature Recognition, while declaratory of an existing fact, is constitutive in its nature. It marks the beginning of the international rights and duties of the recognised community This is in itself, apart from what is believed to be the weight of practice, an additional reason why it is difficult to admit that it is a discretionary act governed by political considerations of self-interest [1]

Precipitate Recognition

§ 72 Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution Foreign States must then decide whether a new State has really already safely and permanently established itself, or only makes efforts to this end without having already succeeded That in every case of civil war a foreign State can recognise the insurgents [2] as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a Government of their own, and conduct their military operations according to the laws of war, there is no doubt But there is a fundamental difference between this recognition as a belligerent Power and the recognition of the insurgents and their part of the country as a new State The question is precisely at what exact time recognition as a new State may be given as distinguished from the recognition as a belligerent Power For an untimely and precipitate recognition as a new State is more than a violation of the dignity of the mother-State It is an unlawful act, and it is frequently maintained that such untimely recognition amounts to intervention [3]

In spite of the importance of the question, no hard-and-fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently Indication of such safe and permanent establishment may be found either in the fact that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts

[1] Recognition of States is, of course, a political function in the meaning that it is within the province of the Executive and not of the Judiciary, but, it will be noted, the executive organs within the State are often charged with the function of ascertaining and applying the law

[2] See below, vol II §§ 76, 76*a*

[3] See below, § 134

to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary back under its sway [1] Of course, as soon as the mother-State itself recognises the new State, there is no reason and no legal justification for other States to withhold their recognition any longer Recognition by the mother-State is conclusive proof of the fact that the new State has finally established its independence [2]

Recognition of New Heads and Governments of Old States

§ 73 Recognition of a new State must not be confused with recognition of a new Head or Government of an old State Recognition of a change in the headship of a State,[3] or in the form of its Government, or of a change in the title of an old State, are matters of importance But the granting or refusing of these recognitions has nothing to do with recognition of the State itself If a foreign State refuses to recognise a new Head, or a change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States

[1] When, in 1903, Panama seceded from Colombia, the United States immediately recognised the new Republic as an independent State and prevented Colombia from asserting her authority over the rebellious province Whatever may have been the higher justification of that step, there is no doubt that it amounted to intervention For the motives of this action see Moore, III § 344, pp 46 and following, and Scott in *A J*, 15 (1921), pp 430-439 The controversy of the United States with Colombia was finally settled by a treaty negotiated in 1914 and ratified in 1922 The Treaty provided, *inter alia*, for a payment of $50,000,000 to be made to Colombia For an account of the final stages of the controversy see Jones, *The Caribbean since 1900* (1936), pp 314-338

[2] The breaking off of the American States from their European mother-States furnishes many illustrative examples Thus the recognition of the United States by France in 1778 was precipitate But when in 1782 Great Britain herself recognised the independence of the United States, other States could accord recognition too without giving offence to Great Britain Again, when the South American colonies of Spain declared their independence in 1810, no Power recognised the new States for many years When, however, it became apparent that Spain, although she still kept up her claims, was not able to restore her sway, the United States recognised the new States in 1822, and Great Britain followed the example in 1824 and 1825 See Gibbs, *Recognition a Chapter from the History of the North American and South American States* (1863), Moore, I §§ 28-36, Smith, I pp 115 170 And see, in particular, for invaluable information, *Diplomatic Correspondence of the United States concerning the Independence of the Latin-American Nations*, Edited by Manning, 3 vols (1925), and *Britain and the Independence of Latin America*, 1812-1830, Edited by Webster, 2 vols (1938) See also Robertson, *France and Latin-American Independence* (1939)

[3] See below, § 342.

as long as recognition is not given either expressly or tacitly. If recognition of a new title [1] of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title

When coming into Power normally and constitutionally [2]

§ 73*a* In the case of the accession of a new Head of a State, whether it be a new monarch or a new President of a republic, other States are as a rule notified and usually recognise the new Head by some formal act such as a message of congratulation But neither such notification nor recognition is strictly necessary according to International Law, because an individual becomes the Head of a State, not through the recognition of other States but through the Municipal Law of his own State Such notification and recognition are, however, not devoid of legal importance, because by notification the one State declares that the individual concerned is its highest organ and has, by its Municipal Law, the power to represent the State in the totality of its international relations, and, conversely, by recognition other States declare that they are ready to negotiate with such individual as the highest organ of his State In practice when the new Head has come into his position in a normal and constitutional manner, such as succession to the throne on the death of the reigning monarch or a presidential election, recognition will as a matter of practice and courtesy be readily granted Similarly, if a State were to change its form of government, for instance, from a monarchy to a republic, in a constitutional manner and without anything in the nature of a *coup d'état*, it is unlikely now that other States would withhold their recognition of the new Government [3]

When coming into Power abnormally and in a revolutionary manner.

§ 73*b* When, however, the new Head or Government, be it a monarch succeeding another monarch, a President of a republic succeeding another President, a monarch succeeding a President of a republic, or a President of a republic a monarch, comes into power not in a constitutional manner but after a *coup d'état*, a revolution (which need not involve

[1] See below, § 119

[2] Incorporating much of § 342 of the third edition

[3] For the recognition of the change by a State of the title of the State or of its Head see below, § 119

bloodshed), or any other event involving a break in legal continuity, the determination by other States of the attitude to be adopted towards the new Head or Government is often difficult. They are called upon to arrive at a decision on the question whether the new authority can be properly regarded as representing the State in question In arriving at that decision, they exercise a discretion which, though necessarily wide, is not an arbitrary act

The Legal Nature of Recognition of Governments

§ 73c For, as in the case of recognition of new States,[1] so also in the matter of recognition of Governments the act of recognition is not a function which International Law can, in principle, leave to be decided by purely political considerations on the part of third States A State whose Government is refused recognition is for most purposes deprived of the benefits of membership of the international community It is accordingly difficult to admit that the withholding or withdrawal of those benefits is a question entirely outside legal regulation A Government which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the State in question and as such to be entitled to recognition The bulk of the practice of States, at least that of Great Britain and of the United States, in the matter of recognition of Governments is based on the principle of effectiveness thus conceived As a rule, that principle has been interpreted in the sense that the new Government must be supported by the 'will of the nation, substantially declared,'[2] and that there must be evidence of popular approval, adequately expressed, of the revolutionary change[3] After the First World War no such evidence was required in most cases Exercise of power, with the apparent acquiescence of the population, was considered to be sufficient proof of effectiveness In such cases British diplomatic representatives abroad were instructed to inform the new Government that the revolutionary change 'did not affect

[1] See above, § 71a

[2] Jefferson to Gouverneur Morris, November 7, 1792, Moore, 1 p 120

[3] See, *e g*, the insistence of Great Britain on a formal vote of the constituent Assembly as a condition for the recognition of the French Covenant in 1870 B F S P, 61 (1870 71), pp 751, 995

the relations between the two countries'[1] The practice of the United States underwent a similar change[2] It is probable that the abandonment of the requirement of express popular approval was merely a passing phase in the practice of recognition at a time when the principle of government by consent suffered an eclipse in many parts of the world

Occasionally States have refused to recognise foreign Governments either on the ground of their revolutionary origin and the degree of violence accompanying the change[3]

[1] See, for instance, with regard to the recognition in 1930 of the Governments of Peru, Bolivia, and Argentina Hansard, Parl Debates, Commons, 1930 1931, vol 244, cols, 458, 1304

[2] Thus with regard to Peru, Bolivia, and Argentina recognition was granted in 1930 on the basis of evidence that the new Governments in these countries 'are *de facto* in control of their respective countries and that there is no active resistance to their rule'. *A J*, 25 (1930), p 121, Hackworth, 1 p 223 This constituted a departure from the practice of recognition as previously pursued by the United States For although the United States had always rejected the principle of legitimacy as a test of recognition, it adhered to the requirement of subsequent legitimation, by an adequate expression of popular approval, of the revolutionary change This was so in particular during the administration of President Wilson, which in this matter was essentially in keeping with the principles enunciated by Jefferson (see above, p 127, n 2) But see the statement of the Secretary of State Stimson made in 1931 Latin American Series, No 4 (1931), p 8 See, generally, Goebel, *The Recognition Policy of the United States* (1915), Cole, *Recognition Policy of the United States since* 1901 (1928), MacCorkle, *American Policy of Recognition towards Mexico* (1933), McMahon, *Recent Changes in the Recognition Policy of the United States* (1934), Lauterpacht, *Recognition in International Law* (1947), pp 87 174, Noel-Henry in *R G*, 35 (1928), pp 201-267, Dennis in *Foreign Affairs* (U S A), 9 (1931), pp 201 221, Hackworth, 1 pp 47 51, and in *A S Proceedings*, 1931, pp 120 131

[3] For an early example see the refusal of Great Britain to recognise in 1792 the French revolutionary Government Smith, 1 pp 80 98 See also *ibid*, pp 229 233, on the British refusal from 1903 1906 to recognise the new Serbian Government following upon the assassination of the Serbian King and Queen

The five Central American Republics concluded in 1907 and 1923 treaties embodying the so-called Tobar doctrine in which they bound themselves not to grant recognition to any Government coming into existence by revolutionary means 'so long as the freely elected representatives of the people have not constitutionally reorganised the country' See Woolsey in *A J*, 28 (1934), pp 325 329 In 1932 Costa Rica and in 1933 Salvador denounced the Treaty of 1923

For the so called Estrada doctrine enunciated in 1930 by the Mexican Foreign Minister and affirming the duty of continuing diplomatic relations, so far as possible, without regard to revolutionary changes see *A J*, 25 (1931), Suppl, p 203 See also Jessup in *A J*, 25 (1931), pp 719-723, and Nervo in *R I* (*Paris*), 7 (1931), pp 436 445

See also the award of October 18, 1923, by the former President Taft in the arbitration between Great Britain and Costa Rica for the statement that non recognition on the ground of illegitimacy of origin is not a rule of International Law *Annual Digest*, 1923 1924, Case No 15 (*c*)

or of their supposed unwillingness to fulfil their international obligations [1] Neither of these tests can be regarded as satisfactory In the absence of effective international guarantees for securing just government and proper administration of the law within the various States, it is impossible to insist on the perpetuation of any existing régime by a refusal to recognise its revolutionary successor Neither is it in the long run practicable to adopt the indirect method of refusal of recognition as a means of compelling the fulfilment of international obligations The more rational method is to grant recognition and then to insist, by such means as International Law offers, on the proper fulfilment of its obligations on the part of the recognised government [2]

It must be emphasised that the effect of a revolution resulting in a Government which for a time failed to secure any recognition from foreign States, does not destroy the international personality of the State or free it, permanently at any rate, from existing treaty obligations, though it involves an interruption in that State's legal capacity for international purposes [3]

De facto Recognition

§ 74 *De facto* recognition of a State or government [4] takes

[1] Thus many States refused for a long time to recognise the Government of Soviet Russia on account of its unwillingness to fulfil obligations contracted by the former Russian Governments and to give assurances of abstention from subversive propaganda abroad See below, p 261, n 2 On the recognition of the Soviet Government by the United States in 1933 see *Documents*, 1933, pp 459-472, Kleist, *Die volkerrechtliche Anerkennung Sovjetrusslands* (1934), Houghton in *International Conciliation* (Pamphlet No 247, February 1929), Dickinson in *Michigan Law Review*, 30 (1931 1932), pp 181-196, Korovin in *Iowa Law Review*, 19 (1933-1934), pp 259 271

[2] In time of war there is often a tendency to shape the practice of recognition with the view to making it to conform with belligerent requirements Thus, for instance, in 1944 Great Britain and the United States declined to recognise the Argentinian Government on account of its failure to adopt a policy in keeping with that of other American Republics But see Kunz in *A J*, 38 (1944), pp 436 441, who regards the refusal of recognition in this case as corroborating the view that recognition is never due as a matter of legal duty

[3] See remarks by the Committee of Jurists in the Aaland Islands question, *Off J*, Special Suppl No 3, p 18

[4] On *de facto* recognition and the status of Governments recognised *de facto* see (in addition to the literature cited above, § 71) Rougier, *Les guerres civiles et le droit des gens* (1903), pp 478-500, Spiropoulos, *Die* de facto *Regierung im Volkerrecht* (1926), Noel Henry, *Les gouvernements de fait devant le juge* (1927), Hervey, *The Legal Effects of Recognition in International Law* (1928), pp 13-18, Kunz, *Die Anerkennung von Staaten und Regierungen im Volkerrecht* (1928), pp 50 53, 132-169, Stille, *Die Rechtstellung der* de facto *Regierung in der*

place when, in the view of the recognising State, the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not as yet offer prospects of complying with other requirements of recognition such as willingness or ability to fulfil international obligations [1] Thus, after the First World War, the Governments of the various new States, such as Finland, Latvia and Esthonia, which formerly constituted part of the Russian Empire, were recognised in the first instance as *de facto* Governments pending the final territorial settlement in that part of the world [2] The Government of Soviet Russia, although, to all appearances, firmly and effectively established, was recognised for a number of years after its establishment by many States *de facto* only on the ground that, in their view, it was unwilling to fulfil its international obligations in such matters as compensation for the confiscated property of foreign subjects and acknow-

englischen und amerikanischen Recht sprechung (1932), Schluter, *De facto Anerkennung im Volkerrecht* (1936), Hackworth, 1 §§ 27-29, Hershey in *A J*, 14 (1920), pp 499 518, Lar naude in *R G*, 28 (1921), pp 457 503, Podesta Costa, *ibid*, 29 (1922), pp 47 59, Dickinson in *Michigan Law Review*, 22 (1923), pp 29 45, 118 134, and in *A J*, 19 (1925), pp 263 272, 753 756, Baty in *Yale Law Journal*, 31 (1922), pp 469 488, Houghton in *Minnesota Law Review*, 14 (1929-1930), pp 251-269, Lauterpacht in *B Y*, 22 (1945), pp 164-190 It must be noted that both *de facto* and *de jure* recognition are legal acts The expression '*de facto* recognition' is a convenient abbreviation for 'recognition as a *de facto* Government (or State),' and *de jure* recognition for 'recognition as a *de jure* Government (or State)' The distinction between *de facto* and *de jure* recognition has no bearing upon the legitimacy or otherwise of the new authority from the point of view of the constitutional law of the State concerned For an emphatic repudiation of the view that constitutional legitimacy is a condition of recognition of governments in International Law see the award of Taft in the arbitration between Great Britain and Costa Rica in 1923 *A J*, 17 (1924), pp 147-174, *Annual Digest*, 1923 1924, Case No 15 See also *Republic of Peru* v *Peruvian Guano Co* (1887), 36 Ch D at p 497, *Republic of Peru* v *Dreyfus Brothers Co* (1888), 38 Ch D 384, where, it appears, the Court refused to consider as relevant the circumstance that the Peruvian Government, recognised by Great Britain, was a revolutionary '*de facto*' dictatorship

[1] Thus in the case of *The Gagara*, the Foreign Office informed the Court that His Majesty's Government had 'for the time being provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto*, independent body, and accordingly has received a certain gentleman as the informal representative of the provisional Government' [1919] P 95

[2] For a list of States which recognised the Soviet Government in that way see *A J*, 28 (1934), p 97 See also Appendix XXIV in Taracouzio, *The Soviet Union and International Law* (1935), Toynbee, *Survey*, 1924, pp 228-262

ledgment of liability for financial obligations incurred by its predecessors

Recognition *de facto* is, in essence, provisional and liable to be withdrawn if the absent requirements of recognition fail to materialise It is indistinguishable from *de jure* recognition inasmuch as the legislative and other internal measures of the authority recognised *de facto* are, before the courts of the recognising State, treated on the same footing as those of a State or Government recognised *de jure* [1] Similarly, a State or Government recognised *de facto* enjoys jurisdictional immunity in the courts of the recognising State [2] But it is inaccurate to assume that no legal consequences follow from the distinction between *de jure* and *de facto* recognition Thus, at a time when in 1937 Great Britain recognised *de facto* the Italian rule over Abyssinia, it was held that Italy could not be regarded as entitled, by virtue of State succession, to the assets of Abyssinia [3] The legal position underwent a change in this respect after the annexation of Abyssinia had been recognised *de jure* [4] According to the practice of some countries, including Great Britain, *de facto* recognition does not, as a rule, bring about either full diplomatic intercourse [5] or the conferment of

[1] *Luther* v *Sagor*, [1921] 3 K B 532 The rule laid down in this case that there is no distinction between *de facto* and *de jure* recognition for the purpose of giving effect to the internal acts of the recognised authority—but not necessarily for other purposes—has since been applied in numerous cases Thus in *Bank of Ethiopia* v *National Bank of Egypt and Liguori* the Court held that in view of the fact that the British Government recognised the Italian Government as being the *de facto* government of the area of Abyssinia then under Italian control, effect must be given to an Italian decree in Abyssinia dissolving the plaintiff Bank and appointing a liquidator [1937] Ch 513 For a criticism of this decision see McNair, *Legal Effects of War* (2nd ed , 1944), p 341 See also *Banco de Bilbao* v *Sancha and Rey*, where it was held that the decrees of the *de jure* Spanish Government had no effect, so far as English courts were concerned, in the territory in the control of the Nationalist Government recognised *de facto* [1938] 2 K B 176, *Annual Digest*, 1938 1940, Case No 29

[2] *The Gagara*, [1919] P 95 In *The Arantzatzu Mendi* it was held that the Nationalist Government of Spain, which was recognised as a *de facto* Government of the part of Spain under its control, was entitled to jurisdictional immunity in an action brought against it by the *de jure* Government of Spain [1938] P 233, [1939] P 37, [1939] A C 216, *Annual Digest*, 1938 1940, Case No 25 For a criticism of the decision see Lauterpacht in *Modern Law Review*, 3 (1939-1940), pp 1-20, and Briggs in *A J*, 33 (1939), pp 689-699

[3] *Haile Selassie* v *Cable and Wireless Ltd* (No 2), [1939] Ch 182

[4] *Ibid*

[5] See the statement of the Foreign Office in the course of the proceedings in *Fenton Textile Association* v *Krassin* (1922) 38 *T L R* 260 See

diplomatic immunities upon the representatives of the *de facto* Government [1]

Consequences of Recognition of New Heads and Governments

§ 75 Among the more important consequences which flow from the recognition of a new Government or State are these (1) it thereby acquires the capacity to enter into diplomatic relations with other States and to make treaties with them, (2) within limitations which are far from being clear, former treaties (if any) concluded between the two States, assuming it to be an old State and not a newly-born one, are automatically revived and come into force [2], (3) it thereby acquires the right, which, at any rate according to English law, it did not previously possess, of suing in the courts of law of the recognising State [3], (4) it thereby acquires for itself and its property immunity from the jurisdiction of the courts of law of the State recognising it and the ancillary rights which are discussed later [4]—an immunity which, according to English law at any rate, it does not enjoy before recognition [5] (5) It also becomes entitled to demand and receive possession of property situate

also House of Commons, *Debates*, vol 139, col 2198, for the statement that the representatives of the Soviet Government, subsequent to its recognition *de facto*, would not be recognised as diplomatic representatives

[1] However, it appears from the language used by Scrutton and Acton LL J in the above case that the matter might have been open to doubt but for the fact that the Trade Agreement with Soviet Russia of 1921 excluded, by implication, the grant of diplomatic immunities According to the practice of the United States, representatives of a government recognised *de facto* enjoy diplomatic immunities

[2] See British Note to Russian Soviet Government Toynbee, *Survey*, 1924, p 491

[3] *City of Berne* v *Bank of England* (1804) 9 Ves Jun 347, *Jones* v *Garcia del Rio* (1823) Turn and Russ 297, p 57, *Taylor* v *Barclay* (1828) 2 Sim 213 (the last two are cases of new and unrecognised States whose Governments were consequently unrecognised, but much of the reasoning is relevant See as to these cases Bushe Fox, cited below, p 133, n 2), and see Spiropoulos, *op cit*, pp 128 140, who contrasts the attitude of the English courts with that of the French courts The American law appears to be the same *Russian Socialist Republic* v *Cibrario* (1923) 235 N Y 255, *Cibrario* v *Russian Trade Delegation in Italy*, *Annual Digest*, 1931-1932, Case No 26, for the American literature see below, n 5

[4] See below, § 115

[5] A fair inference from *The Jupiter*, (1924) P 236 See also *The Annette*, *The Dora*, L R [1919] P 105 American courts have granted certain immunities to an unrecognised Government, the ground being that immunity ought not to depend on recognition but on the nature of the action see *Wulfsohn* v *Russian Socialist Republic* (1923) 234 N Y 372, 138 N E 24, *Underhill* v *Hernandez* (1897), 168 U S 250, *Nankivel* v *Omsk All Russian Government*, *Annual Digest*, 1923-1924, Case No 70, *Voevodine* v *Government of*

within the jurisdiction of a recognising State, which formerly belonged to the preceding Government at the time of its supersession [1] (6) Recognition being retroactive and dating back to the moment at which the newly recognised Government established itself in power, its effect is to preclude the courts of law of the recognising State from questioning the legality or validity of the acts both legislative and executive, past and future, of that Government [2], it therefore

the Commander-in Chief of the Armed Forces in the South of Russia, ibid, 1931-1932, Case No 25, see also v *National City Bank* (1924) 158, 145 N E 917, for a discussion of the same point, and Borchard in *Yale Law Journal*, 31 (1922), pp 534 537, Dickinson in *Michigan Law Review*, 22 (1923), p 131, and in *A J*, 19 (1925), pp 263-272

[1] For instance, *land*, see Answers in the House of Commons on May 12 and 14, 1924, Hansard, *Commons*, 1924, vol 173, columns 878, 1312 *State archives Union of Soviet Socialist Republics* v *Belaiew* (1925) 42 T L R 21, *the same* v *Onou* (1925) 69 *Solicitors' Journal*, 676, London *Times* newspaper, May 14, 1925 *Merchant Ships; The Jupiter* [1924] P 236

[2] *A M Luther Co* v *Sagor & Co*, [1921] 3 K B 532 See Fachiri in *B Y*, 12 (1931), pp 95 106 This is the established doctrine of English and, up to 1933, of American courts In 1933, in *Salimoff* v *Standard Oil Company*, 262 N Y 220, 186 N E 679, *Annual Digest*, 1933 1934, Case No 8, the Court of Appeals of New York held that the nationalisation decrees of the unrecognised Soviet Government with regard to property situated in Russia were to be treated as valid The decision of the Court was probably influenced by the statement of the Department of State which was presented before the Court and which affirmed that the Soviet Government exercised effective power in Russia and that the refusal to recognise it was due to reasons other than absence of effectiveness In the case of *Sokoloff* v *National City Bank* (1924) 239 N Y. 158, 166; *A J*, 19 (1925), pp 269, 270, it was pointed out that courts might recognise acts and decrees of an unrecognised foreign Government 'if violence to fundamental principles of justice or to our own public policy might otherwise be done' See generally on the judicial practice in the United States in matters of recognition, Dickinson in *A J*, 25 (1931), pp 214 237, Tennant in *Michigan Law Review*, 29 (1930-1931), pp 708 741, Borchard in *A J*, 26 (1932), pp 261 271 For a learned and trenchant although somewhat one sided plea for an independent judicial treatment of these questions see Jaffe, *Judicial Aspects of Foreign Relations* (1933), and Mann in *Grotius Society*, 29 (1943), pp 143 170 So long as the function of recognition is performed by the Executive, it is difficult to see how the judicial organs of the State can treat as valid the legislation of a foreign authority which the executive organs of the State treat as non existent On the position of unrecognised Governments generally see also Houghton in *Indiana Law Review*, 4 (1928 1929), pp 519 *et seq*, and in *Minnesota Law Review*, 13 (1929), pp 216 *et seq*, Bushe Fox in *B Y*, 12 (1931), pp 63 75, and 13 (1932), pp 39 48, Wright in *A J*, 26 (1932), pp 342 348, Kallis in *Virginia Law Review*, 20 (1933-1934), pp 1 *et seq*, Makarov in *Z o V*, 4 (1934), pp 1 24, Doukas, *ibid*, 35 (1937), pp 1071-1098 For further literature see below, § 75*f* In *Russian Volunteer Fleet* v *United States* (1931), 282 U S 481, *Annual Digest*, 1931-1932, Case No 24, the Supreme Court of the United States held that non recognition does not deprive the nationals of a State with an unrecognised Government of a right of action

validates, so far as concerns those courts of law, certain transfers of property and other transactions which before recognition they would have treated as invalid [1]

[1] Charles de Visscher, *op cit*, pp 162-166, Spiropoulos, *op cit*, pp 164-168, McNair, *op cit* at p 61, Mervyn Jones in *B Y*, 16 (1935), pp 42 55, *A M Luther Co* v *Sagor* (1921) 3 K B 532, *Williams* v *Bruffy* (1877) 96 U S 176, *U S* v *Trumbull* (1891) 48 Fed 94, Scott, *Cases*, p 322, *Oetjen* v *Central Leather Co* (1917) 246 U S 397, Scott, *Cases*, p 70, *Ricaud* v *American Metal Co* (1917) 246 U S 304 For other applications of the principle of retroactivity in International Law see below, § 157*f* See also Prudhomme in 52 *Clunet* (1925), pp 318 330, who points out that one of the first practical consequences of the French recognition of the Soviet Government was that the French assets of French branches of corporations having their *siège social* in Russia were placed *sous séquestre* as the result of the recognition of the Russian nationalisation decrees, it seems, however, that this was a provisional measure (see a judgment in 1925 by the Court of Appeal of Aix, December 23, reported by Esmein in *Zeitschrift für auslandisches und internationales Privatrecht*, 1 (1927) pp 315 316, and in *Annual Digest*, 1925-1926, Case No 17, where the Court refused to recognise the validity in France of the Soviet nationalisation decrees 'as violating the very bases of the French legal system') For a clear statement of the attitude of French courts see *Cie Nord de Moscou* v *Phenix Espagnol*, decided in 1928 by the Paris Court of Appeal Sirey, 1928, II p 161, *Annual Digest*, 1927-1928, Case No 42 Similarly, the courts of the United States, while adhering to the view that recognition has the effect of validating the legislation of a foreign Government inside its territory, have held that no extra-territorial effect will be given in case of conflict with the public policy of the recognising State *Vladikavkazsky Rly Co* v *New York Trust Co* (1934) 263 N Y 369, 189 N E 456 On this case see *Columbia Law Review*, 34 (1934), p 962, Panter in *Illinois Law Review*, 29 (1934), p 248, *Z o V*, 4 (1934), p 698 See, however, *United States* v *Pink* (1942) 315 U S 203, *Annual Digest*, 1941 1942, Case No 13, where the majority of the members of the Supreme Court held that the recognition of the Soviet Government by the United States had the effect of rendering inoperative the law of the State of New York in so far as it refused to give extraterritorial effect in New York to Russian confiscatory decrees For a criticism of that decision see Borchard in *A J*, 36 (1942), p 275, and Jessup, *ibid*, p 282 The Supreme Court seemed, in this matter, to assimilate recognition to a treaty which, according to the Constitution, overrides the law of any single State And see below, § 144*b*, on the extraterritorial effect of legislation generally English courts found originally that they were not bound to hold that the dissolution of a foreign corporation by a decree of the Government of the State which gave it birth prevents the members or representatives of the dissolved corporation from suing in England However, in subsequent decisions English courts largely abandoned that view see *Russian Commercial and Industrial Bank* v *Comptoir d'Escompte de Mulhouse and others* [1925] A C 112, and *Banque Internationale de Commerce de Petrograd* v *Goukassow*, *ibid*, 150, *Sedgwick Collins & Co* v *Rossia Insurance Co* [1926] 1 K B 1, *Lazard Bros & Co* v *Banque Industrielle de Moscou* [1932] 1 K B 617 (where the Court admitted that Russian banks formed before the Revolution had been dissolved by Soviet legislation), *Re Russian Bank for Foreign Trade* [1933] Ch 745, *Re Russo Asiatic Bank* [1934] Ch 720, *Russian and English Bank* v *Baring Bros & Co* [1936] 1 All E R 505 See Wortley in *B Y*, 14 (1933), pp 1 17, Westlake, *Private International Law*, 7th ed (1925), § 306*a*, and Dicey, Rules 74 and 139 See also some American cases cited by Dickinson and Fraenkel, *op cit* See Wohl, *The Nationalisation of*

§ 75a In addition to the kinds of recognition discussed above, the following have acquired prominence (a) recognition of belligerency, (b) recognition of insurgency, (c) recognition of new territorial titles and international situations

Recognition of Insurgency

(a) *Recognition of belligerency* brings about the normal operation of the rules of war proper and is therefore discussed below, vol II §§ 55, 76, 76a

(b) *Recognition of insurgency* —It often happens that the scope and character of a civil war do not, in the opinion of third States, permit or call for the recognition of a formal condition of belligerency This may occur, for instance, when the rebellious forces do not act under the command of an organised authority in possession of considerable territory [1] or when they do not by their conduct offer the necessary guarantees of complying with the accepted rules of war In these and similar cases third States, without making a formal pronouncement and without conceding to the rebellious forces belligerent rights affecting foreign nationals, refrain from treating them as law-breakers (so long as they do not arrogate to themselves the right to interfere with foreign subjects outside the territory occupied by them), consider them as the *de facto* authority in the territory under their occupation, and maintain with them relations deemed necessary for the protection of their nationals, for securing commercial intercourse and for other purposes connected with the hostilities When that happens the rebels possess as against third States the status of insur-

Joint Stock Banking Corporations in Soviet Russia and its Bearing on their Legal Status Abroad in *University of Pennsylvania Law Review*, vol 75 (1927), pp 385 410, 527 543, and 622-645 See also Thormodsgard and Moore in *St Louis Law Review*, 1927, pp 108-117

As to the position with regard to the non recognition of Soviet Russia after the First World War see Lagarde, *La reconnaissance du gouvernement des Soviets* (1925), Prudhomme in 52 *Clunet* (1925), pp 318 330, Freund, *ibid*, pp 331-343, Nolde in *Annales Contemporaines*, No 24 (1925), pp 335 349, Kunz in *Z V*, 13 (1926), pp 580 586, Nebolsine in *Yale Law Journal*, 39 (1929-1930), pp 1130-1162, Philonenko in 56 *Clunet* (1929), pp 13-24, Trachtenberg in *Répertoire*, II pp 380-386; Nolde in *R I* (*Geneva*), 7 (1929), pp 201 213 And see, in particular, Stoupnitzky, *Statut international de l'U R R S État Commerçant* (1936), pp 235-310

[1] See *e g* the Message of President Grant of December 7, 1875, justifying, on these grounds, the refusal to recognise the belligerency of Cuban insurgents · Moore, I p 196.

gents [1] On occasions third States have exacted from the legitimate Government the recognition of the consequences of the situation thus created They have, for instance, insisted that the legitimate Government is not entitled to close by decree the ports occupied by insurgents unless such closure is accompanied by a blockade effectively maintained [2]

Recognition of New Territorial and International Situations

§ 75b (c) As a rule States may acquire new territorial or other rights by unilateral acts, such as discovery or annexation, or by treaty, without recognition on the part of third States being required for their validity [3] The position is different, however, when the act alleged to be creative of a new right is in violation of an existing rule of customary [4] or conventional International Law [5] In such cases the act in question is tainted with invalidity and incapable of producing legal results beneficial to the wrongdoer in the form of a new title or otherwise [6] That invalidity may, in

[1] On insurgency, see Lauterpacht, *Recognition in International Law* (1947), pp 270 310, Hall, 5*a*, Lawrence, § 142, Hyde, 1 § 50, Fauchille, § 199, Wilson, *International Law* (9th ed, 1935), § 28, and in *A J*, 1 (1907), pp 46 60, *The Three Friends* (1897), 166 U S 1 The characteristic feature of the status of insurgency, so far as third States are concerned, is the refusal to recognise fully a state of belligerency with the concomitant grant of belligerent rights as against neutrals Care must accordingly be taken not to commit the mistake of implying such recognition from the fact that third States maintain close contact with insurgents and otherwise recognise their effective authority in the territory occupied by them See *Spanish Government* v *North of England Steamship Company*, where it was held that a 'blockade' instituted by the insurgent Spanish authorities which, though recognised as a *de facto* Nationalist Government, were not recognised as belligerents, was not a blockade in the legal sense (1938) 54 *T L R* 852, *Annual Digest*, 1938 1940, Case No 30 And see, to the same effect, *Tatem* v *Gamboa* [1938] 3 *All E R* 135, *Annual Digest*, 1938 1940, Case No 31 See also generally on civil war in International Law Wehberg in *Hague Recueil*, vol 63 (1938) (1), pp 7 123

[2] See Dickinson in *A J*, 24 (1930), pp 69 78, and the *Oriental Navigation Company Case*, *Annual Digest*, 1927-1928, Case No 361, *A J*, 23 (1929), p 434 It is often maintained that so long as the position is one of insurgency as distinguished from belligerency, the lawful Government is in principle responsible for damage to aliens occurring in the territory occupied by the insurgents However this must be understood in the light of the principles limiting the responsibility of the State for the acts of rioters and rebels in civil war See below, § 165*b*

[3] See below, § 241

[4] See Verzijl in *R I* (*Paris*), 15 (1935), pp 284 339, for an admirable discussion of this question

[5] As to treaties see below, § 503

[6] The Permanent Court of International Justice repeatedly held that a unilateral act which is not in accordance with law cannot confer upon a State a legal right See the Order of December 6, 1930, in the case of the *Free Zones of Upper Savoy and the District of Gex* (2nd phase) P C I J, Series A, No 24, the Order of August 3, 1932, concerning the *South Eastern Territory of Greenland ibid*, Series A/B, No 48, p 285, the Advisory Opinion of March 3, 1928, in the case of the *Jurisdiction*

the absence of an international legislature, be wholly or partially cured by an individual or collective act of other States who, by an express act of recognition, may henceforth treat as valid the new title or situation notwithstanding the initial illegality of the act on which it is based Such express recognition has also often been sought and given when the validity of the title claimed by a State has been doubtful or controversial [1] In such cases recognition, to the extent to which it is given,[2] amounts to an express waiver of claims conflicting with the right thus recognised

The Obligation of Non-recognition [3]

§ 75c A State confronted either with an attempt by another State to bring about a new title, treaty or situation by means of an illegal act or with an actually consummated act of that nature, may expressly declare that it will not

of the Courts of Danzig ibid, Series B, No 15, p 26, and the Judgment of April 5, 1933, in the case of *Eastern Greenland* (status) *ibid*, Series A/B, No 53, pp 75, 95 For an apparent but not real exception see the Judgment of June 24, 1932, concerning the *Interpretation of the Statute of Memel* (jurisdiction) *ibid*, Series A/B, No 47, p 336

[1] See *e g* the recognition in 1920 of the sovereignty of Norway over the Spitsbergen Treaty Series, No 18 (1924), Cmd 2092, the recognition in 1920 of Roumanian sovereignty over Bessarabia Hertslet's *Commercial Treaties*, xxix p 1024, the recognition in 1929 by the Vatican City of the existing territory of the Kingdom of Italy see below, § 106, and see the Judgment of the Permanent Court of International Justice of April 5, 1933, in the case of the *Legal Status of Eastern Greenland*, for an account of the Danish efforts to secure formal recognition of her sovereignty over Greenland P C I J, Series A/B, No 53

[2] See the Exchange of Notes of November 18 and 19, 1930, between Great Britain and Norway in which the former recognised Norwegian sovereignty over Jan Mayen Island As Great Britain had no information concerning the reasons for the Danish Decree extending Danish sovereignty to the island in question, the British recognition was expressed to be 'independently of and with all due reserves in regard to the actual grounds on which the annexation may be based' Treaty Series, No 14 (1931), Cmd 3792 See also below, p 508, on the recognition by Norway in 1930 of British (Canadian) sovereignty over Sverdrup Island

[3] On the doctrine of non recognition see Hill, *Recent Policies of Non-recognition* (International Conciliation Pamphlet, 1933, No 293, pp 37-44), Graham, *In Quest of a Law of Recognition* (1933), pp 19 *et seq*, Wild, *Sanctions and Treaty Enforcement* (1934), pp 160 179, Sharp, *Non recognition as a Legal Obligation* (1934), pp 152 172, and in *Geneva Special Studies*, v No 4 (1934), Lauterpacht in *Legal Problems in the Far Eastern Conflict* (1941), pp 129 156, Borchard and Morrison, *ibid*, pp 157-178, Langer, *Seizure of Territory The Stimson Doctrine and Related Principles* (1947), Wright in *A J*, 26 (1932), pp 342 348, and *ibid*, 27 (1933), pp 39-61, McNair in *B Y*, 14 (1933), pp 65 74, Fischer Williams in *Grotius Society*, 18 (1933), pp 109 129, in *Hague Recueil*, 44 (1933) (II), pp 263 309, and in *H L R*, 47 (1934), pp 776 794, Middlebush in *A S Proceedings*, 1933, pp 40 55, Chailley in *R I (Paris)*, 13 (1934), pp 151-174, Herz in *R I*, 3rd ser, 17 (1936), pp 581-590, Scelle in *Hague Recueil*, vol 55 (1936) (I), pp 126-135 See also below, p 139, n 2.

in the future validate by an act of recognition the fruits of the illegal conduct Thus when in the autumn of 1931 Japan invaded the Chinese province of Manchuria, Mr Stimson, United States Secretary of State, informed both Japan and China on January 7, 1932, that the United States 'cannot admit the legality of any situation *de facto* nor does it intend to recognise any treaty or agreement entered into between these Governments or agents thereof which may impair the treaty rights of the United States and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Treaty of Paris of August 27, 1928 '[1] This, upon analysis, was nothing else than a declaration that the United States will not in the future do anything to legalise by recognition the illegal act and its presumably invalid results As the result of that declaration the United States did not assume any legally binding obligation not to grant in the future the recognition in question

However, third States may assume an express obligation not to validate the illegal act and its consequences in the future by means of recognition Thus in the Resolution adopted on March 11, 1932, the Special Assembly of the League declared that 'it is incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris '[2] So far as members of the League were concerned, the obligation implied in that Resolution must be regarded as declaratory of the obligations of Article 10 of the Covenant in which members of the League agreed to guarantee the existing territorial integrity and political independence of other members of the League[3] It constituted the very minimum of the duties of a guarantor, and while binding with special force those members of the

[1] See *A J*, 26 (1932), p 342, *Documents*, 1932, p 262

[2] *Off J*, Special Suppl No 101, p 8, *Documents*, 1932, p 284 And see to the same effect the communication of February 16, 1932, of the President of the Council to the Japanese representative *Off J*, 1932, p 383

[3] In fact in the Resolution of the Council of the League of February 16, 1932 (see above, n 2), the obligation of non recognition is described as following from the terms of Article 10

League who expressly agreed to it,[1] it did not constitute an extension of the obligations of the Covenant [2]

On October 10, 1933, a considerable number of American States, including the United States, signed an Anti-War Pact of Non-Aggression and Conciliation in which they undertook not to recognise territorial arrangements not obtained through pacific means or 'the validity of an occupation or acquisition of territory brought about by armed force' [3] A number of European States subsequently adhered to that Convention In 1938 the Conference of American States adopted at Lima an emphatic Resolution on non-recognition of acquisition of territory by force [4]

[1] There was a disposition to question the binding character of this, as indeed of any other Resolution of the Assembly see *B Y*, 16 (1935), pp 157 160 Probably there is no good reason for denying generally that a State may undertake a binding obligation by consenting to a Resolution of the Assembly Ratification of a signed treaty is not the only way of assuming binding obligations in International Law (see below, p 800, n) In the Advisory Opinion of October 15, 1931, concerning the *Railway Traffic between Lithuania and Poland* (P C I J, Series A/B, No 42), the Permanent Court of International Justice considered that a Resolution of the Council assented to by Poland and Lithuania was in the nature of an engagement binding upon them

[2] On the non recognition of Manchukuo see Toynbee, *Survey*, 1932, pp 452 469, Ling, *La Position et les droits du Japon en Mandchourie* (1933), Mong, *La position juridique du Japon en Mandchourie* (1933), *Geneva Special Studies*, v No 3 (1934), Willoughby, *The Sino Japanese Controversy and the League of Nations* (1935), pp 516 535, *Z o V*, 4 (1934), pp 72, 73, Chailley in *R I* (*Paris*), 13 (1934), pp 151-174, Cavaré in *R G*, 42 (1935), pp 5 99 The Resolution of the Assembly of March 11, 1932, was general in character and not limited to the particular dispute then before the Council Thus, although in the course of the Italo Abyssinian conflict in 1936, neither the Assembly nor the Council expressly reiterated the obligation of non recognition, it was generally assumed that the obligation formulated in the Resolution of 1932 held good This apparently was the view of Great Britain in 1938 when she took steps in order to obtain a declaration of the Council of the League that the question of the recognition of the position of Italy in Abyssinia was one for each member of the League 'to decide for itself in the light of its own situation and its own obligations' (*Off J*, 1938, May-June, p 335) See also the declaration of the British Prime Minister of April 13, 1938 House of Commons, *Debates*, vol 334, col 1099 And see Rousseau, *Le conflit Italo Ethiopien devant le droit international* (1938), pp 251 *et seq*

[3] Article 3 *Documents*, 1933, p 476

[4] The Resolution, after reiterating previous American declarations on the subject of non recognition, declared, as a fundamental principle of the public law of America, that the occupation or acquisition of territory as the result of conquest by force has no legal effect It was declared that the pledge of non recognition was an obligation which could not be avoided either unilaterally or collectively *A J*, 34 (1940), Suppl, p 197 And see Gutierrez, *La doctrina del non-reconocimiento de la conquista en América* (1938) In July 1940, at the meeting of the Ministers of Foreign Affairs of the American Republics, a Convention was adopted providing, in view of the principle of non-recognition of transfers of territory

It must be noted that the proclamation of the principle or the assumption of the obligation of non-recognition do not have the effect of invalidating an otherwise legal situation Their effect is to announce the intention or to undertake the obligation to make full use of the right to treat as invalid the results of an illegal act The instrument of non-recognition is admittedly an imperfect weapon of enforcement However, in the absence of a regularly functioning international machinery for enforcing the law, it must be regarded as a supplementary weapon of considerable legal and moral potency It prevents any law-creating effect of prescription It constitutes a standing challenge to the legality of the situation which results from an unlawful act and which, in relation to the courts of the non-recognising State, is a mere nullity [1]

Implied Recognition

§ 75*d* Recognition can be either express or implied Express recognition takes place by a formal notification or declaration clearly announcing the intention of recognition, such as a note addressed to the State or Government which has requested recognition Implied recognition [2] takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it Such acts may properly be referred to as modes of recognition [3] As recognition is a matter of intention and as im-

brought about by force, for provisional administration of the territories in question, situated in the Western Hemisphere, by one or more American States on lines approaching substantially those of the mandate system under the Covenant of the League *A J*, 35 (1941), Suppl, p 28

[1] See above, § 75, on the effects of recognition

In consequence of the refusal of the United States to recognise the annexation of the Baltic Republics by Soviet Russia in 1939 the United States courts declined to give effect to the decrees of the authorities in the annexed territories or to issue letters rogatory to them See *The Kotkas, Annual Digest*, 1941 1942, Case No 15, *The Signe, ibid*, Cases No 16 and 19, *The Maret* (1944) F (2*d*) 431 See also, to the same effect, the decision of the High Court of Eire in *The Ramava, ibid*, Case No 20 On the other hand, see *The Denny, ibid*, Case No 18, decided in 1942 by a United States Circuit Court of Appeals And see Briggs in *A J*, 37 (1943), pp 585 596 On the British refusal to grant *de jure* recognition see the *Tallinna Laevauhisus* case (1946), 79 *Lloyd's List L R*, 245

[2] For a detailed discussion see Lauterpacht in *B Y*, 21 (1944), pp 123-150 See also Kunz, *Die Anerkennung der Staaten und Regierungen in Volkerrecht* (1928), pp 48 *et seq*, Scalfati Fusco, *Il riconoscimento di stati nel diritto internazionale* (1938), pp 253 257

[3] On the question of modes of recognition generally see Temperley, v pp 157-162, Hackworth, i § 32, Fauchille, §§ 206 208, Spiropoulos, *Die* de facto *Regierung in Volkerrecht* (1926), pp 14-19, Gemma in *Hague Recueil*, 1924 (iii), pp 369-378

portant legal consequences follow from the grant or refusal thereof, care must be taken not to imply recognition from actions which, although amounting to a limited measure of intercourse, cannot properly be regarded as modes of recognition [1] Thus, in the absence of an unequivocal intention to the contrary, no recognition is implied in participation in an international conference in which the unrecognised authority takes part [2], in the conclusion of a multilateral treaty to which that authority is a party [3], in the retention (as distinguished from fresh appointment) of diplomatic representatives for an interim period [4], in the retention, replacing, and (probably) sending and reception of consuls (especially if the latter is not accompanied by a request for or issue of an exequatur) [5], in the fact

[1] In connection with the *Trent* case Earl Russell insisted on the right of neutral States to receive from unrecognised Governments special agents not possessing diplomatic character for the purpose of protecting British subjects *U S Diplomatic Correspondence*, 1862, p 8, *British Parl Papers*, 1862, lxii p 575 A similar right was claimed in 1792 by Jefferson for the purpose of 'reforming the unfriendly restrictions on our commerce and navigation' Moore, i p 120 In 1937, during the Spanish Civil War, Great Britain sent to and received from the insurgents, at that time not recognised as a government, agents for the protection of commercial and financial interests The British Foreign Secretary stated on November 8, 1937, that 'the reception of such an agent in London will not in any way constitute recognition by His Majesty's Government of the authorities of the territories under the control of General Franco' House of Commons, *Debates*, 1937-1938, vol 328, col 1386 And see Hackworth, i pp 327 364, on 'Acts Falling Short of Recognition'

[2] In its instruction to the delegation of the United States to the Conference on the supervision of the international trade in arms and ammunition the Department of State expressed in 1925 the view that the participation of the United States at a conference attended by delegates of the Soviet Government, at that time not recognised by the United States, would, in the matter of recognition, 'signify nothing' Hackworth, i p 348

[3] Occasionally, a declaration is attached, *ex abundante cautela*, to the effect that participation in a multilateral treaty does not amount to recognition See *e g* the Declaration of the United States in signing the International Sanitary Convention of June 21, 1926 (Hudson, *International Legislation*, vol iii p 1975) For other instances see Lauterpacht, *op cit*, p 126 However, on other occasions no such declaration has been deemed necessary see Hudson in *A J*, 22 (1929), p 130 See also Hackworth, i p 353

[4] It has been the practice of most States in case of a revolutionary change of government in a foreign country to instruct their diplomatic representatives to remain at their posts and to maintain necessary contacts with the new authority without, however, officially recognising it as a government

[5] See below, § 428 For a survey of the British and American practice see a Foreign Office Memorandum prepared in 1873 by the Librarian of the Foreign Office and printed in Smith, i pp 251 257 For the more recent practice of the United States see Moore, i § 72, and v § 698, and Hackworth, iv pp 688 *et seq* See

and manner of communication with foreign authorities [1], in the request for and grant of extradition [2]; in the maintenance of contact with the insurgents in a civil war [3], and in the admission, so far as States opposed to such admission are concerned, to an international organisation such as the United Nations [4] The only legitimate occasions for

also *Harvard Research, Consuls* (1932), Article 6, pp 238-261 In the opinion of the Advisory Committee of the Assembly of the League of Nations set up in connection with the non-recognition of Manchukuo, the replacing of consuls did not imply recognition *Off J*, Special Suppl, No 113, p 3

[1] Thus, for instance, on December 2, 1929, in the course of the conflict between Russia and China, the Government of the United States, which at that time did not recognise the Soviet Government of Russia, addressed identical notes to the two States engaged in the dispute reminding them of their obligations under the General Treaty for the Renunciation of War *Documents on International Affairs*, 1929, p 277 For various examples of precautions taken to obviate the suggestion of implied recognition following upon intercourse with unrecognised authorities see Hackworth, 1 pp 343 *et seq* On the question of the possible implied recognition of the annexation of Abyssinia by Italy as the result of communications addressed to the 'King of Italy and Emperor of Abyssinia' see Lauterpacht, *op cit*, pp 139, 140

[2] See Hall (4th ed, 1895), p 93

[3] See below, § 168*c*

[4] See above, p 141, n 1 The Commercial Tribunal of Luxemburg held in 1935 that the admission of Soviet Russia to the League of Nations implied the recognition of the Soviet Government by Luxemburg *Union of Soviet Socialist Republics* v *Luxemburg and Saar Company, Annual Digest*, 1935-1937, Case No 34 See also, to the same effect, Scelle in *R G*, 27 (1921), pp 122-138, Fauchille, vol 1 (1922), pp 334, 335, Anzilotti, *Corso di diritto internazionale* (3rd ed, 1928), p 172 See also Schücking-Wehberg, pp 267-269, Rougier in *R.G*, 28 (1921), pp 222 242, Coucke in *R I*, 3rd ser, 2 (1921), pp 325 329, Graham, *The League of Nations and Recognition of States* (1933) Similarly, in the previous editions of this volume (§ 72, n) reliance was placed on the general legal principle that admission to a partnership of a new member binds the minority which has voted against admission In practice, some members of the League, such as Switzerland and Belgium, asserted their right to continue in their refusal to recognise the Government of Soviet Russia after the admission of that country to the League See Makarov in *Z o V*, 5 (1935), pp 58 59 Following upon the Vilna dispute Lithuania refused to maintain diplomatic relations with Poland See Brocklebank in *A J*, 20 (1926), pp 483 501, Chklaver in *R I (Paris)*, 2 (1928), pp 224 250, and P C I J, Series A/B, No 42 (Advisory Opinion in the matter of the Railway Traffic between Poland and Lithuania) In 1935 Uruguay suspended diplomatic relations with the Soviet Government on account of alleged communist propaganda For the correspondence on the subject and the Russian appeal to the League see *Off J*, 1936, pp 138, 232

The question of recognition implied in the admission of a new member is one which must confront any general international organisation It is reasonable to assume that States voting for admission thereby grant recognition—if they have not done so before With regard to States voting against admission the proper course would seem the adoption of an express rule to the effect that as admission to the Organisation is in itself sufficient evidence of the possession of the required attributes of statehood or of governmental capacity, such admission is tantamount to recognition by all the members of the Organisation

implying recognition are . (*a*) the conclusion of a bilateral treaty, such as a treaty of commerce and navigation, regulating comprehensively the relations between the two States [1], (*b*) the formal initiation of diplomatic relations, (*c*) probably, the issue of a consular exequatur [2], (*d*) in the case of recognition of belligerency, a proclamation of neutrality or some such unequivocal act

Conditional Recognition

§ 75*e* Recognition, in its various aspects, is neither a contractual arrangement nor a political concession It is a declaration of capacity This being so, it is improper to make it subject to conditions other than the existence—including the continued existence—of the requirements which qualify a community for recognition as an independent State, a Government, or a belligerent in a civil war In fact, the practice of States shows few examples, if any, of conditions of recognition in the accepted sense, *i e* of stipulations the non-fulfilment of which justifies withdrawal of recognition When in 1878, at the Berlin Congress, Bulgaria, Montenegro, Serbia and Roumania were recognised as independent States, a condition was imposed upon them to the effect that they should not impose religious disabilities upon their subjects [3] There was general agreement that any failure on the part of these States to fulfil those conditions would not justify or make legally possible withdrawal of recognition [4] This applies even more cogently to cases in which the recognising State obtains, as the price of recognition, promises and undertakings given not in the general interest but for its

[1] Thus, for instance, France recognised the independence of the United States by concluding with it a Treaty of Amity and Commerce in 1778 This mode of recognition of a seceding community has often been adopted in order to spare the susceptibilities of the parent State For an interesting despatch by Canning on the subject, written in 1825, see *Britain and the Independence of Latin-America*, edited by Webster (1938), vol 1 p 291 On the other hand agreements for limited purposes do not necessarily imply recognition See, *e g*, the Agreement between the British and Russian Governments of February 12, 1920, for the exchange of prisoners of war, registered in September 1920 with the Secretariat of the League *L N T S*, 1 p 264 In November 1920 the Foreign Office informed the Court, in connection with the proceedings in *Luther* v *Sagor*, that 'His Majesty's Government have never officially recognised the Soviet Government in any way' [1921] 1 K B 456

[2] As distinguished from a request for the issue of an exequatur—a matter on which the practice of Governments seems to be divided See Lauterpacht, *op cit*, pp 134-135

[3] See Articles 5, 27, 35 and 44 of the Treaty of Berlin of 1878, in Martens, *N R G*, 2nd ser, III p 449.

[4] See, *e g*, Rivier, 1 p 61

particular advantage Such stipulations, which are contrary to the true function of recognition,[1] are a relatively rare occurrence [2] They do not in any case constitute a condition in the accepted legal sense of the term [3]

Retroactivity of Recognition

§ 75*f* According, at least, to the practice of British and American courts, recognition is retroactive in the sense that courts treat as valid the acts of the newly recognised State or Government dating back to the commencement of the activities of the authority thus recognised [4] That rule, for which there appears to be no direct international authority,[5] is one of convenience rather than of principle Convenience and good understanding between nations would seem to demand that once a foreign State or Government has been recognised, none of its acts, including those prior to recogni-

[1] When during the Peace Conference in 1919 it was suggested by some States that the recognition of Finland be made dependent upon the acceptance of certain undertakings relating to the military situation in the Baltic, especially with regard to Soviet Russia, the representative of the United States objected to the proposal on the ground that 'a nation was entitled to recognition of independence as a matter of right, and it was not justifiable to put conditions on such a recognition simply to serve some political purpose' See Graham, *The Diplomatic Recognition of Border States*, Part I, Finland (1936), p 142

[2] See Hackworth, 1 p 192, who points out that, since 1906, the United States have not accorded conditional recognition to any State The same applies to the period prior to 1906

[3] Thus, for instance, when in 1933 the United States recognised the Soviet Government, the Governments of both States gave mutual undertakings and explanations with regard to their future policy in such matters as religious freedom and the protection of economic rights It was with reference to these various undertakings that the Supreme Court of the United States referred, somewhat widely, to conditional recognition *United States* v *Pink* (1942), 315 U S 203, 229 See generally on so-called conditional recognition Lauterpacht in *B Y*, 22 (1945), pp 185 187

[4] *Luther* v *Sagor* [1921] 3 K B 432, *White, Child & Beney, Ltd* v *Eagle Star and British Dominions Insurance Company, Ltd* (1922) 38 *T L R* 616, *The Jupiter* [1927] P 122, 250, *Bank of Ethiopia* v *National Bank of Egypt and Liguori* (1937) 53 *T L R* 751, *Oetjen* v *Central Leather Co* (1918) 246 U S 297, *Ricaud* v *American Metal Company* (1918) 246 U S 304, *United States* v *Belmont* (1936) 301 U S 324, *A J*, 31 (1937), p 537 (and comment thereon by Jessup *ibid*, pp 481 484) For a criticism of the doctrine of retroactivity see Hervey, *The Legal Effects of Recognition in International Law* (1928), pp 66, 101, 110, Mervyn Jones in *B Y*, 16 (1935), pp 42 55, Nisot in *Canadian Bar Review*, 21 (1943), pp 627 *et seq*

[5] See the observations of the Permanent Court of International Justice in the case of *Certain German Interests in Polish Upper Silesia*, Series A, No 7, pp 28, 29, 84, and of Erich in *Hague Recueil*, vol 13 (1926) (III), pp 499 502 And see the comments by Mervyn Jones, *op cit*, pp 51, 52, on the *Andrew Allen* case which came in 1799 before the British American Mixed Commission under the Jay Treaty See also Moore, *International Adjudications*, III (1931), pp 238-252

tion, should be regarded as a mere nullity [1] In principle, there is little to be said for treating as legally effective legislative acts performed at a time when the authority in question was, in the view of the non-recognising State, a mere instrumentality of power [2]

Withdrawal of Recognition

§ 75g Recognition is a declaration, on the part of the recognising State, that a foreign community or authority is in possession of the necessary qualifications of statehood, of governmental capacity, or of belligerency These qualifications are not necessarily enduring for all time. A State may lose its independence, a government may cease to be effective, a belligerent party in a civil war may be defeated In all these cases withdrawal of recognition is both permissible and indicated [3] On occasions, withdrawal of recognition is

[1] It was on some such considerations that the Supreme Court relied in *United States* v *Pink* (1942) 315 U S 203 In that case the Supreme Court gave a comprehensive and highly controversial extension to the principle of retroactivity It laid down that, in some cases, recognition endows with legal effect, outside its territory, such acts of the recognised Government as have hitherto been treated as invalid by the *lex fori* for reasons not connected with non-recognition For a criticism of that decision see Borchard in *A J*, 36 (1942), p 275, and Jessup, *ibid*, p 282

[2] It has been held by the Supreme Court of the United States that the principle of retroactivity is not applicable to transactions, in the United States, between American nationals and the predecessor of the newly recognised Government *Guaranty Trust Company* v *United States* (1938) 304 U S 126, *A J*, 32 (1938), p 848, *Annual Digest*, 1938 1940, Case No 69 In the absence of some such qualification of the principle of retroactivity, nationals of a State could not safely deal with the predecessor of the newly recognised Government during the period when the former was still recognised

[3] The Institute of International Law, while laying down, in a Resolution adopted in 1936, that recognition *de jure* of a State is irrevocable, in effect qualified that rule by adding that such recognition ceases to have effect in case of a definite disappearance of one of the essential elements of statehood obtaining at the moment of recognition (Article 5) *A J*, 30 (1936), Special Suppl, p 186 Hyde, 1 § 38, and Fauchille, § 213, consider recognition to be capable of withdrawal For the withdrawal of the recognition of Finland by France in 1918 see Temperley, VI p 289, Fauchille, 1 (1) No 167 (4) Probably this was a case of withdrawal of recognition from a particular Government See Lauterpacht in *B Y*, 22 (1945), p 180

If recognition *de jure* is capable of withdrawal, and if, as suggested, the essence of recognition *de facto* is that it is provisional and revocable, what, it may be asked, is the difference, if any, between *de facto* and *de jure* recognition? The answer is that the revocability of the former is one which is inherent in the situation as it exists at the time when recognition is granted and that it can therefore be withdrawn more easily, whereas in the case of recognition *de jure* a most stringent proof is required of the final disappearance of the essential elements of statehood, of governmental capacity, or of belligerency For the other legal consequences of the distinction between *de jure* and *de facto* recognition see above, § 74

accomplished by means of an express notification to the authority from which it is withdrawn [1] As a rule, however, withdrawal of recognition takes place by the recognition *de jure* of the rival Government which has succeeded in establishing itself, or of the sovereignty of the State which has annexed another Thus Great Britain withdrew in 1938 her recognition of Abyssinia as an independent State by recognising *de jure* the annexation of that country by Italy [2] In 1939 she withdrew her recognition from what had been hitherto the *de jure* Government of Spain by recognising the revolutionary Government, hitherto recognised *de facto*, as the *de jure* Government of the whole of Spain [3]

In view of the far-reaching consequences of withdrawal of recognition it must be noted (*a*) that such effect can be attributed only to the *de jure*, and not to the *de facto*, recognition of the new authority replacing the State or Government from which it is being withdrawn, and (*b*) that it is not permissible to infer withdrawal of recognition from acts other than those which are unequivocally, and not by mere implication, expressive of the intention of the State in question

[1] See, *e g*, the British communication sent in 1861 to the Charge d'Affaires of Naples subsequent to the recognition of the Kingdom of Italy which had annexed the Neapolitan territories Satow, *A Guide to Diplomatic Practice* (3rd ed, 1932), p 113 See, as to the withdrawal of the United States recognition of Montenegro, the communication addressed in 1921 by the Acting Secretary of State to the Montenegrin Consul General in charge of the Legation *U S For Rel*, 1921 (II), p 946 As to the withdrawal of recognition from the various representatives of the former Russian régime subsequent to the recognition of the Soviet Government by the United States in 1933 see *A J*, 28 (1934), Suppl, p 13 For an instance of withdrawal of recognition not accompanied by simultaneous recognition of a new authority, see the withdrawal of recognition by the United States from the revolutionary Walker Government in Nicaragua in 1856 Moore, I p 143

[2] See Toynbee, *Survey*, 1938 (1), pp 158 163 See also *Haile Selassie* v *Cable and Wireless, Ltd* [1939] Ch 182

[3] The withdrawal by Great Britain in 1866 of her recognition of the belligerency of the Confederate States was announced in a letter from the Foreign Secretary to the various Government Departments informing them that in the view of the British Government 'neutral nations could not but consider the Civil War in America at an end' *London Gazette*, June 6, 1866 For an example of withdrawal of recognition of conquest see *Azazh Kebbeda Tesema* v *Italian Government*, a case decided in 1940 by the Palestine Supreme Court In this case the Court received official information that the British recognition of the Italian conquest of Ethiopia had been withdrawn *Annual Digest*, 1938-1940, Case No 36

III

CHANGES IN THE CONDITION OF INTERNATIONAL PERSONS

Grotius, II c 9, §§ 5-13—Pufendorf, VIII c 12—Vattel, I § 11—Hall, § 2—Halleck, I pp 96-99—Phillimore, I §§ 124 137—Taylor, § 163—Westlake, I pp 58-66—Wheaton, §§ 22 32—Hershey, §§ 124, 125—Moore, I §§ 76-79—Bluntschli, §§ 39 53—Hackworth, I § 56—Heffter, § 24—Holtzendorff in *Holtzendorff*, II pp 21-23—Liszt, § 7 (III)—Ullmann, §§ 31 and 35—Fauchille, §§ 214 215 (6), 221, 222, 230—Despagnet, §§ 86-89—Pradier-Fodéré, I §§ 146 157—Nys, I pp 432 435—Rivier, I § 3, pp 62 67—Calvo, I §§ 81 106—Fiore, I §§ 321 331, and *Code*, §§ 124 146—Martens, I §§ 65 69—Bustamante, pp 141 159—Baty, pp 191 197—Borchard, § 84—McNair, Chapters 34 (1) and (3) and 35 (2)-35 (5)—Balladore Pallieri, pp 240-245, and the same in *Annali dell' Istituto di scienze giuridiche* of the University of Messina, V (1930 1931)—Redslob in *R I (Paris)*, 13 (1934), pp 445 483

Important in contradistinction to Indifferent Changes

§ 76 The existence of International Persons is exposed to the flow of things and times There is a constant and gradual change in their citizens through deaths and births, emigration and immigration There is a frequent change in those individuals who are at the head of the States, and there is at times a change in the form of their Governments, or in their dynasties if they are monarchies There take place changes in their territories through loss or increase of parts thereof, as well as changes regarding their independence through partial or total loss of the same Several of these and other changes in the condition and appearance of International Persons involve no questions of International Law, although they may be of great importance for the inner development of the States concerned, and, directly or indirectly, for international policy Those changes, on the other hand, which are, or may be, of importance to International Law must be divided into three groups according to their influence upon the character of the State concerned as an International Person. For some of these changes affect a State as an International Person, others do not, again, others extinguish a State as an International Person altogether [1]

[1] On the birth of new States see Hall, § 1, Westlake, I pp 44-50, Smith, I pp 233-245, Fauchille, §§ 195-198 (3), *Off J*, Special Suppl No 3 (Report of Committee of Jurists on the Aaland Islands question), Masaryk, *The Making of a State* (Czecho-Slovakia) (1927), pp

Changes not affecting States as International Persons

§ 77 A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory International Law cannot be said to be indifferent to these changes Although strictly no notification to or recognition by foreign Powers is necessary, according to the Law of Nations, in case of a change in the headship of a State or in its entire dynasty, or if a monarchy becomes a republic or *vice versa*, no official intercourse is possible between the Powers refusing recognition and the State concerned Although, further, a State can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign States refuse recognition

But whatever may be the importance of such changes, they neither affect a State as an International Person, nor affect the personal identity of the State concerned [1] France, for instance, has retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired, lost, and regained parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now, finally as it seems, a republic All her international rights and duties [2] as an International

343 347, and Kelsen in *R I* (*Paris*), 4 (1929), pp 613 641 As to the Baltic States see Rutenberg, *Die baltischen Staaten und das Volkerrecht* (1928), Montfort, *Les nouveaux États de la Baltique* (1933), Graham, *The Diplomatic Recognition of the Border States Finland* (1935) On the question whether Yugoslavia as enlarged after the First World War is a new State see Kaufmann in *Z I*, 31 (1923-1924), pp 211-251 And see Tomitch, *La formation de l'État Yougoslave* (1927) And see below, § 79

[1] For this reason a State is responsible for all acts committed by a former Head, although such Head may have attained its position through revolution See above, § 73*a*, and the case of *The Republic of Peru* v *Dreyfus Brothers* (1888) 38 Ch D 348, and Spiropoulos, *op cit*, pp 172-177 It is believed that this responsibility exists, whether or not the former Head was recognised by the State demanding redress

[2] The repudiation in February 1918 by the Russian Soviet Government of the public debts of Russia incurred by previous duly recognised Governments was a breach of International Law as generally understood at that time, see Fauchille, § 215 (4), and literature there cited And see Chailley, *La nature juridique des traités internationaux* (1932), pp 135 146 This attitude of the Soviet Government constituted one of the reasons why a number of States refused at that time to recognise that Government There appears to be room for a reconsideration of the existing rule on the subject in cases when the social and political upheaval accompanying a revolutionary change of government is such as to render equitable and reasonable a modification of the obligations contracted by the former régime

Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance [1] Even such loss of territory as occasions the reduction of a Great Power to a small Power does not affect a State as an International Person

Changes affecting States as International Persons

§ 78 Changes which affect States as International Persons are of a different character

(1) As in a Real Union the member-States of the union, although fully independent, make one International Person,[2] two States which hitherto were separate International Persons are affected in that character by entering into a Real Union For through that change they appear henceforth together as one and the same International Person.

(2) Other changes affecting States as International Persons are such changes as involve a partial loss of independence on the part of the States concerned. Many restrictions may be imposed upon States without interfering with their independence proper,[3] but certain restrictions involve inevitably a partial loss of independence In the Advisory Opinion concerning the *Customs Régime between Germany and Austria* the Permanent Court of International Justice held in September 1931 that, in the circumstances of the case, the entering into a customs union with another State constituted a change in status amounting to compromising a State's independence [4] If a hitherto independent State comes under the protectorate of another State, its character as an International Person is affected Again, if several hitherto independent States enter into a Federal State, they transfer a part of their sovereignty to the Federal State and become thereby part sovereign States

(3) States which become permanently neutralised are thereby also affected in their character as International Persons, although their independence remains untouched But permanent neutralisation alters the condition of a State so much that it thereby becomes an International Person of a particular kind [5]

[1] Hyde, II § 542

[2] See below, § 87, where the character of a Real Union is fully discussed

[3] See below, §§ 126, 127, where the different kinds of these restrictions are discussed

[4] See below, § 124.

[5] See below, §§ 95-101.

Extinction of International Persons

§ 79 A State ceases to be an International Person when it ceases to exist [1] Practical causes of extinction of States are merger of one State into another, annexation after conquest in war, breaking up of a State into several States,[2] and breaking up of a State into parts which are annexed by surrounding States

By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another In this way the Congo Free State merged in 1908 into Belgium, Korea in 1910 into Japan, and Montenegro in the Serb-Croat-Slovene State after the First World War And the same is the case if a State is subjugated by another In this way the Orange Free State and the South African Republic were absorbed by Great Britain in 1901 An example of the breaking up of a State into parts which are annexed by surrounding States is the absorption of the old State of Poland by Russia, Austria, and Prussia in 1795

IV

SUCCESSION OF INTERNATIONAL PERSONS

Grotius, II c 9 and 10—Pufendorf, VIII c 12—Hall, §§ 27-29—Phillimore, I § 137—Lawrence, § 49—Halleck, I pp 96 99—Taylor, §§ 164 168—Westlake, I pp 68 83, and *Papers*, pp 475 497—Wharton, I § 5—Moore,

[1] See Raestad in *R I*, 3rd ser, vol 20 (1939), pp 441 449

[2] But when does a State cease to be the same State? As to the case of Austria Hungary after the First World War see, in favour of the view that the new Austrian Republic is a new State, Strupp, *Éléments*, § 5, p 110, *contra*, Temperley, vol IV pp 417, 418, Soubbotitch, *Effets de la dissolution de l'Autriche-Hongrie sur la nationalité de ses ressortissants* (1926), pp 41 45, and Borchard in *A J*, 19 (1925), pp 358, 359, the matter is also discussed by Anzilotti, p 86, Sack, *Les effets des transformations des États*, etc, vol I (1927), and Udina, *L'estinzione dell' impero Austro Ungarico nel diritto internazionale* (2nd ed, 1933) The question has also arisen in connection with the old Ottoman Empire and the new Turkish Republic In the *Ottoman Debt Arbitration* of 1925, it was held that the latter is not a new State, but a continuation of the former, see *Annual Digest*, 1925-1926 See also Hall, 8th ed, p 116 (n), Hyde, I § 129, Kelsen in *Hague Recueil*, vol 42 (1932) (4), pp 294 297, Balladore Pallieri, cited above at p 147, Anzilotti, pp 177 186 As to the end of the Kingdom of Montenegro see *In re Savini*, decided in October 1927 by the Court of Appeal of Rome *Annual Digest*, 1927-1928, Case No 106 On the continuity of the Czechoslovak Republic in the years 1938 1945 see Keruča in *Bulletin de droit tchécoslovaque*, 5 (1947), pp 45 59 See also Vošta, *O právní kontinuitě česko slovenské republiky* (1947), and Kojecký, *Československo ve světle theorie mezinárodního práva o uznání* (1947)

1 §§ 92 99—Hershey, §§ 127-130—Hyde, 1 §§ 120 133, II §§ 543 545—Borchard, § 83—Fenwick, pp 117-122—Bluntschli, §§ 47-59—Schwarzenberger, pp 70-79—Heffter, 25—Holtzendorff in *Holtzendorff*, II pp 33-43—Liszt, § 34—Ullmann, § 32—Fauchille, §§ 216-234 (5)—Despagnet, §§ 89-102—Pradier-Fodéré, 1 §§ 156-163—Nys, 1 pp 432 435, II pp 28-38—Rivier, 1 § 3, pp 69-75—Calvo, 1 §§ 99 104—Fiore, 1 §§ 349-366—Cavaglieri, pp 201 217—Martens, 1 § 67—De Louter, 1 pp 224-232—Cruchaga, 1 §§ 200 204—Hackworth, 1 §§ 79-82—Keith's Wheaton, pp 57-78—Baty, pp 197 203—Smith, 1 pp 334-416—Balladore Pallieri, pp 281 297—Audinet in *Répertoire*, 1 pp 573 626—Appleton, *Des effets des annexions de territoires sur les dettes de l'État démembré ou annexé* (1895)—Huber, *Die Staatensuccession* (1898)—Keith, *The Theory of State Succession, with special reference to English and Colonial Law* (1907)—Cavaglieri, *La dottrina della successione di Stato a Stato*, etc (1910)—Focherini, *Le successioni degli Stati*, etc (1910)—Schoenborn, *Staatensukzessionen* (1913), and in *Strupp, Wort*, II pp 578 588—Michel, *Die Einverleibung Frankfurts in den preussischen Staat als Fall einer Staatensukzession* (1913)—Schmidt, *Der Uebergang der Staatsschulden bei Gebietsabtretungen* (1913)—Phillipson, *Termination of War and Treaties of Peace* (1916), pp 34 51 and 290 334—Barclay, Struycken, Kaufmann, *Studien zur Lehre von der Staatensukzession* (1923)—Guggenheim, *Beitrage zur volkerrechtlichen Lehre vom Staatenwechse* (1925)—Sack, *Les effets des transformations des États sur leurs dettes publiques et autres obligations financières*, vol 1 (1927)—the same, *Succession aux dettes publiques d'État* (1929) (a comprehensive treatise), and in *Hague Recueil*, vol 23 (1928) (III), pp 145 321—Feilchenfeld, *Public Debts and State Succession* (1931) (a leading treatise)—Fabri, *Effetti giuridici delle annessioni territoriali* (1931)—Richards in *Law Magazine and Review*, 28 (1903), pp 129 141—Keith in *Z V*, 3 (1909), pp 618 648—Hershey in *A J*, 5 (1911), pp 285-297—Sayre in *A J*, 12 (1918), pp 475-497, and 705 743—Hurst in *B Y*, 1924, pp 163-178—Cavaglieri in *Rivista*, 3rd ser, vol 3 (1924), pp 26 46, 236-271—the same in *Annuaire*, 36 (1) (1931), pp 185-255, in *R G*, 38 (1931), pp 257-296, and in *R I*, 3rd ser, 15 (1934), pp 219 248—Kelsen in *Hague Recueil*, vol 42 (1932), (IV) pp 312-349—Udina, *ibid*, vol 44 (1933) (II), pp 667 772—Strupp, *ibid*, vol 47 (1934) (1), pp 468-490—Monaco in *Rivista*, 26 (1934), pp 289-320, 462 502—Kaeckenbeeck in *B Y*, 17 (1936), pp 1-18, and in *Hague Recueil*, vol 59 (1937) (1), pp 325-354—Walz in *Z V*, 21 (1937), pp 1-18—Garner in *A J*, 32 (1938), pp 421-438—Canasacchi in *Rivista*, 32 (1940), pp 133 193, 321 378

Common Doctrine regarding Succession of International Persons

§ 80 Although there is no unanimity among the writers on International Law with regard to the so-called succession of International Persons, nevertheless the following common doctrine can be stated to exist

A succession of International Persons occurs when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition

Universal succession takes place when one International

Person is completely absorbed by another, either through subjugation or through voluntary merger And universal succession further takes place when a State breaks up into parts, which either become separate International Persons of their own or are annexed by surrounding International Persons

Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an International Person, secondly, when one International Person acquires a part of the territory of another through cession, thirdly, when a hitherto full sovereign State loses part of its independence through entering into a Federal State, or coming under suzerainty or under a protectorate, or when a hitherto not-full sovereign State becomes full sovereign

Nobody has ever maintained that on the successor devolve *all* the rights and duties of his predecessors But after stating that a succession takes place, writers try to deduce the consequences and to make out what rights and duties do, and what do not, devolve

Several writers,[1] however, contest the common doctrine, and maintain that a succession of International Persons never takes place Their argument is that the rights and duties of an International Person disappear with the extinguished Person,[2] or become modified, according to the modifications an International Person undergoes through losing part of its sovereignty

How far Succession actually takes place

§ 81 The practice of States shows that no *general* succession takes place according to the Law of Nations With the extinction of an International Person disappear its rights and duties as a person But it is equally wrong to maintain that no succession whatever occurs For nobody doubts that certain rights and duties actually and really devolve upon an International Person from its predecessor. And since this devolution takes place through the very fact of one International Person following another in the possession of State territory, there is no doubt that, as far as these

[1] For instance, Gareis, pp 66-70, Cavaglieri, *La dottrina della successione di Stato a Stato* (1910), Focherini, *op cit*

[2] See above, § 79

devolving rights and duties are concerned, a succession of one International Person to the rights and duties of another really does take place But no general rule can be laid down concerning all the cases in which a succession takes place These cases must be discussed singly

Succession in consequence of Absorption

§ 82 When a State merges voluntarily into another State —as, for instance, Korea in 1910 did into Japan—or when a State is subjugated by another State, the latter remains one and the same International Person and the former becomes totally extinct as an International Person

(*a*) *Political Rights and Duties* —No succession takes place, therefore, with regard to rights and duties of the extinct State arising either from the character of the latter as an International Person or from its purely political treaties Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which concluded them They are personal treaties, and they naturally, legally, and necessarily presuppose the existence of the contracting State But it is controversial whether treaties of commerce, extradition, and the like, made by the extinct State remain valid, so that a succession takes place The majority of writers—correctly, it is believed—answer the question in the negative,[1] because such treaties, although they are non-political in a sense, possess some prominent political features [2]

(*b*) *Local Rights and Duties* —A genuine succession takes place, however, with regard to such international rights and duties of the extinct State as are locally connected with its land, rivers, main roads, railways, and the like According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main

[1] See also, to the same effect, the decision of the German Supreme Court of August 13, 1936, with reference to the extradition treaties concluded by the German States prior to the German law of 1934 which transformed Germany into a unitarian State (at least) in the field of foreign affairs *A J*, 31 (1937), p 739, and comment thereon by Riesenfeld, *ibid*, p 720

[2] On the whole question concerning the extinction of treaties in consequence of the absorption of a State by another see Moore, v § 773, McNair, Chapter 35 (1), Hyde in *A J*, 26 (1932), pp 133-136, Chailley, *La nature juridique des traités internationaux* (1932), pp 146-159, and below, § 548 When, in 1910, Korea merged into Japan, the latter published a declaration which will be found in Martens, *N R G*, 3rd ser, 4, p 26.

roads, navigation on rivers, and the like, remain valid, and all rights and duties arising from such treaties of the extinct State devolve on the absorbing State [1]

(c) *Fiscal Property and Debts* —There is also a genuine succession with regard to the fiscal property and the fiscal funds of the extinct State They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State [2] But the debts [3] of the extinct State must, on the other hand, also be taken over by the absorbing State [4] The private creditor of an extinct State certainly acquires no right directly available to him under International Law [5] against

[1] As to local debts not abolished by treaty see *Polish Mining Corporation* v *District of Ratibor*, decided in 1933 by the German Supreme Court *Annual Digest*, 1933 1934, Case No 37

[2] See *Haile Selassie* v *Cable and Wireless, Limited* (No 2) [1939] Ch 182 That case is also an authority for the rule that only the successor who is recognised *de jure* is entitled to the assets of the former sovereign *The United States* v *Prioleau*, 35 L J Ch 7 See also *Land Oberoester reich* v *Gude* (1940) 109 F 2d, 635, where an American court laid down the rule that 'a right of action belonging to one sovereign will pass to its successor, if the successor has come to power in a manner acceptable to what our own government considers the principles of international law'

[3] See Moore, 1 § 97, and Appleton, *Des effets des annexions de territoires sur les dettes*, etc (1895) On the nature of the public debt with regard to State Succession see Sack, cited above and in *New York University Law Quarterly Review*, 10 (1932 1933), pp 127-156, 341 358 As to the effects of changes of sovereignty on currency questions see Nolde in *Hague Recueil*, vol 27 (1929) (II), pp 285-313 And see, in particular, the comprehensive works of Feilchen feld and Sack, cited above at p 151

[4] This is almost generally recognised by writers on International Law and the practice of the States (See Huber, *op cit*, pp 156 and 282, note 449) The Report of the Transvaal Concessions Commission (see *Parl Papers*, South Africa, 1901, Cmd 623), although it declares (p 7) that 'it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist,' nevertheless agrees that 'the modern usage of nations has tended in the direction of the acknowledgment of such contracts' It may, however, safely be maintained that not a usage, but a real rule of International Law, based on custom, is in existence with regard to this point (See Hall, § 29, and Westlake in *L Q R*, 27 (1901), pp 392 401, 21 (1905), pp 335-339, and Westlake, 1 pp 74 83)

[5] This is the real portent of the judgment in the case of *Cook* v *Sprigg* [1899] A C 572, and in the case of *The West Rand Central Gold Mining Co* v *The King* [1905] 2 K B 391 In so far as the latter judgment denies the existence of a rule of International Law that compels a subjugator to pay the debts of the subjugated State, its arguments are in no wise decisive, and it should be noted that the plaintiff being a British corporation the adverse judgment could not give rise to an international question An international court would recognise such a rule It will be noted that in *Cook* v *Sprigg* and in the decisions which followed it English Courts have not questioned the rule of International Law according to which a change of sovereignty as the result of cession does not affect private property The *ratio decidendi* in these cases has been the doctrine that acquisition of territory by cession or annexation being

the absorbing State But if he is a foreigner, the right of protection possessed by his home State enables the latter to exercise pressure upon the absorbing State for the purpose of making it fulfil its international duty to take over the debts of the extinct State Some jurists [1] go so far as to maintain that the succeeding State must take over the debts of the extinct State, even when they are higher than the value of the accrued fiscal property and fiscal funds But it is doubtful whether in such cases the practice of the States would follow that opinion [2]

(*d*) *Contracts*, apart from those resulting in financial indebtedness —There is a considerable body of authority

an 'act of State' (see p 304, n 1), municipal tribunals have no authority to give a remedy in respect of any actions arising therefrom See *Secretary of State for India* v *Sardar Rustam Khan, Law Reports, Indian Appeals*, vol 68 (1940 41), p 109, *Annual Digest*, 1941 1942, Case No 21 See also *Hoani Te Heuheu Tukino* v *Aoeta District Maori Land Board* [1941] A C 308 The recent practice of States, particularly in view of the Peace Treaties concluded after the First World War, tends to establish as a rule of International Law the duty of a successor State, whether the succession arises upon cession or annexation or dismemberment, to respect the acquired rights of private persons, whether proprietary, contractual, or concessionary (See the Advisory Opinion of the Permanent Court on the *Settlers of German Origin in Territory ceded by Germany to Poland*, Series B, No 6, particularly pp 35, 36, the Court held that the political origin attaching to the rights, and rendering them obnoxious to the successor State, does not relieve it of the duty to respect acquired rights of this character) As to the meaning of acquired rights see Decamps in *R G*, 15 (1908), pp 385-400, Guggenheim, *op cit*, pp 122 137, Sack, *op cit*, pp 57-61, Hyde, 1 §§ 132, 133, Kaeckenbeeck in *B Y*, 17 (1936), pp 1-18, Szaszy in *R I*, 3rd ser, 17 (1936), pp 406-420, and *Emeric Kulin* v *Roumania*, before the Roumano-Hungarian Mixed Arbitral Tribunal in *Recueil T A M*, 7 (1927), p 138, *Annual Digest*, 1927-1928, Case No 59 For an example of a restrictive interpretation of the obligation to respect private rights see *Niederstrasser* v *Polish State*, decided in 1931 by the Upper Silesian Arbitral Tribunal *Annual Digest*, 1931 1932, Case No 33 The successor State cannot avoid its obligations by enacting legislation either of a discriminatory character or nominally affecting all the residents of the territory See also an award of the same Tribunal in 1934 denying that the obligation to respect 'droits de toute nature' extended to an alleged acquired right to continued employment as a teacher *Hausen* v *Polish State*, *ibid*, 1933-1934, Case No 40 The French Court of Cassation seems to have adopted a different view *In re Kremer*, *ibid*, 1935-1937, Case No 43

[1] See Martens, 1 § 67, Heffter, § 25, Huber, *op cit*, p 158

[2] In the third edition the author continued 'On the other hand, a State which has subjugated another would be compelled to take over even such obligations as have been incurred by the annexed State for the immediate purpose of the war which led to its subjugation' This opinion seems to be open to very grave doubt see the Report of the Transvaal Concessions Commission, *supra*, at p 9, and Westlake, 1 p 81, and Sack, *op cit*, pp 165-182, who regards such a war debt as amongst 'dettes odieuses' not passing to the successor State

among text-writers in favour of the view that the absorbing State is bound by the contracts of the extinct State—for instance, a contract for the building of warships, or for coaling a fleet, but it is believed that no judicial authority is in existence Where the contract can be said to have a local character, such as a scheme for irrigation or for the building of locks on a river, the case for continued survival is stronger than in the case of other contracts

(*e*) *Concessionary Contracts* require special consideration —for instance, a State concession for the building and running of a railway or for the working of mines. They usually have a local character, and there is much to be said in favour of the view that, if before the extinction of the State which granted the concessions every act necessary for vesting them in the holder had been performed, they would survive the extinction and bind the absorbing State But every case must be studied on its merits, and it is difficult to lay down a general principle [1]

(*f*) *Unliquidated Damages for Torts or Delicts* —There is good authority for saying that a State does not become liable for unliquidated damages for the torts or delicts of the extinct State which it has absorbed [2] Where, however, the latter had acknowledged its liability and compensation had been agreed, a debt has arisen which, it is suggested, ought to survive the extinction of personality and be discharged by the absorbing State

(*g*) *Unliquidated Damages for Breach of Contract* —It seems

[1] Protocol XII annexed to the Treaty of Lausanne with Turkey in 1923 provided for the maintenance by succeeding States of pre war concessions granted by Turkey, but that is a case of cession of territory and not of absorption of a State see the *Mavrommatis Concessions* Judgment of the Permanent Court, Series A, No 5 See Westlake, 1 pp 82, 83, Moore, 1 § 98, Gidel, *Des effets de l'annexion sur les concessions* (1904), Teyssaire in *R G*, 35 (1928), pp 447-465, Schiffner in *Z ö R*, 9 (1929), pp 161-181

[2] *Brown's* claim, American and British Claims Arbitration Tribunal, November 1923, in *B Y*, 1924, pp 210 221, and *A J*, 19 (1925), pp 193 206, see also Hurst in *B Y*, 1924, pp 103 178 The matter is exhaustively discussed in the British Answer in *Brown's* claim, pp 6-17 The award in *Brown's* claim was followed by the same tribunal in No 84 of the *Hawaiian Claims* see *A J*, 20 (1926), pp 381, 382 For a denial of the obligation to take over liquidated damages in respect of railway accidents see a decision of the Polish Supreme Court in *Dzierzbicki v District Electrical Association of Czestochova, Annual Digest*, 1933 1934, Case No 38

that the analogy of the absence of liability for unliquidated damages for a delict is applicable to the case of unliquidated damages for breach of a contract, so as to make them irrecoverable against a successor, for breach of contract is also a wrongful act, but that, if compensation for breach had been agreed with the extinct State, the absorbing State ought to discharge that liability

The case of a Federal State arising—like the German Empire in 1871—above a number of several hitherto full sovereign States also presents, with regard to many points, a case of State succession [1] However, no hard and fast rules can be laid down concerning it, since everything depends upon the question whether the Federal State is one which—like the United States of America—totally absorbs all international relations of the member-States, or whether—like Switzerland—it absorbs these relations to a greater extent only [2]

Succession on the Suppression of a Revolt

§ 82a It is also necessary to consider the position which arises when a revolt which got so far as the establishment of a rival Government is suppressed Who is entitled to the property of the suppressed Government? In so far as it is situate within the territory of the parent State against which the revolt took place, no question of International Law arises In so far as the property is situate in the territory of foreign States, a distinction must be made between, on the one hand, property which formerly belonged to the parent State and was seized by the rebel Government, and, on the other hand, property which had been acquired by the rebel Government, as the result of voluntary subscriptions, lawful seizures of prizes, and so forth The former property can be recovered by the parent Government in a foreign court by title paramount, the latter is recoverable by virtue of its right as the successor of the rebel Government These principles are illustrated by a group of decisions given by English courts after the end of the American Civil War [3]

[1] See Huber, *op cit*, pp 163 170, Keith, *op cit*, pp 92 98, and Schoenborn, *op cit*, §§ 8 and 9

[2] See below, § 89

[3] *United States of America* v *Prioleau* (1865) 35 L J Ch 7, *Same* v *McRae* (1869) L R. 8 Eq 69, see also *King of the Two Sicilies* v *Wilcox* (1850) 1 Sim N S 332 For litigation in the United States of America arising out of the civil war in Ireland in 1919-1921, and concerning the former 'Irish Republic's' funds see Dickinson in *A J*,

The case of liability for the debts and wrongful acts of the rebel Government is not so simple, but the Mixed Commission appointed by the Treaty of Washington, 1871, held that the United States of America were 'not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces'[1]

Succession in consequence of Dismemberment

§ 83 When a State breaks up into fragments which themselves become States and International Persons, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another A difficulty is, however, created when the territory of the extinct State is absorbed by several States[2] Succession actually takes

21 (1927), pp 747 753, Garner, *ibid*, pp 753-757, and *Annual Digest*, 1925-1926 See also *Republic of China* v *Merchants' Fire Assurance Corporation of New York*, decided in 1931 by the United States Circuit Court of Appeals 49 F (2d) 862, *Annual Digest*, 1931-1932, Case No 45 And see Smith, 1 pp 405 416, and Uren in *Michigan Law Review*, 28 (1929-1930), pp 149 162

[1] Moore, *Digest*, 1 § 22, p 60, and Moore, *International Arbitrations*, 1 684, 695, in 2900-2901, 2982 2987 But sometimes a State may agree to pay for the damage done by revolutionary forces, *e g* in a treaty between Great Britain and Mexico in 1926, Cmd 2876 It will be noted in *United States of America* v *McRae*, *supra*, where the defendant, a Confederate agent in England, claimed to set off certain sums alleged to be due to him by the former Confederate Government, that the Federal Government being unwilling to admit any liability for the acts of the Confederate Government declined to submit to an account being taken, accordingly they only recovered such property as was theirs by title paramount and appear to have abandoned their claim based on succession *Quaere*, was this because they did not wish to prejudice their case for a general exemption of liability for the debts and wrongs of the Confederate Government? See also *Hopkins'* claim before the American-Mexican Claims Commission in *A J*, 21 (1927), pp 160-167

The distinction between *de facto* general and local Governments is relevant in this connection, the Confederate Government was only local Where, however, the suppressed *de facto* Government was general, the better opinion is that the State which suppresses it and succeeds to its property is responsible for its contracts and loans, see Award of the Permanent Court of Arbitration in the *French Claims against Peru* in *A J*, 16 (1922), at p 482, Borchard, p 206, Spiropoulos, *Die de facto-Regierung im Volkerrecht* (1926), pp 92 98, and Kunz in *Strupp, Wort*, II p 612 But a distinction has been drawn between contracts of the suppressed *de facto* Government which are impersonal transactions of governmental routine and therefore bind the State, and contracts of a nature personal to the suppressed Government which therefore do not survive, instances of the former type are the purchase of postal money orders (*Hopkins'* claim before the American-Mexican Claims Commission in *A J*, 21 (1927), pp 160-167, and in *Annual Digest*, 1925-1926, Case No 170), or of motor ambulances (*Peerless Motor Car Co's* claim before the same Commission in *A J*, 22 (1928), pp 180 182, *Annual Digest* 1927-1928, Case No 163)

[2] See above, § 79 (n 1), for the case of incomplete absorption of territory, *e g.* Austria and Russia.

place here too, first, with regard to the international rights and duties locally connected [1] with those parts of the territory which the respective States have absorbed Succession takes place, secondly, with regard to the fiscal property and the fiscal funds which each of the several absorbing States finds on the part of the territory it absorbs And the debts of the extinct State must be taken over But the case is complicated through the fact that there are several successors to the fiscal property and funds, and the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors [2]

When—as in the case of Sweden-Norway in 1905—a Real Union [3] is dissolved and the members become separate International Persons, a succession likewise takes place All treaties concluded by the Union devolve upon the former members, except those which were concluded by the Union for one member only—*e g* by Sweden-Norway for Norway —and which, therefore, devolve upon that former member only, and, further, except those which concerned the Union itself and lose all meaning by its dissolution

§ 84 When in consequence of war or otherwise one State

Succession in case of Separation or Cession.

[1] See Sack, *op cit*, pp 205 218

[2] See, however, the award in the Ottoman Debt Arbitration of 1925 in *Annual Digest*, 1925-1926, Case No 57

In the complicated case of the dismemberment of Austria Hungary in 1918, when the Real Union—see below, § 87—was dissolved, and the old State broke up into fragments, some of which became themselves States and International Persons, while others were annexed by surrounding States, the Treaties of Peace made express provision for the apportionment between the States concerned of the pre war debt of Austria Hungary, and defined the extent of the liability of Austria for the debt incurred by the dismembered Dual Monarchy in prosecuting the war Thus the Treaty of Peace with Austria provided (Article 203) that each of the States to which territory of the former Austro-Hungarian monarchy was transferred, and each of the States arising from the dismemberment of that monarchy, including Austria, should assume responsibility for a portion of the secured and unsecured bonded debt of the former Austro - Hungarian Government, as it stood before the outbreak of war Machinery was provided for ascertaining that portion which each State was to assume None of these States, other than Austria, were to bear any responsibility for the bonded *war* debt of the former Austro - Hungarian Government, but, on the other hand, they were to have no recourse against Austria in respect of war debt bonds which they or their nationals held (Article 205) For a scholarly and exhaustive treatment of the relevant provisions of the various Peace Treaties see Feilchenfeld, *Public Debts and State Succession* (1931), pp 431-755

For a detailed discussion of the principle of State succession as to the public debt on dismemberment and in other cases see Sack, *op cit*, particularly pp 219-599

[3] See below, § 87

cedes a part of its territory to another, or when a part of the territory of a State breaks off, and becomes a State and an International Person itself, succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property [1] found on that part of the territory [2] It would be only just if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of International Law concerning this point can be said to exist, although many treaties [3]

[1] See *The United States* v *Perchéman* (1833) 7 Peters 51

[2] The courts of law of most of the Succession States arising after the First World War have denied succession as to fiscal obligations except where it was stipulated for by treaty, as to Poland see Ehrlich, *Prawo narodów* (2nd ed, 1932), § 213 As to the practice of courts in Czecho Slovakia, Austria, and Roumania see *Annual Digest*, 1925-1926, 1927-1928, and 1929 1930

[3] Thus, for instance, Articles 9, 33, and 42 of the Treaty of Berlin (see Martens, *N R G*, 2nd ser, 3 p 449) of 1878 stipulated that Bulgaria, Montenegro, and Serbia should take over part of the Turkish debt Again, the Peace Treaty of Lausanne of 1912, by which Italy acquired Tripoli, stipulated that Italy should take over a part of the Turkish debt (Martens, *N R G*, 3rd ser, 7 p 7) Likewise the Treaty of Peace with Germany of 1919 provided that the Powers to which German territory had been ceded should assume responsibility for a portion of the pre-war debt of the German Empire, and also of the pre-war debt of the German State to which the ceded territory belonged The Treaty of Peace with Italy of 1946 lays down that the Successor State shall be exempt from payment of the Italian public debt but that it shall assume the obligations of the Italian State towards holders who continue to reside in the ceded territory in so far as these obligations correspond to that of the debt which was issued prior to the entry of Italy into the war and is not attributable directly or indirectly to military purposes (Annex XIV (6)) For the Ottoman Debt Arbitration in 1925 see *Annual Digest*, 1925 1926, and note by Brown in *A J*, 20 (1926), pp 135 139 See also Alphand, *Le partage de la dette Ottomane* (1928) As, however, Germany in 1871 refused to undertake any part of the French debt, France was exempted by the Treaty of Peace from assuming any part of the German debt on account of the cession of Alsace Lorraine (Article 255), and in the case of Poland, that part of the German debt which was attributable to measures for the German colonisation of Polish provinces was to be excluded from the apportionment (Article 255)

On the other hand, the United States refused, after the cession of Cuba in 1898, to take over from Spain the so called Cuban debt—that is, the debt which was settled by Spain on Cuba before the war (see Moore, 1 § 97, pp 351 385) Spain argued that it was not intended to transfer to the United States a proportional part of the debt of Spain, but only such debt as attached individually to the island of Cuba The United States, however, met this argument by the correct assertion that the debt concerned was not incurred by Cuba, but by Spain, and settled by her on Cuba See Wilkinson, *The American Doctrine of State Succession* (1934) Similarly, by Articles 46-57 of the Treaty of Lausanne of 1923 between Turkey and the Allied and Associated Powers, provision was made for the distribution of the Ottoman Public Debt among the various States which succeeded to portions of the Ottoman Empire or were created in territories formerly forming part of it On the

have stipulated a devolution of a part of the debt of the predecessor upon the successor [1]

V

COMPOSITE INTERNATIONAL PERSONS

Pufendorf, VII c 5—Hall, § 4—Westlake, I pp 31-37—Phillimore, I §§ 71-74, 102-121—Twiss, I §§ 37-60—Halleck, I pp 75 79—Taylor, §§ 120-130—Wheaton, §§ 39 50—Hyde, I §§ 30 32—Moore, I §§ 6-11—Hershey, §§ 96 102—Hartmann, § 10—Heffter, §§ 20-21—Holtzendorff in *Holtzendorff*, II pp 118 149—Liszt, § 9—Ullmann, §§ 20 24—Hatschek, pp 34-41—Fauchille, §§ 165-174 (3)—Despagnet, §§ 109 126—Pradier Fodéré, I §§ 117 124—Mérignhac, II pp 6 42—Nys, I pp 392 409—Rivier, I §§ 5 6—Calvo, I §§ 44 61—Fiore, I §§ 335 339, and *Code*, §§ 101-109—Cavaglieri, pp 135 143—Martens, I §§ 56-59—De Louter, I pp 191-216—Keith's Wheaton, pp 114 128—Balladore Pallieri, pp 246-260—Anzilotti, pp 153 159, 189 197—Hold Ferneck, I pp 229 238—Scelle, I pp 187-225—Pufendorf, *De Systematibus Civitatum* (1675)—Jellinek, *Die Lehre von den Staatenverbindungen* (1882)—Borel, *Étude sur la souveraineté de l'état fédératif* (1886)—Brie, *Theorie der Staatenverbindungen* (1886)—Hart, *Introduction to the Study of Federal Government* in *Harvard Historical Monographs* (1891) (including an excellent bibliography)—Le Fur, *État fédéral et confédération d'états* (1896)—Moll, *Der Bundesstaatsbegriff in den Vereinigten Staaten von America* (1905)—Ebers, *Die Lehre von dem Staatenbunde* (1910)—Dupuis, *Le droit des gens et les rapports des grandes puissances* (1920), pp 133-170—Nawiasky, *Der Bundesstaat als Rechtsbegriff* (1920)—Kelsen, *Das Problem der Souveranität und die Theorie des Volkerrechts* (1920), pp 274 314, and *Allgemeine Staatslehre* (1926), pp 193-225—Lundborg, *Die gegenwartigen Staatenverbindungen* (1921)—Newton, *Federal and Unified Constitutions* (1923)—Wheare, *Federal Government* (1946)—Verdross, pp 99-111, and in *Z I*, 35 (1926), pp 257 275—Kunz, *Staatenverbindungen* (1929), pp 61 288, 404 713 (the leading treatise on the subject)—Pilotti in *Hague Recueil*, vol 24 (1928) (IV), pp 445 544—Scelle *ibid*, vol 46 (1933) (IV), pp 393-414—Raestad in *Nordisk T A*, *Acta Scandinavica*, V (1934), pp 3-28, 45-66

Real and apparent Composite International Persons

§ 85 International Persons are as a rule single sovereign States In such single States there is one central political authority as Government, which represents the State, within its borders as well as without, in its international intercourse

refusal of Germany to take over the Austrian public debt after the annexation of Austria in 1938 see Garner in *A J*, 32 (1938), pp 766 775, Brandt in *Z o V*, 9 (1939), pp 127-147

[1] Many writers, however, maintain that there is such a rule of International Law See Huber, *op cit*, §§ 125-135 and 205, where the treaties concerned are enumerated See also Schmidt, *Der Uebergang der Staatsschulden bei Gebietsabtretungen* (1913), Sibley in *J C L*, 3rd ser, 7 (1925), pp. 22-39, and Sack, *op cit*, particularly pp 52-90 In substance, recognition of the new State is sometimes made to depend upon its undertaking a proper share of the obligations of the former State of which it formed part.

with other International Persons Such single States may be called *simple* International Persons And a State may remain a simple International Person, although it may grant so much internal independence to outlying parts of its territory that these parts become in a sense States themselves Great Britain was before the First World War a simple International Person, although the Dominion of Canada, Newfoundland, the Commonwealth of Australia, New Zealand, and the Union of South Africa were States, because Great Britain was alone sovereign and represented exclusively the British Empire within the Family of Nations [1]

Historical events, however, have created, in addition to the simple International Persons, *composite* International Persons A composite International Person is in existence when two or more sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively or at least to a great extent as one single International Person History has produced two different kinds of such composite International Persons—namely, Real Unions and Federal States In contradistinction to Real Unions and Federal States, a so-called Personal Union and a union of so-called Confederated States are not International Persons

States in Personal Union

§ 86 A Personal Union is in existence when two sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch [2] Thus a Personal Union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxemburg, and from 1885 to 1908 between Belgium and the former Congo Free State [3] At present there is no Personal Union in existence [4] A Personal Union is not, and is in no point treated as though it were, an International Person, and its two sovereign member-States remain separate International

[1] For the present position see below, § 94*b*

[2] A fact which according to English law results in the subjects of the two countries owing a common allegiance and having a common nationality *Calvin's Case* (1608) 7 Co Rep 1, and *Isaacson* v *Durant* (1886) 71 Q B D 54

[3] See Thomson, *Fondation de l'État Indépendent du Congo* (1933)

[4] See, however, below, § 87, p 163 (n 3), as to Denmark and Iceland

Persons Theoretically it is even possible for them to make war against each other, although in practice this will never occur. If, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the envoy of both States at the same time, but not the envoy of the Personal Union

States in Real Union

§ 87 A Real Union [1] is in existence when two sovereign States are, by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person A Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person They form a compound Power, and are by the treaty of union prevented from making war against each other On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as separately they are not International Persons [2] At present there is no Real Union in existence,[3]

[1] See Bluthgen in *Z V*, 1 (1907), pp 237 263

[2] See, however, as to Austria Hungary, Advisory Opinion on *Question of Jaworzina*, Series B, No 8, at p 43, where the Permanent Court referred to Austria and Hungary before 1918 as 'distinct international units' See also the decision of Judge Parker of May 25, 1927, with regard to the jurisdiction of the Tripartite Claims Commission *Annual Digest*, 1927-1928, Case No 54

[3] It is probable that between 1918 and 1944 Denmark was a Real Union In 1918 Denmark recognised Iceland as a sovereign State, but this was not followed by international recognition by other States See, *e g*, as to the United States, Hackworth, 1 § 42 Clause 7 of the Danish Law of November 30, 1918, printed in *British and Foreign State Papers*, 111 (1917-1918), pp 703 707, and in Martens, *N R G*, 3rd ser, XII p 3, provided that 'Denmark shall attend on Iceland's behalf to foreign affairs' This did not make Iceland a protectorate The Union was probably Real rather than Personal, because it resulted from a constitutional arrangement intended to last at any rate until 1940, when it was to come up for reconsideration In renewing in 1926 the Anglo Danish Arbitration Convention of October 25, 1905, two separate Conventions were made by Great Britain, one with Denmark (Cmd 2835) and the other with Iceland (Cmd 2836) Iceland had an Envoy Extraordinary and Minister Plenipotentiary at Copenhagen (*Iceland Year Book*, 1927, p 56), and Denmark had a representative of the same class in Iceland See Lundberg, *Zwei umstrittene Staatenbildungen* (1918), *Die gegenwartigen Staatenverbindungen* (1921), and *Islands Volkerrechtliche Stellung* (1934), Remertz, *Die staatsrechtliche Stellung Islands* (1919), Gregerson, *L'Islande Son statut à' avers les âges* (1937), Berlin in *Z ö R*, 15 (1935), pp 572-599 See also Stefanson in *Foreign Affairs*

that of Sweden-Norway [1] having been dissolved in 1905, and that of Austria-Hungary [2] having come to an end by the collapse of the Austro-Hungarian Empire in 1918, just before the close of the First World War

Confederated States (*Staatenbund*)

§ 88 Confederated States (*Staatenbund*) are a number of full sovereign States linked together for the maintenance of their external and internal independence by a recognised international treaty into a union with organs of its own, which are vested with a certain power over the member-States, but not over the citizens of these States. Such a union of Confederated States is not any more itself a State than a Real Union is, it is merely an International Confederation of States, a society of an international character, since the member-States remain full sovereign States and separate International Persons Consequently, a union of Confederated States is not an International Person, although it is for some purposes so treated on account of its repre-

(*U S A*), 7 (1929), pp 270 281, Arnórsson in *Nordisk T A*, 2 (1931), pp 63 78, Berlin, *ibid*, *Acta Scandinavica*, pp 95 100 As to Iceland joining the League see Hudson in *A J*, 18 (1924), p 448 Iceland, in response to an inquiry as to eligibility, was invited by the Secretary General of the League to apply for admission, but it is believed that no such application was ever made *Off J*, 1920, p 265, Schucking und Wehberg, p 254, Hudson, *op cit* In 1943 Iceland severed her constitutional relation with Denmark and declared herself an independent State Her independence was recognised by Great Britain, the United States, Soviet Russia, and other States She is a member of the United Nations

[1] Sweden Norway (see Aall and Gjelsvik, *Die Norwegisch-Schwedische Union* (1912)) became a Real Union in 1814, but this is not universally recognised Phillimore, I § 74, maintains that there was a Personal Union between Sweden and Norway, and Twiss, I § 40, calls it a Federal Union The King could declare war, make peace, conclude alliances and other treaties, and send and receive the same diplomatic envoys for both States The Foreign Secretary of Sweden managed at the same time the foreign affairs of Norway Both States had, however, in spite of the fact that they made one and the same International Person, different commercial and naval flags The Union was peacefully dissolved by the Treaty of Stockholm (Karlstad) of October 26, 1905 Norway became a separate kingdom, the independence and integrity of which was guaranteed by Great Britain, France, Germany, and Russia by the Treaty of Christiania of November 2, 1907 (see below, § 574, p 870, n 4)

[2] Austria-Hungary became a Real Union in 1723 In 1849 Hungary was united with Austria, but in 1867 Hungary became again a separate sovereign State, and the Real Union was re established Their army, navy, and foreign ministry were united The Emperor King could declare war, make peace, conclude alliances and other treaties, and send and receive the same diplomatic envoys for both States With the downfall of the Austro Hungarian Empire in 1918, the Union came to an end And see above, p 150, n 2.

senting the compound power of the full sovereign member-States The chief and sometimes the only organ of the union is a Diet, where the member-States are represented by diplomatic envoys The power vested in the Diet is an international power which does not in the least affect the full sovereignty of the member-States That power is essentially nothing else than the right of the body of the members to make war against such a member as will not submit to those commandments of the Diet which are in accordance with the Treaty of Confederation, war between the member-States being prohibited [1] in all other cases

History has shown that Confederated States represent an organisation which in the long run gives very little satisfaction It is for that reason that the three important unions of Confederated States of modern times—namely, the United States of America, the German, and the Swiss Confederation—turned into unions of Federal States Notable historic Confederations are those of the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and from 1815 to 1848, and the Confederation of the Rhine (*Rheinbund*) from 1806 to 1813 At present there is no union of Confederated States [2] The last in existence, the major Republic of Central America,[3] which comprised the three full sovereign States of Honduras, Nicaragua, and San Salvador, and was established in 1895, came to an end in 1898

Federal States (*Bundesstaaten*)

§ 89 A Federal State is a perpetual union of several sovereign States which has organs of its own and is invested with power, not only over the member-States, but also over their citizens [4] The union is based, first, on an international treaty of the member-States, and, secondly, on a subse-

[1] The fact that war between the member States of the League of Nations was, in certain circumstances, not prohibited, is sufficient to show that the League of Nations was not a *Staatenbund*—a union of Confederated States described in the text See below, § 167*c*

[2] See, however, below, § 167*c*, for the views of some writers upon the League of Nations as a Confederation

[3] See Martens, *N R G*, 2nd ser, 31, pp 276 292

[4] See Mouskheli, *La théorie juridique de l'État fédéral* (1931), Kunz in *R I*, 3rd ser, 11 (1930), pp 835-877, and 12 (1931), pp 131-149, Schlesinger in *Z ö R*, 16 (1936), pp 87-103

quently accepted constitution of the Federal State A Federal State is said to be a real State side by side with its member-States, because its organs have a direct power over the citizens of those member-States This power was established by American [1] jurists of the eighteenth century as a characteristic distinction between a Federal State and Confederated States, and Kent as well as Story, the two later authorities on the Constitutional Law of the United States, adopted this distinction, which is indeed kept up until to-day by the majority of writers on politics Now if a Federal State is recognised as itself a State, side by side with its member-States, it is evident that sovereignty must be divided between the Federal State on the one hand, and, on the other, the member-States This division is made in this way, that the competence over one part of the objects for which a State is in existence is handed over to the Federal State, whereas the competence over the other part remains with the member-States Within its competence the Federal State can make laws which bind the citizens of the member-States directly without any interference by these member-States On the other hand, the member-States are totally independent as far as *their* competence reaches

For International Law this division of competence is only of interest in so far as it concerns competence in *international* matters [2] Since it is always the Federal State which is competent to declare war, make peace, conclude treaties of alliance and other political treaties, and send and receive diplomatic envoys, whereas no member-State can of itself declare war against a foreign State, make peace, conclude alliances or other political treaties, the Federal State, if recognised, is certainly itself an International Person, with all the rights and duties of a sovereign member of the Family

[1] See especially Nos 15 and 16 of *The Federalist* (by Hamilton, Jay, and Madison), which establish the difference between Confederated States and a Federal State in the way mentioned in the text above

[2] A Federal Constitution gives rise to certain difficulties in foreign relations for instance, (1) as to State Responsibility (see below, § 152), (2) as to signature and ratification by the Federal Government of treaties regulating matters within the competence of the Governments of the member States see below, § 340*f*, p 658, n 6, and above, p 38, n 7

of Nations On the other hand, the international position of the member-States is not so clear It is frequently maintained that they are deprived of any status whatsoever within the Family of Nations But there is no justification for that view Thus, the member-States of the Federal State of Germany, under the German Constitution as it existed before the First World War, retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign States [1] Further, the reigning monarchs of these member-States were still treated by the practice of the States as heads of sovereign States, a fact without legal basis if these States had been no longer International Persons Thirdly, the member-States of Germany, as well as of Switzerland, retained their competence to conclude international treaties between themselves without the consent of the Federal State, and they also retained the competence to conclude international treaties with foreign States as regards matters of minor interest Fourthly, in the judicial settlement of disputes which have arisen from time to time among them the municipal courts in question have had recourse to rules of International Law whenever applicable [2] In view of this, it must be acknowledged that the

[1] Article 45 of the Weimar Constitution of August 14, 1919, was as follows 'The President of the Federation represents the Federation in its international relations He concludes alliances and other treaties with foreign powers in the name of the Federation He accredits and receives ambassadors Declaration of war and conclusion of peace are effected by federal law Alliances and such treaties with foreign States as refer to matters of federal legislation require the consent of the Reichstag' Under Article 78, 'the administration of the relations with foreign States is the business of the Federation alone', but Bavaria was allowed to maintain diplomatic intercourse with the Holy See (Oppenheimer, *The Constitution of the German Republic* (1923), p 28) On the international position of Bavaria prior to the changes effected by the National Socialist régime in Germany see Thils, *Probleme der staats- und volkerrechtlichen Stellung Bayerns* (1930) On the Weimar Constitution see Stier-Somlo, *Die Verfassung des deutschen Reichs* (1920), Giese, same title (1921), Anschutz, same title (1926), Brunet, *La Constitution allemande* (1921) By a Law of January 30, 1934, the sovereign rights of the member States were transferred to the *Reich* German *Reichsgesetzblatt*, 1934, I p 75 The effect of that Law—as well as of a subsequent Decree of February 2, 1934 (*ibid*, p 81)—was to abolish the right of the States to make international agreements As to Soviet Russia see below, p 169, n 4

[2] See, for clear pronouncements to that effect, *Bremen* v *Prussia*, decided by the German *Staatsgerichtshof* in 1925 *Annual Digest*, 1925-1926, Case No 266, and *ibid*, 1927-1928,

member-States of a Federal State can be International Persons in a degree Full subjects of International Law —International Persons with all the rights and duties regularly connected with membership of the Family of Nations — they certainly cannot be Their position, if any, within this circle is overshadowed by their Federal State, they are part sovereign States, and they are, consequently, International Persons for some purposes only [1]

But it happens frequently that a Federal State assumes *in every way* the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all. This is the case with the United States of America and all those other American Federal States whose Constitution is formed according to the model of that of the United States Here the member-States are sovereign too, but only with regard to *internal* [2] affairs All their external

Case No 289, *Canton of Thurgau* v *Canton of St Gallen*, decided in 1928 by the Swiss Federal Court, and Case No 86, *Württemberg* v *Baden*, decided in 1927 by the German *Staatsgerichtshof* The application of rules of International Law to disputes between States members of the American Union has also been a constant feature of the work of the Supreme Court of the United States See *Judicial Settlement of Controversies between States of the American Union*, edited by J B Scott, 2 vols (1918), and *Analysis* thereof, by the same (1919) See also Lauterpacht, *The Function of Law*, pp 439 452, and Harrison Moore in *J C L*, 3rd ser, 17 (1935), pp 163-209

[1] See Stoke, *The Foreign Relations of the Federal State* (1931) On the position of the German States in the past see Riess, *Auswartige Hoheits rechte der deutschen Einzelstaaten* (1905), and Windisch, *Die volkerrechtliche Stellung der deutschen Einzelstaaten* (1913) As to Switzerland see His in *R I*, 3rd ser, 10 (1929), pp 454-479 On the application by a State member of extradition treaties concluded by Federal States see Hudson in *A J*, 28 (1934), pp 286-292 It has been held that State members of Federal States cannot invoke the jurisdictional immunities enjoyed by sovereign States See *State of Céara* v *D'Archer de Montgascon*, *Annual Digest*, 1931-1932, Case No 84, but see *Sullivan* v *State of São Paulo* (1941) 122 Fed (2nd Series) 355, *Annual Digest*, 1941 1942, Case No 50, *État de Céara* v *Dorr*, 60 *Clunet* (1933), p 644 A member State may, by virtue of the Federal Constitution, enjoy immunity from suit within the Federation in question, as is *e g* the position in the United States see *The Principality of Monaco* v *The State of Mississippi* (1933) 291 U S 643, and 292 U S 313, *Annual Digest*, 1933 1934, Case No 61, *A J*, 28 (1934), p 576 And see for comment thereon Reeves, *ibid*, pp 739 742 See also McGrane, *Foreign Bondholders and American State Debts* (1935)

[2] The courts of the United States of America have always upheld the theory that the Federal Government is sovereign as to all powers of government actually surrendered, whereas each member State is sovereign as to all powers reserved See Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), p 163 And see Mitchell, *State Interests in American Treaties* (1936) and Levitan in *Yale Law Journal*, 55 (1946), pp 467-497

sovereignty being absorbed by the Federal State, it is certainly a fact that they are not International Persons at all so long as this condition of things lasts

The principal Federal States in existence [1] are the following The United States of America since 1787, Switzerland since 1848, Mexico since 1857, Argentina since 1860, Canada since 1867, Germany since 1871,[2] Brazil since 1891, Venezuela since 1893, Australia since 1901,[3] and the Union of Socialist Soviet Republics of Russia since 1918 [4]

[1] Colombia was a Federal State until 1886 see Fauchille, § 172 (1)

Within the British Empire, Canada since 1867, and Australia since 1900, have had federal Constitutions The Union of South Africa, formed in 1909, is different The Government of India Act, 1935 (26 Geo 5, c 1), provides, in Part II, for a Federal Constitution to be introduced as soon as a sufficient number of Rulers have decided to accede However, external affairs are amongst those included in the discretionary powers of the Governor General

[2] But see above, p 167, n 1

[3] It will be noted that neither Canada in 1867 nor Australia in 1901 were States in the international sense

[4] For the modifications of the Constitution since 1918 see a memorandum on Soviet Russia and a translation of its Constitution published by the British Foreign Office in 1924, Bach, *Le droit et les institutions de la Russie soviétique* (1923), Yaneff, *La constitution de l'Union des Républiques socialistes Soviétiques* (1926), Taracouzio, *The Soviet Union and International Law* (1935), pp 26-122, and, in particular, pp 237-239, Pilenco in *R G*, 30 (1923), pp 223-241, and Timashev in *Archiv des offentlichen Rechts*, 52 (1927), pp 1 21 According to Article 14 of the Constitution of December 1936, the representation of the Union in international affairs, the conclusion and ratification of treaties, and questions of war and peace are within the jurisdiction of the Union The Constitution is printed in *International Conciliation* (Pamphlet No 327, 1937), pp 135-163 For comment thereon see Dobrin in *Grotius Society*, 22 (1936), pp 99 116, Verdross in *Ö Z o R*, 1 (1946), pp 212-218 On February 1, 1944, Soviet Russia adopted an amendment to her Constitution by virtue of which each Republic of the Union acquired 'the right to enter into direct relations with States, to conclude agreements with them, and to exchange diplomatic representatives with them' (Law on the Granting to Union Republics of Authority in the Sphere of Foreign Relations) See Dobrin in *Grotius Society*, 30 (1944), pp 260 283 In May 1945 the Republics of Ukraine and White Russia were separately invited to the San Francisco Conference They are separate members of the United Nations

On monetary unions see Nolde in *Hague Recueil*, vol 27 (1929) (II), pp 364 388 On the proposed European Customs Union see Truchy in *Hague Recueil*, vol 48 (1934) (II), pp 575 626 On the Customs Unions between Belgium and Luxemburg by the Treaty of July 25, 1921, and between Switzerland and Liechtenstein of March 29, 1923, see Pilotti in *Hague Recueil*, vol 24 (1928) (IV), pp 463, 464 See also Spillmann, *Die rechtliche und politische Lage des Fürstentums Liechtenstein nach dem Weltkriege* (1933) As the result of the Customs Union Treaty with Switzerland some of the economic measures applied by Switzerland against Italy in 1935 were equally and without further formality operative in the territory of the Principality *Off J*, Special Suppl No 147, p 43 While Liechtenstein entrusted Switzerland with her representation abroad, this was subject to the retention in principle of her sovereign rights including the right to appoint her own representatives See Spillmann, *op cit*,

VI

VASSAL STATES

Hall, § 4—Westlake, I pp 25 27—Lawrence, § 39—Phillimore, I §§ 85-99—Twiss, I §§ 22 36, 61 73—Taylor, §§ 140 144—Wheaton, § 37—Moore, I § 13—Hershey, §§ 103, 104—Hyde, I §§ 17, 18—Bluntschli, §§ 76, 77—Hackworth, I § 16—Heffter, §§ 19 and 22—Holtzendorff in *Holtzendorff*, II pp 98 117—Liszt, § 10—Ullmann, § 25—Gareis, § 15—Hatschek, pp 30 34, 43 48—Fauchille, §§ 188 190 (1)—Despagnet, §§ 127 128—Merignhac, I pp 201-219—Pradier-Fodéré, I §§ 109-112—Nys, I pp 382-390—Rivier, I § 4—Calvo, I §§ 66-72—Fiore, I § 341, and *Code*, §§ 110-115—Martens, I §§ 60 61—De Louter, I pp 177 183—Cruchaga, I §§ 163-166—Holland, *Lectures*, pp 74-80—Anzilotti, pp 202 217—Scelle, I pp 134 141—Stubbs, *Suzerainty* (1882)—Baty, *International Law in South Africa* (1900), pp 48-68—Boghitchévitch, *Halbsouveranität* (1903)—Sereni, *La rappresentanza nel diritto internazionale* (1936), pp 304 *et seq*—Rutherford in *A J*, 20 (1926), pp 300 325

The Union between Suzerain and Vassal State

§ 90 Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal, the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law only With the disappearance of the feudal system, suzerainty of this kind likewise disappeared Modern suzerainty involves only a few rights of the suzerain State over the vassal State which can be called constitutional rights The rights of the suzerain State over the vassal are principally international rights, of whatever they may consist Suzerainty is by no means sovereignty It is a kind of international guardianship, since the vassal State is either absolutely or mainly represented internationally by the suzerain State

pp 106-122 For the literature on the abortive Austro-German Customs Union and the Advisory Opinion of the Permanent Court of September 5, 1931, on this matter see vol II p 75, n 5 On the proposed European Union see *Documents*, 1930, pp 61 79, League Doc A 46 1930 VII, Toynbee, *Survey*, 1930, pp 131-142, Mirkine-Guetzévitch and Scelle, *L'Union européenne* (1931) (a collection of documents), Leonard, *Vers une organisation politique et juridique de l'Europe* (1935), *Round Table*, xx (1929-1930) pp 79 99, *International Conciliation* (Pamphlet No 265, December 1930), Lambert in *R G*, 36 (1929), pp 397-415, Politis in *R I (Geneva)*, 8 (1939), pp 201-211, Barthélemy in *R I (Paris)*, 5 (1930), pp 420-440, Le Fur, *ibid*, 6 (1930), pp 71 96, Pusta, *ibid*, pp 97 122, 506-516, De la Brière in *R I*, 3rd ser, 12 (1931), pp 5-36, Scelle in *R G*, 38 (1931), pp 521-563, Cordier in *Geneva Special Studies*, II No 6 (1931), Deák in *American Political Science Quarterly*, 46 (1931), pp 424 433 For some governmental replies see *R I (Paris)*, 6 (1930), pp 280 325 See also *ibid*, 9 (1932), pp 617 646

§ 91 The fact that the relation between the suzerain and the vassal always depends upon the special case, excludes the possibility of laying down a general rule as regards the position of vassal States within the Family of Nations It is certain that a vassal State as such need not have any position whatever within the Family of Nations In every case in which a vassal State has absolutely no relations whatever with other States, since the suzerain absorbs these relations entirely, such vassal remains nevertheless a half sovereign State on account of its internal independence, but it has no position whatever within the Family of Nations, and consequently is for no purpose whatever an International Person and a subject of International Law This is the position of the Indian vassal States of Great Britain, which have no international relations [1] whatever either between themselves or with foreign States [2] Yet instances can be given which demonstrate that vassal States can have some small and subordinate position within that family, and that they must in consequence thereof in some few points be considered as International Persons [3]

International Position of Vassal States

[1] See Hall, p 28, Westlake, I pp 41-43, and *Papers*, pp 211 219, 620 632, and Lindley, pp 195 201 See also Lee Warner, *The Native States of India* (1910), pp 254 279, Stimmel in *Strupp, Wort*, III pp 3 13, and Fitzgerald (as to Berar) in *L Q R*, 42 (1926), pp 514 520 Not to be confused with the position of the Indian vassal State is the position of India See below, § 94*b*

[2] It is therefore extremely doubtful whether the rulers of these States can claim the privileges which, according to International Law, are due to heads of States abroad see *Statham* v *Statham and the Gaekwar of Baroda* [1912] P 92 The Ceylon Supreme Court held in 1942 that the State of Mysore was not an independent Sovereign State and that it was not therefore entitled to jurisdictional immunities *The Superintendent, Government Soap Factory, Bangalore* v *Commissioner of Income Tax, Annual Digest*, 1941-1942, Case No 10 The High Court of Allahabad gave a similar decision in 1942 with regard to the Maharaja of Benares *Bishwanath Singh* v *Commissioner of Income Tax, ibid*, Case No 11

[3] Thus Egypt, while she was still a vassal State of Turkey, could conclude commercial and postal treaties with foreign States without the consent of suzerain Turkey, and Bulgaria could, while she was under Turkish suzerainty, conclude treaties regarding railways, post, and the like Thus, further, Egypt and Bulgaria, while they were Turkish vassal States, were permitted to send and receive consuls as diplomatic agents Thus, thirdly, the former South African Republic, although in the opinion of Great Britain under her suzerainty, could conclude all kinds of treaties with other States, provided Great Britain did not interpose a veto within six months after receiving a copy of the draft treaty, and was absolutely independent in concluding treaties with the neighbouring Orange Free State Again, Egypt acquired in 1898, when she was still a Turkish vassal State, *condominium* (see below,

At the same time, there are other factors which show that for the most part the vassal State, even if it has some small position of its own within the Family of Nations, is considered a mere portion of the suzerain State Thus all international treaties concluded by the suzerain State are *ipso facto* concluded for the vassal, if an exception is not expressly mentioned or self-evident Thus, again, war of the suzerain is *ipso facio* war of the vassal [1] Thus, thirdly, the suzerain bears within certain limits a responsibility for actions of the vassal State [2]

At present all such vassal States of importance as were to some extent International Persons have disappeared The last was Egypt [3]

§ 171), together with Great Britain, over the Sudan, which meant that they exercised conjointly sovereignty over this territory Although vassal States have not the right to make war independently of their suzerain, Bulgaria, at the time a vassal State, nevertheless fought a war against the full sovereign Serbia in 1885, and Egypt conquered the Sudan conjointly with Great Britain in 1898

[1] Yet when Turkey entered the First World War against the Allied Powers in 1914, it was not considered that thereby a state of war existed between them and Egypt, presumably because the Turkish suzerainty was then of so nominal a character In July 1926, the Greco-Bulgarian Mixed Arbitral Tribunal held in *Katrantsios v Bulgarian State* that the Island of Samos, which in 1832 was established as a tributary principality of the Porte, was neutral in wars in which Turkey was a belligerent *Annual Digest*, 1925 1926, Case No 27

[2] As regards the position of Bulgaria while she was a vassal State under Turkish suzerainty see Holland, *The European Concert in the Eastern Question* (1885), pp 277-307, and Nédjmidin, *Volkerrechtliche Entwickelung Bulgariens* (1908)

[3] See Holland, *The European Concert in the Eastern Question* (1885), pp 89-205, Hesse, *Die staatsrechtlichen Beziehungen Aegyptens zur hohen Pforte* (1897), Grunau, *Die staats- und volkerrechtliche Stellung Aegyptens* (1903), Cocheris, *Situation international de l'Égypte et du Soudan* (1903), Freycinet, *La Question d'Égypte* (1905), Dungern, *Das Staatsrecht Aegyptens* (1911), Mayer, *Die volkerrechtliche Stellung Aegyptens* (1914), Moret in *R G*, 14 (1907), pp 405 417, Lamba, *ibid*, 17 (1910), pp 36 55, Sayur in *Z V*, 3 (1909), pp 561-617 Turkey having entered the First World War against the Allied Powers in October 1914, Great Britain, by a unilateral declaration dated December 18, 1914, terminated Turkish suzerainty and declared a protectorate over Egypt On February 28, 1922, Great Britain by a unilateral declaration terminated the Protectorate and declared Egypt to be an independent sovereign State, reserving, however, to the discretion of the British Government the following matters (*a*) the security of the communications of the British Empire in Egypt, (*b*) the defence of Egypt against all foreign aggression or interference, (*c*) the protection of foreign interests in Egypt and the protection of minorities, (*d*) the Sudan See Egypt, No 1 (1922), Cmd 1592, pp 29, 30 And see, for the British announcement to the foreign Powers, Egypt, No 2 (1922), Cmd 1617, Martens, *N R G*, 3rd ser, pp 489 490, *A J*, 17 (1923), Suppl, pp 30, 31 For a detailed bibliography as to the position prior to 1922 see former editions of this work, §§ 91 and 93 By the Treaty of Lausanne, 1923, Turkey renounced all her rights and titles over Egypt

VII

STATES UNDER PROTECTORATE

Hall, §§ 4 and 38*—Westlake, 1 pp 22-24—Lawrence, § 39—Phillimore, 1 75 82—Lindley, pp 181 206, 304 306—Twiss, 1 §§ 22 36—Taylor, §§ 134 139—Wheaton, §§ 34 36—Moore, 1 § 14—Hershey, §§ 105 106—Hyde, 1 §§ 15, 16, 19 25—Bluntschli, § 78—Hackworth, 1 § 17—Heffter, §§ 19 and 22—Holtzendorff in *Holtzendorff*, 11 pp 98-117—Gareis, § 15—Liszt, § 10—Ullmann, § 26—Hatschek, pp 30 34, 43-48—Fauchille, §§ 176 187 (10)—Despagnet, §§ 129-136—Mérignhac, 11 pp 180-226—Pradier Fodéré, 1 §§ 94 108—Nys, 1 pp 390 392—Rivier, 1 § 4—Calvo, 1 §§ 62 65—Fiore, 1 § 341, and *Code*, §§ 116 123—Martens, 1 §§ 60, 61—De Louter, 1 pp 183 189—Gemma, pp 80 88—Cavaglieri, pp 152 164—Cruchaga, 1 §§ 154 162—Keith's Wheaton, pp 79-104—Baty, pp 399-404—Smith, 1 pp 67-76—Anzilotti, pp 226 238—Scelle, 1 pp 145 168—Pillet in *R G*, 2 (1895), pp 583-608—Heilborn, *Das volkerrechtliche Protektorat* (1891), and in *Z V*, 8 (1914), pp 217 232, and in *Strupp, Wort*, 11 pp 324 329—Engelhardt, *Les Protectorats*, etc (1896)—Gairal, *Le Protectorat international* (1896)—Despagnet, *Essai sur les Protectorats* (1896)—Boghitchévitch, *Halbsouveranitat* (1903)—Dupuis, *Le droit des gens et les rapports des grandes puissances* (1920), pp 233-269—Kunz, *Staatenverbindungen* (1929), pp 163 193, 288 350—Sereni, *La rappresentanza nel diritto internazionale* (1936), pp 304 311—Venturini, *Il protettorato internazionale* (1939)—Rutherford in *A J*, 20 (1926), pp 300 325

§ 92 The relation of protectorate between two States differs in some respects from that of suzerainty A protectorate arises when a weak State surrenders itself by treaty [1] Conception of Protectorate

and the Sudan as from November 5, 1914, Article 17 As to the Anglo Egyptian Sudan see below, § 171 (1) See also Headlam Morley, *Studies in Diplomatic History* (1930), pp 51-104, Tadros, *La Souveraineté égyptienne et la Déclaration du 28 février*, 1922 (1934), O'Rourke, *The Juristic Status of Egypt and the Sudan* (1935), Ried, *La nationalité égyptienne* (1937), Ruzé in *R I*, 3rd ser, 3 (1922), pp 385 423, and 4 (1923), pp 67-95, Brinton in *A J*, 34 (1940), pp 208-219 The relations between Great Britain and Egypt were placed on a new basis as the result of the Treaty of Friendship and Alliance signed in London on August 26, 1936, and formally terminating the occupation of Egypt by British forces The Treaty provided for a permanent alliance between the two countries, which bound themselves not to adopt an attitude with regard to foreign Powers or to conclude treaties which are inconsistent with the terms of the alliance It laid down, secondly, the duty of consultation in case of a dispute with a third Power involving a risk of war Thirdly, it stipulated for mutual support in case of war, subject to the obligations of the Covenant Treaty Series, No 6 (1937), Cmd 5360 See also *B Y*, 18 (1937), pp 79 96 And see below, § 206, as to the stationing of British forces in Egypt, § 318 as to capitulations, § 171 as to the Sudan, and § 539 as to revision clauses

[1] This is the rule, but in the case of Egypt—see p 172, n 3—the protectorate was based upon a unilateral declaration on the part of Great Britain.

into the protection of a strong State in such a way that it transfers the management[1] of all its more important[2] international affairs to the protecting State Through such a treaty an international union is called into existence between the two States, and the relation between them is called protectorate The protecting State is internationally the superior of the protected State, the latter has with the loss of the management of its more important international affairs lost its full sovereignty, and is henceforth only a half sovereign State Protectorate is, however, a conception which, like suzerainty, lacks exact juristic precision, as its real meaning depends very much upon the special case Generally speaking, protectorate may, again like suzerainty, be called a *kind of international guardianship*

International Position of States under Protectorate

§ 93. The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly defines it by enumerating the reciprocal rights and duties of the protecting and the protected States Each case must therefore be treated according to its own merits Thus the question whether the protected State can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided according to the terms of the particular treaty of protectorate In any case, recognition of the protectorate on the part of third States is necessary to enable the superior State to represent the protected State internationally But it is characteristic of a protectorate, in contradistinction to suzerainty, that the protected State always has, and retains for some purposes, a position of its own within the Family of Nations, and that it is always for some purposes an International Person and a subject of International Law Heads of States and Governments of Protectorates enjoy the usual juris-

[1] A treaty of protectorate must not be confused with a treaty of protection in which one or more strong States promise to protect a weak State without absorbing the international relations of the latter

[2] That the admission of consuls belongs to these affairs became apparent in 1906, when Russia, after some hesitation, finally assented to Japan, and not Korea, granting the exequatur to the consul-general appointed by Russia for Korea, which was then a State under Japanese protectorate See below § 427

dictional immunities in the courts of the protecting State [1] and, probably, in those of other States The protectorate is not considered a mere portion of the protecting State [2] It is, therefore, not necessarily a party in a war [3] waged by the superior State against a third State, and treaties concluded by the superior State are not *ipso facto* concluded for the protected State And, lastly, it can at the same time be under the protectorate of two different States, which, of course, must exercise the protectorate conjointly

In Europe there are at present [4] two protectorates (1) The

[1] *Mighell* v *Sultan of Johore* [1894] 1 Q B 149, *Duff Development Company* v *Government of Kelantan* [1924] A C 797, *Government of Morocco* v *Laurens* *Annual Digest*, 1929-1930, Case No 75

[2] See Advisory Opinion of the Permanent Court on the *Nationality Decrees in Tunis and Morocco*, Series B, No 4, Cmd 1899 of 1923 (exchange of notes between France and Great Britain on this question subsequent to the Opinion of the Court), and Lindley, pp 304 306

[3] See the case of *The Ionian Ships*, 2 Spinks 212, Phillimore, 1 § 77, Scott, *Cases*, p 21, and Pitt Cobbett, *Leading Cases on International Law* (5th ed), II (1931) p 50, and see Lindley, p 306 In *H C van Hoogstraten* v *Low Lum Seng* the Supreme Court of the Federated Malay States held, in October 1939, that the latter were at war with Germany in view of the unequivocal acts of the British High Commissioner placing them in a state of war *Annual Digest*, 1938-1940, Case No 16

[4] Of former protectorates in Europe the following may be mentioned The principality of Monaco, which was under the protectorate of Spain from 1523 to 1641, afterwards of France until 1814, and then of Sardinia, became through *desuetudo* a full sovereign State, since Italy never exercised the protectorate The present status of Monaco is not easy to classify By a treaty of July 17, 1918, between France and Monaco, France 'assure à la principauté de Monaco la défense de son indépendance et de sa souveraineté et garantit l'intégrité de son territoire' (see Fauchille, § 178 (with bibliography), Moncharville in *R G*, 27 (1920), pp 217 232, Ruzé in *R I*, 3rd ser, 2 (1921), pp 330-346 (including text of treaty of July 17, 1918), Roussel Despierres in *R I* (*Paris*), 6 (1930), pp 531-543) Monaco agreed that her international relations should always be the object 'd'une entente préalable' between the two Governments, and that in the event of a vacancy in the Crown of Monaco 'notamment faute d'héritier direct ou adoptif' the territory of Monaco would form, under the protectorate of France, an autonomous State (This treaty is recognised by the parties to the Treaty of Peace with Germany of 1919 see Article 436) Until that event happens, it seems preferable to regard Monaco as an independent State in close alliance with France The Ionian Islands, which were under British protectorate from 1815, merged into the Kingdom of Greece in 1863 The Free State of Cracow, which was created in 1815 by the Vienna Congress, and put under the joint protectorate of Austria, Russia, and Prussia, was annexed by Austria in 1846

The Free City of Danzig was created a separate State by Articles 100-108 of the Treaty of Peace with Germany in 1919 and 'placed under the protection of the League of Nations,' which was represented at Danzig by a High Commissioner The constitution, that is, the political organisation, of the Free City was placed under the guarantee of the League A treaty of November 9, 1920, between the Free City and Poland regulated the relations be

Republic of Andorra is under the joint protectorate of France and Spain [1] (ii) The Republic of San Marino, an enclave of Italy, formerly under the protectorate of the Papal States, is now under the protectorate of Italy [2]

Protectorates outside the Family of Nations

§ 94 Outside Europe [3] there are numerous States under

tween them upon a number of points and provides that the Polish Government shall undertake the conduct of the foreign relations of the Free City as well as the diplomatic protection of its citizens when abroad Thus Poland exercised on behalf of the League this very important aspect of the protectorate, and all disputes between the Free City and Poland arising out of this matter or any other matter under the Treaty of Versailles ' or any arrangements or agreements made thereunder ' are decided in the first instance by the High Commissioner of the League, subject to an appeal by either party to the Council of the League For an instance of such an appeal, upon which the Council took the Advisory Opinion of the Permanent Court, see the *Polish Postal Service in Danzig*, Series B, No 11 In addition the Permanent Court of International Justice has had occasion to pronounce on a number of other questions relating to the status of Danzig and its relations with Poland see Fifth Edition, p 171, n 2 As part of the territorial settlement following upon the Second World War Danzig is to be incorporated in Poland

As to the status of the Free City of Danzig while under Polish protectorate before the Second World War see Loening, *Die volkerrechtliche Stellung Danzigs* (1921), and *Danzig, sein Verhaltnis zu Polen und seine Verfassung* (1921), and in *Z V.*, 12 (1923), pp 489 497, Pfeuffer, *Die volkerrechtliche Stellung der Freien Stadt Danzig* (1921), Fauchille, § 187 (9); Schucking und Wehberg, pp 121 125, Fleischmann in Liszt, pp 101, 102, Anzilotti, pp 125 127, Ehrlich, *Prawo narodów*, 2nd ed, 1932, § 235, Levesque, *La situation internationale de Dantzig* (1924), Harder, *Danzig, Polen und der Volkerbund* (1928), Toynbee, *Survey*, 1932, pp 370 394, Weck, *La condition juridique du conseil du port et des voies d eau de Dantzig* (1933), Makowski, *Le caractère étatique de la Ville Libre de Dantzig* (1933), Matschke *Die Grundlagen des internationalen Statuts von Danzig* (1936), Clunet in 47 *Clunet* (1920), pp 481 486, Piccioni in *R G*, 28 (1921), pp 84 106, Lannoy in *R I*, 3rd ser, 2 (1921) pp 436 455, Makowski in *R G*, 30 (1923), pp 169 222, Lewis in *B Y*, 1924, pp 89 102, Verzijl in *Ostrecht*, 2 (1926), pp 353 385, Redslob in *R I* 3rd ser, 7 (1926), pp 126 155 (with bibliography), reprinted in *La théorie de la Société des Nations* (1927) §§ 22 27, Gargas in *Zeitschrift für vergleichende Rechtswissenschaft*, 42 (1927), pp 321 341 (as to nationality in Danzig), Hostie in *R I*, 3rd ser, 14 (1933), pp 572 614, and 15 (1934), pp 77 128, Van Hamel in *International Conciliation* (Pamphlet No 288, March 1933), Crusen in *Z V*, 19 (1935), pp 39 64, Morrow in *B Y*, 18 (1937), pp 114 126

[1] This protectorate is exercised for Spain by the Bishop of Urgel As regards the international position of Andorra see Vilar, *L Andorre* (1905), Fauchille, § 177 (2), Goule in *Répertoire* 1 pp 562 566 And see the decision of the French Court of Cassation of December 1, 1933, in *Re Société de Nickel*, Sirey, 1935, 3, 1, with a note by Rousseau, *Annual Digest*, 1933 1934, Case No 21

[2] See, however, Sottile, *La République de Saint Marin* (1924), who maintains that San Marino is a fully sovereign State, citing a declaration of the Italian Government of March 1, 1923, to this effect See also Fauchille, § 181 (published in 1922), who classified San Marino as being under the protectorate of Italy

[3] On the American continent the United States established for a time a relationship with Cuba, Panama, the Dominican Republic, Haiti and Nicaragua which, while implying the right of intervention on the part of the United States in certain cases (see below, § 135) and important

the protectorate of European States. As the protectorate over them is recognised by third States, the latter are legally prevented from exercising any political influence in these protected States, and, failing special treaty rights, they have no right to interfere if the protecting State annexes the protected State and makes it a mere colony of its own, as, for instance, France did with Madagascar in 1896. Examples of such protectorates outside Europe are the French over Tunis and Morocco,[1] Annam, Tonkin, and Cambodia, the

restrictions on the freedom of foreign policy, did not exhibit the characteristics of a protectorate as described above See Hyde, I §§ 19 24, and Kunz, *op cit*, pp 301 304, who regards the relation as one of 'quasi-protectorate' See also the United States Act to provide for the complete independence of the Philippine Islands of March 24, 1934 (48 Stat at L 456), which provides in Section 2 (*a*), para 10, that in the transitional period limited to ten years, foreign affairs shall be under the direct supervision and control of the United States See Toynbee, *Survey*, 1933, pp 544 574, *Documents*, 1934, pp 419 447, Gilmore in *Iowa Law Review*, 16 (1930), pp 1-19, Kalaw in *Foreign Affairs*, 1935, pp 689 *et seq*, Friede in *Z o V*, 5 (1935), pp 172 188, Reeves in *A J*, 29 (1935), p 478, Hayden in *Foreign Affairs* (*U S A*), 14 (1935), pp 639 653, Harrington in *International Affairs*, 15 (1936), pp 268-288, Popper in *Foreign Policy Reports* (*U S A*), December 1936 It was held in 1938, in *Bradford* v *Chase National Bank of New York*, that the Philippine Commonwealth was a sovereign State and that its property was, therefore, immune from the jurisdiction of the courts of the United States 24 F Suppl 28, *Annual Digest*, 1938 1940, Case No 17 See also *ibid*, Case No 18, where, in *Suspine et Al* v *Compañía Transatlantica Centroamericana* it was held that citizens of the Philippines were subject to the United States neutrality legislation The Philippines Commonwealth was invited to the San Francisco Conference in 1945 and is now a separate member of the United Nations

[1] As to Morocco see Articles 141-146 of the Treaty of Versailles, and Rouard de Card *Le Traité de Versailles et le Protectorat de la France au Maroc* (1923) As to Tunis and Morocco see Advisory Opinion cited above, p 175, n 2, and Winkler, *La nationalité dans les protectorats de Tunisie et du Maroc* (1926), pp 17-52 See also *In re Société des Phosphates Tunisiens* decided on November 20, 1929, by the French Conseil d'Etat *Annual Digest*, 1929-1930, Case No 12 and Note On the recognition by the United States of the French Protectorate over Morocco see Rouard de Card, *Les États Unis d'Amérique et le protectorat de la France en Maroc* (1930) And see Fitoussi and Bénazet, *L'État tunisien et le protectorat français* (2 vols, 1931) See also Moresco, *Les rapports des droits publics entre la Métropole et les Colonies, Dominions et autres territoires d'outremer* (1937) The Tangier zone (see below, § 95) is a curious specimen of a protectorate It is administered by an international body under powers delegated by the Sultan of Morocco, which in turn is a French protectorate According to the Treaty of 1923 (see below, p 217, n 1) the protection in foreign countries of Moroccan subjects of the Tangier Zone is entrusted to France (Article 6) On the other hand, treaties concluded by Morocco (i e by France on behalf of Morocco) extend to Tangier only with the consent of the international legislative assembly of the Zone Treaties to which all the Powers signatories of the Act of Algeciras are parties apply automatically to the Zone (Article 8) On June 14, 1940, Spanish troops invaded the Zone and on November 4 the Spanish army of occupation terminated the activities of the administration under the

Spanish over Morocco,[1] and the British over the Malay Federation which, since 1948, comprises the nine Malay States as well as Penang and Malacca

Whatever may be the degree of civilisation or actual independence in the territories in question, these protectorates are exercised over real States [2] For this reason they must not be compared in every way with the so-called colonial protectorates [3] and protectorates over African tribes, which European States acquire through a treaty with the chiefs of these tribes, and by which the territory in question is usually preserved for future occupation on the part of the so-called protector [4]

Treaty Great Britain and a number of other signatories of the Treaty protested As the result of a Conference held in Paris in 1945 the position as it existed before 1940 was restored Cmd 6678 (1945) See Delore in *A J*, 35 (1940), pp 140 145

[1] See, for various questions of State responsibility and others connected with that Protectorate, the award of Huber in the *Spanish Zone of Morocco Claims* case between Great Britain and Spain decided on December 29, 1924, and reported in various parts of *Annual Digest*, 1923-1924

[2] Thus these States and their sovereigns enjoy the usual jurisdictional immunities in British courts see *Mighell* v *Sultan of Johore* [1894] 1 Q B 149, *Duff Development Company Ltd* v *Government of Kelantan* [1924] A C 797 The following are British Protected States certain Sheikdoms in the Persian Gulf, Brunei, Tonga All these are placed under the authority of the Secretary of the Colonies Sarawak was annexed to the Crown in 1946 subsequent to its cession by the ruling Rajah So was North Borneo in the same year On the other hand, *Indian States*, a list of which will be found in the *India Office List*, are not protected States in the above sense They and their rulers do not enjoy jurisdictional immunities See above, p 171, n 2 They were placed under the authority of the Secretary of State for India The same applies to the territories of Bahrein, Koweit, Sultanate of Muscat and Oman, and the Trucial Sheikdoms

[3] *E g* the British colonial protectorates which probably are covered by a British declaration of war They are primarily administered under the Foreign Jurisdiction Act, 1890, but their constitutional position is not always free of doubt See *e g* *Sobhuza II* v *Miller*, decided in 1925, where the Privy Council held, in effect, that the Swaziland Protectorate was foreign territory and its inhabitants aliens [1926] A C 518, *Annual Digest*, 1925 1926, Case No 28 and Note The fact that most of these protectorates originate in a treaty with the native chiefs may not be without legal relevance to the question of their transfer to another jurisdiction The following colonial protectorates are in this class British Solomon Islands, Gambia, Kenya, Nigeria, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone, Somaliland, Swaziland, Tanganyika Territory, Uganda, Zanzibar As to the British Protectorates of Swaziland and Bechuanaland and their proposed union with South Africa see *Round Table*, 24 (1934), pp 785 802, and 25 (1935), pp 318 323 On the Aden Protectorate as distinguished from the Aden colony see Robbins in *A J*, 33 (1939), pp 700 715 For a comparative study of the relations of metropolitan and overseas territory generally see Maresco in *Hague Recueil*, vol 55 (1936) (1), pp 513-590

[4] See below, § 226 These are sometimes called *colonial protectorates* See Perrinjaquet in *R G*, 16 (1909), pp 316-367

VIII

THE BRITISH COMMONWEALTH OF NATIONS

Higgins in Hall, § 4, pp 34 35, and ch ii A, p 72—Winfield in Lawrence, §§ 35 and 40—Fauchille, §§ 159 (5) and 174 (2)—Liszt, § 7, ii 6, and § 31, ii 1—Hatschek, pp 41-43—Keith's Wheaton, pp 129 134—Smith, i pp 46 67—Anzilotti, pp 217-226—Scelle, i pp 225 246—Keith, *Responsible Government in the Dominions* (2nd ed), 1928, pp 840 926, 1233 1238), *Imperial Unity and the Dominions* (1916), *War Government of the Dominions* (1921), and *Dominion Home Rule in Practice* (1921)—Lawrence in Hearn shaw, *King's College Lectures on Colonial Problems* (1913), pp 3-32—Zimmern, *The Third British Empire* (2nd ed , 1927)—Hatschek, *Britisches und Romisches Weltreich* (1921)—Duncan Hall, *The British Commonwealth of Nations* (1920), and Lowell and Duncan Hall, same title (1927) (World Peace Foundation Pamphlet)—Temperley, vi pp 335 367—Hurst in *Great Britain and the Dominions* (University of Chicago Press, 1927)—Redslob, *La théorie de la Société des Nations* (1917), pp 279 318—Mazzoleni, *L' odierno impero britannico* (1928)—Buchet, *Le 'status' des dominions britanniques* (1928)—Toynbee, *Conduct of British Empire Foreign Relations since the Peace Settlement* (1928)—Baker, *The Present Juridical Status of the British Dominions in International Law* (1929)—Kunz, *Staatenverbindungen* (1929), pp 713 818—Dewey, *Dominions and Diplomacy* (2 vols , 1929)—Keith, *The Sovereignty of the British Dominions* (1929)—the same, *Speeches and Documents on the British Constitution*, 1918-1931 (1932 edition)—the same, *The Constitutional Laws of the British Dominions* (1933), pp 388 431—the same, *The Governments of the British Empire* (1935), pp 18 178—the same, *The Dominions as Sovereign States* (1938)—Chevallier, *L'évolution de l'Empire britannique* (2 vols , 1930)—Borner, *L'Empire britannique* (1930)—Elliott, *The New British Empire* (1932)—Gemma, *L' Impero Britannico* (1933)—*British Commonwealth Relations* (ed by Toynbee, 1934)—Apelt, *Das Britische Reich als volkerrechtsverbundene Staatengemeinschaft* (1934)—*Consultation and Co operation in the British Commonwealth* (compiled by Palmer, 1934)—Dawson, *The Evolution of Dominion Status*, 1900 1935 (1937)—*Survey of British Commonwealth Affairs*, vol i , Nationality (1937), by Hancock (with a legal chapter by Latham)—*The British Empire*, a Report by a Study Group of Members of the Royal Institute of International Affairs (1937)—Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939)—Wheare, *The Statute of Westminster and Dominion Status* (2nd ed , 1942)—Duncan Hall, *The British Commonwealth of Nations in War and Peace* (in *The British Commonwealth at War*, ed by Elliott and Duncan Hall, 1943)—Tupper in *J C L*, New Ser , 17 (1917), pp 5-18—Keith, *ibid* , 18 (1918), pp 54 57, *ibid* , 3rd ser , 1 (1919), pp 7-16, 5 (1923), pp 161 168, 9 (1927), pp 85-94, 241-248, and comments by him in successive volumes of *J C L* till 1945—Duncan Hall, *ibid* , 3rd ser , 2 (1920), pp 196 205—Harrison Moore, *ibid* , 3rd ser , 8 (1926), pp 21-37—Nathan in *Grotius Society*, 8 (1923), pp 117-132—Lewis in *B Y* , 1922-1923, pp 21-41, *ibid* , 1923 1924, pp 168-169, and *ibid* , 1925, pp 31-43—Ewart in *A J* , 7 (1913), pp 268 284—Scott, *ibid* , 21 (1927), pp. 95-101—Johnston, *ibid* , 21 (1927)

pp. 481 489—Borden in *Canadian Bar Review*, 1925, pp 513 521, and in *Journal of Royal Institute of International Affairs*, 6 (1927), pp 197-207—Kenny in *Cambridge Law Journal*, 1926, pp 297-301—Jenks, *ibid*, 1927, pp 13 23—Rohn in *R I*, 3rd ser, 4 (1923), pp 195 226—Löwenstein in *Jahrbuch des offentlichen Rechts*, 13 (1925), pp 404 497, and in *Archiv des offentlichen Rechts*, New Ser, 12 (1927), pp 255 272—H A Smith in *Cornell Law Quarterly*, December 1926, pp 1 12—Dunn in *Virginia Law Review*, March 1927, pp 354 379—Jennings in *R I*, 3rd ser, 8 (1927), pp 397 437, and *ibid*, 9 (1928), pp 438 493—Lavoie in *R G*, 36 (1927), pp 171 209 (Canada)—Anderson in *Canadian Bar Review*, 8 (1930), pp 32, 112, 196—MacKay in *International Conciliation* (Pamphlet No 272, September 1931)—Chevallier in *R I* (*Paris*), 7 (1931), pp 147-251, *ibid*, 15 (1935), pp 347 387, in *R G*, 39 (1932), pp 458 497, and in *Hague Recueil*, vol 64 (1938) (II), pp 237 340—Menzel in *Z o R*, 12 (1932), pp 736 774—Shatzky in *R I* (*Geneva*), 11 (1933), pp 1 21—MacKenzie in *A J*, 28 (1934), pp 559 662—Kaufmann in *Hague Recueil*, vol 55 (1935) (IV), pp 341 348—Lundborg in *Z V*, 19 (1935), pp 147 174—Corbett in *University of Toronto Law Journal*, 3 (1940), pp 348 *et seq*—Scott in *A J*, 38 (1944), pp 34 49 See also *The Constitutions of All Countries*, vol I, *The British Empire* (London, H M Stationery Office,

Position of Self-Governing Dominions before the First World War

§ 94*a* Prior to the First World War the position of self-governing Dominions, such as Canada, Australia, New Zealand, and South Africa, did not present any difficulties in International Law They had no international position whatever, because they were, from the point of view of International Law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like Nor did they become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered [1] by the mother country to enter into certain treaty arrangements of minor importance with foreign States, they still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them

[1] See below, § 496*a*

Progress towards Independent Statehood

§ 94*b* Between the First and the Second World Wars there took place a pronounced change in the status of the self-governing Dominions That change was in the direction of full statehood in International Law The following salient historical facts may be conveniently referred to as marking important stages in that development

I As the result of intimate participation in the First World War, not merely in the field but also in the counsels of the British Empire by the presence of the Dominion Prime Ministers in the Imperial War Cabinet, we find the Dominions (and India) in 1919 separately represented within the British Empire delegation at the Peace Conference,[1] separately signing the Peace Treaties 'for the Dominion of Canada' and so forth, and separately (except Newfoundland) scheduled to the Covenant as original members of the League and ultimately acquiring separate membership in it [2]

II The abortive Franco-British Defence of France treaty of June 28, 1919, included a clause providing that the Treaty 'shall impose no obligations upon any of the Dominions unless and until it is approved by the Parliament [*sic*] of the Dominions concerned,' a provision which reappears in the Locarno Treaty of Mutual Guarantee [3] of 1925 (Article 9), with the substitution (as a concession to the less democratic atmosphere then prevailing) of the word 'Government' for 'Parliament'

III Australia, New Zealand, and South Africa were allotted mandates directly from the League and were responsible to the League for their performance The mandate was 'conferred upon His Britannic Majesty for and on behalf of' the Government of the particular Dominion [4]

[1] See Glazebrook, *Canada at the Peace Conference* (1942)

[2] On the position of the Dominions in the League see Manning, *The Policies of the British Dominions in the League of Nations* (1932), Duncan Hall, *op cit* (1943), pp 14 19, Baker, *op cit*, pp 64-129, Harrison Moore in *International Affairs*, 10 (1931), pp 372 391, Schücking und Wehberg (3rd ed, 1931), pp 257-265. As to Canada · Soward in *International Conciliation* (Pamphlet No 283, October 1932)

[3] Treaty Series, No 28 (1926), Cmd 2764, see below, § 577*a*

[4] As to British Dominions as Mandatories see Evatt, *The British Dominions as Mandatories* (1934), and in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp 27 54 See *Tagaloa v Inspector of Police*, where the Supreme Court of New Zealand held

IV We find the Imperial Government at the request of the Irish Free State (which became a self-governing Dominion 'on the Canadian model' in March 1922 [1] and a member of the League in 1923) accrediting in 1924 a Minister Plenipotentiary to the United States of America for 'the handling of matters at Washington exclusively relating to the Irish Free State' [2] Canada, to whom a similar right had been conceded in 1920, exercised it in 1926 All the five Dominions now send to and receive diplomatic representatives from many States [3]

V Another landmark was reached in March 1923 when the Halibut Fisheries Treaty, which, as had happened in the case of other treaties, had been negotiated directly between Canada and the United States of America, was signed by a Canadian minister holding 'full powers' from the Crown and without the association of a minister or diplomatic representative of the Imperial Government, a new practice which was confirmed by a resolution of the Imperial Conference [4] later in the same year In 1925 this

on October 21, 1927, that New Zealand's authority to administer Western Samoa was given to her directly by the League of Nations as a member of the League and that it was not therefore dependent on the New Zealand Constitution Act of 1852, *Annual Digest*, 1927-1928, Case No 31 See also in *Re Tamasee* (1929), *New Zealand Law Reports*, 209, *Annual Digest*, 1933 1934, Case No 16, *Nelson* v *Brairsby* (1934), *New Zealand Law Reports*, 559, *Annual Digest*, 1933 1934, Case No 15, *Jolly* v *Mainka* (1933), 49 C L R 242, *Annual Digest*, 1933 1934, Case No 17, *Ffrost* v *Stevenson*, decided in 1937 by the High Court of Australia [1937] 58 C L R 528, *Annual Digest*, 1935-1937, Case No 29 See also *Rex* v *Offen*, a South African case, *ibid*, Case No 20 See below, p 203, on *R* v *Christian* And see Sandhaus, *Les Mandats C dans l'Empire Britannique* (1931) See also *Winter* v *Minister of Defence and Others*, *Annual Digest*, 1938-1940, Case No 20, where the Supreme Court of South Africa held that an internment order issued by the Government at the outbreak of the war in pursuance of emergency regulations was not inconsistent with the provisions of the Mandate

[1] By the Irish Free State Agreement Act, 1922 As to the new title of His Majesty proclaimed on May 13, 1927, see the Royal and Parliamentary Titles Act, 1927, and Hudson in *A J*, 22 (1928), pp 146-150

[2] Cmd 2202

[3] See on the diplomatic representation of Dominions generally, Chevallier in *R I*, 3rd ser, 13 (1932), pp 277-301, and Harrison Moore in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp 1 17

[4] Cmd 1987, pp 13-15 The Halibut Fisheries Treaty incident may be studied in comments by Lewis in *B Y*, 1923 1924, pp 168-169, and *ibid*, 1925, pp 31-43, by Keith in *J C.L*, 5 (1923), pp 166, 167, and *ibid*, 6 (1924), pp 135, 136, by Harrison Moore, *ibid*, 8 (1926), pp 21 37, and by Mackenzie in *B Y*, 1925, pp 191, 192, and in *A J*, 19 (1925), pp 489 504 The Resolutions

treaty was communicated direct by the Canadian Government to the Secretariat of the League for registration

VI The Imperial Conference of 1926[1] adopted the important Report of its Inter-Imperial Relations Committee, presided over by Earl Balfour, which contains[2] the following definition of 'the group of self-governing Communities composed of Great Britain and the Dominions'

> They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations

The same Report recommended a number of changes both in inter-imperial relations and in relations with foreign countries, particularly as to the making of treaties[3] (of which a specimen form is submitted in the Report), representation at international conferences, the general conduct of foreign policy, the issue of exequaturs to foreign consuls in the Dominions,[4] and the channels of communication between Dominion Governments and foreign Governments, and also between Dominion Governments and His Majesty's Government in Great Britain[5] An Imperial Conference

of the 1923 Conference provide that Full Powers 'should indicate the part of the Empire in respect of which the obligations are to be undertaken,' and those of the 1926 Conference provide that Full Powers should be 'issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire' concerned On the Treaty making power of the Dominions generally see Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939), McNair, *The Law of Treaties* (1938), pp 67 76, Chevallier in *R I (Paris)*, 4 (1929), pp 67-134, Baker, *op cit*, pp 164 202 And see below, § 496*a*

[1] In 1925 a Dominions Office was established in London which is distinct from the Colonial Office

[2] Cmd 2768, at p 14

[3] See below, § 496*a*

[4] See below, § 427

[5] In accordance with the Report, the Governor General of a Dominion is His Majesty's personal representative in that Dominion and not the representative or agent there of His Majesty's Government in Great Britain, who is represented in each Dominion by a semi-diplomatic agent having the title of 'High Commissioner in (Canada, etc) for His Majesty's Government in Great Britain' Communication between the London and each Dominion Government is direct and not through the Governor General As to the status of the High Commissioners of the Dominions in London, and of the representatives of Great Britain in Dominion capitals, see Murville, *Le Gouverneur dans les Dominions britanniques* (1929), and, in particular, Evatt, *The King and his Dominion Governors* (1936), and below, § 361

has no executive or legislative power, and the changes recommended in 1926 as the result of the adoption of this Report were gradually translated into fact by executive action and legislation in Great Britain and in the Dominions

VII The Imperial Conference of 1930 [1] amplified in detail the principles of the Conference of 1926 In particular it recommended the procedure to be followed in cases in which the existing diplomatic channels continue to be used as between the Dominion Governments which have not appointed diplomatic representatives of their own and foreign Governments It was agreed that in all matters other than those of general and political concern the necessary communications should pass directly between the Dominion Government concerned and the British diplomatic representative in question With regard to negotiation of treaties and the conduct of foreign affairs generally, it was recommended that any of His Majesty's Governments conducting negotiations with a foreign Power should inform the other Commonwealth Governments and give them an opportunity of expressing their views if they think that their interests may be affected It was laid down that none of the Commonwealth Governments may take steps which might involve the other Governments in any active obligations without their definite consent [2] At the Imperial Conference of 1937 it was formally put on record that each Member of the Commonwealth takes part in multilateral treaties as an individual entity, and that, unless the Treaty expressly provides to the contrary, no Member of the Commonwealth is in any way responsible for the obligations undertaken by any other Member [3]

[1] (1930) Cmd 3717 and 3718

[2] See Jennings in *R I*, 3rd ser, 12 (1931), pp 181 219, Lavoie in *R G*, 39 (1932), pp 776 828 As to a Commonwealth Tribunal and the extremely cautious recommendations of the Conference of 1930 see Lauterpacht, *The Function of Law*, pp 449, 450, MacKay in *Canadian Bar Review*, 10 (1932), pp 338 348, *Round Table*, 23 (1932 1933), pp 742-756, *The British Empire* (Report of the Study Group of the Royal Institute of International Affairs, 1937), pp 267 275 See also Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (1931)

[3] *Summary of Proceedings*, Cmd 5482 (1937), p 27

VIII The Statute of Westminster, 1931,[1] gave expression to the principle of equality of status and the fully autonomous statehood of the Dominions by removing any lingering remnants of their formal dependence upon the Imperial Parliament That Statute was enacted in pursuance of the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation of 1929[2] which, in turn, was summoned in accordance with a resolution of the Conference of 1926 The Statute of Westminster lays down, in particular, that in the future no law or provision made by a Dominion Parliament shall be void or inoperative on the ground of repugnancy to the law of England or an Act of the Imperial Parliament, that a Dominion Parliament shall have power to repeal Imperial legislation in so far as it is in force in the Dominion concerned,[3] and that in the future no Act of Parliament of the United Kingdom shall extend to a Dominion or a part thereof unless the Dominion has requested and consented to its enactment.[4]

Dominions as Sovereign States

§ 94*ba* The Dominions availed themselves in varying degrees of the emancipating provisions of the Statute of

[1] 22 Geo 5, c 4

[2] (1929) Cmd 3479

[3] In *Moore and Others* v *Attorney-General for the Irish Free State and Others* [1935] A C 484, *Annual Digest*, 1935 1937, Case No 22, the Judicial Committee of the Privy Council held that, in view of the Statute of Westminster, the legislature of the Irish Free State was competent to enact legislation abrogating the Anglo-Irish Treaty of 1921 (which had been incorporated in an Imperial Act of Parliament) No opinion was expressed on the conformity of such action with the 'contractual' obligations of the Irish Free State See also *British Coal Corporation* v *The King* [1935] A C 500, *Annual Digest*, 1935-1937, Case No 21, affirming the right of Canada, under the provisions of the Statute of Westminster, to abolish appeals to the Judicial Committee of the Privy Council in criminal matters See Jennings in *L Q R*, 52 (1936), pp 173-188 And see § 89 above, on the application of rules of International Law in the relations of composite States

[4] See Mahaffy, *The Statute of Westminster*, 1931 (1932), Wheare, *The Statute of Westminster and Dominion Status* (2nd ed, 1942), Kennedy in *L Q R*, 48 (1932), pp 191 216, Ewart in *Canadian Bar Review*, 10 (1932), pp 111-122, Hudson in *Harvard Law Review*, 46 (1932 1933), pp 261-289, Loren in *J C L*, 3rd ser, 15 (1933), pp 47 53, Chevallier in *R I (Paris)*, 17 (1936), pp 413-441 See also the British Commonwealth Merchant Shipping Agreement of December 10, 1931—(1932) Cmd 3994—removing the restrictions on the Dominions with regard to merchant shipping and recognising their full legislative authority over all ships within their territorial waters or engaged in their coasting trade The Agreement was subsequently registered by the Union of South Africa under Article 18 of the Covenant on May 10, 1932, No 2960

Westminster[1] The cumulative result of the successive landmarks, as outlined above, in the development of the internal and external independence of what are usually described as the Dominions[2] has been to make their status indistinguishable from that of full international personality. Although the equality of status in relation to the mother country has not been followed in all respects by an equality of function[3]—in particular in the field of diplomatic and consular intercourse[4]—the resulting inequality, if any, is not such as to impair the full international personality of the other members of the Commonwealth Their legal right to all the external[5] attributes of sovereignty is undisputed.

[1] According to Section 10 of the Statute of Westminster, its principal provisions were not applicable to Australia, New Zealand or Newfoundland until adopted by the Parliaments of these Dominions New Zealand has not yet adopted the Statute, Australia adopted it during the Second World War This explains why in 1939 it was necessary for the Imperial Parliament to enact legislation designed, *inter alia*, to give Australian and New Zealand statutes extra territorial operation for certain purposes In 1934 South Africa re enacted the Statute of Westminster so as to make it also a South African statute and to make South Africa, according to her law, fully independent of the Imperial Parliament (Status of the Union Act, 1934) The same Act proclaimed the status of South Africa as a 'sovereign independent State' The Irish Free State, partly in disregard of its treaty obligations with Great Britain, went much further The Constitution Act, 1936, removed the Crown from all the internal activities of the Free State The Executive Authority (External Relations) Act, 1936, in empowering the Executive Council to appoint diplomatic and consular representatives and to conclude international agreements, 'authorised' the King to act on behalf of Ireland in these matters as and when advised by the Executive Council to do so The Constitution of 1937 described Ireland as a sovereign and independent State

[2] It will be noted that the term 'Dominion' does not appear in the official title of the Irish Free State (Eire), of Australia, which is a 'Commonwealth,' or of South Africa, which is a 'Union' However, it is convenient, in accordance with the accepted usage, to refer in this Section to Canada, Australia, New Zealand, South Africa and the Irish Free State —but not to India and Newfoundland (see below, p 190, n 6)—as Dominions

[1] The distinction between equality of function and equality of status, although of great usefulness in this connection, is not of legal relevance See on that distinction Earl Balfour in *Journal of the Royal Institute of International Affairs*, 6 (1927), p 212, and Cmd 2768, at p 14 The inequality of function expresses itself mainly in the fact that the Dominions still avail themselves in many cases of the services and organs of Great Britain, in particular for the protection of their citizens abroad and for the obtaining of information as to conditions in foreign countries

[4] By 1945 Canada, Australia, New Zealand, South Africa and Ireland were all sending diplomatic and, some of them, consular representatives to various countries

[5] In the internal sphere the Statute of Westminster did not do away altogether with the right of and necessity for Imperial legislation Thus legislation by Parliament at Westminster is still necessary for any amendment of the Constitutions of Canada and probably, of some parts of the Con

It is now an acknowledged principle that in the field of their external affairs—including the declaration of war—the King acts on the advice of the Dominion concerned Their full independence is qualified, though not in a way amounting to a legal limitation of full international capacity, by the agreement, expressed in detail in the recommendations of the Imperial Conference of 1930, that there shall be mutual consultation in vital political matters affecting peace and war.[1] Some of them, by acquiring the Great Seal [2] and thus making it possible to dispense with the Royal signature, have secured a machinery for the more expeditious exercise of their undisputed power of concluding treaties Their independence is not decisively or even seriously impaired by the fact that, according to the view held by the majority of the members of the Commonwealth [3] and according to what is probably the better legal opinion,[4] one member of

stitutions of Australia and New Zealand Although, since the Statute of Westminster, Ireland has barred all appeals to the Judicial Committee of the Privy Council and Canada has barred all appeals in criminal cases, there is a vast field of matters in which there still exists such right of appeal However, in most cases it is open to the legislatures of the Dominions to bar the right of appeal by statute For a lucid survey of the position on this question see *The British Empire* (A Report of a Study Group of the Royal Institute of International Affairs, 1937), pp 195 203

[1] See Cmd 3717 (1930)

[2] Canada and South Africa acquired a Great Seal in 1932, Australia did the same, though for more limited purposes, in 1939

[3] Members of the Canadian Government frequently expressed the view that Canada had no legal power to remain neutral when Great Britain was at war See Scott in *A J*, 38 (1944), pp 41, 42 This opinion is also held, even more emphatically, by Australia and New Zealand See Duncan Hall in *The British Commonwealth at War* (1943, as cited above at p 179), pp 20-22 See also Clokie in *American Political Science Review*, 34 (1940), pp 737-750 In announcing, on September 3, 1939, the British declaration of war on Germany the Australian Prime Minister said 'Great Britain has declared war, and, as a result, Australia is also at war' (Duncan Hall, *op cit*, p 20) See also *ibid*, p 22, for divergent expressions of opinion by South African statesmen The Irish Free State was the only Dominion which in 1939 declared its neutrality In *Murray* v *Parkes* it was held that a citizen of the Irish Free State who was ordinarily resident in Great Britain when the National Service (Armed Forces) Act, 1939, was passed was liable to be called up under that Act [1942] 2 K B 123 The Court held that Irish citizenship was supplementary to, and not inconsistent with, the wider British nationality The Statute of Westminster did not either expressly or by implication grant to the Irish Free State the right to secede from the British Commonwealth See also *Hume Pipe & Concrete Construction Co, Ltd* v *Moracrete Ltd* [1942] 1 K B 189

[4] The paramount consideration seems to be that the King, the common allegiance to whom is the acknowledged basic factor of the Commonwealth association, cannot legally be at peace with a foreign State in respect of some of his Dominions and at war in respect of others It is true that in some

the Commonwealth cannot remain neutral while the others are at war A limitation of this nature is not inconsistent with full sovereignty It would follow, for instance, from participation in a system of collective security in which the members of the organisation have divested themselves of the right to remain neutral in certain contingencies Neither is it an unilateral restriction operating only as against the Dominions In theory, a declaration of war by any of the Dominions would involve in war all other members of the Commonwealth, including Great Britain At the commencement and in the course of the Second World War the various Dominions exercised, as a rule, their right to declare war separately from the action taken by Great Britain [1] It is probable that the importance attached to the independent exercise of that weighty prerogative of statehood was due primarily not to doubts as to the operation of what has been termed 'automatic belligerency,' but to the assertion of the

matters, such as conclusion of treaties, recognition, and diplomatic representation, the King may act differently in respect of his several Governments Such apparent divergency of action is fully consistent with the elastic nature of the Commonwealth, but the line —which is a pragmatic and not necessarily a logical one—must be drawn somewhere Unity of legal status and joint defence at a time of supreme trial would seem to constitute the irreducible minimum In comparison, undue importance need not be attached to the suggestion that it would be difficult for the King to act personally in declaring neutrality for one of the members of the Commonwealth when another is involved in a war (see Keith, *Speeches and Documents on the British Dominions*, 1918 1931 (1932), p 29) In most of the Dominions no such personal action seems necessary See, *e g*, the Irish Constitution (Amendment No 27) Act, 1936, which transfers to the Executive Council the right to declare war or neutrality This seems also to be the effect of the South African Status of the Union Act, 1934, according to which the Governor-General of South Africa, acting on the advice of his Ministers in South Africa, is empowered to exercise the external prerogatives of the Crown And see below, n 1, as to Australia See vol II p 189, n 1 See also, in addition to Scott and Duncan Hall, referred to above, p 187, n 3, Baker, *op cit*, pp 330 342, Ewart in *Canadian Bar Review*, 10 (1932), pp 495 506, Scott in *Foreign Affairs*, 10 (1931 1932), pp 617 631

[1] In 1939 Australia and New Zealand did not declare war separately on Germany But in 1941 and 1942 Australia declared war separately on Finland, Roumania, Hungary and Japan Thus the state of war against Japan was declared on December 9, 1941, by the Governor General of Australia to whom the King, acting on the direct advice of the Australian Government, assigned the power to declare war In establishing this precedent importance was attached to acting on the practice that in all matters affecting Australia the King and his representative act exclusively on the advice of the Government of Australia It appears that Canada and South Africa declared war separately in all cases The United States Neutrality Act of September 5, 1939, was not made applicable to South Africa and Canada till September 8 and 10, respectively, after they had declared war on Germany

principle that in matters of peace and war alike any action of the Crown legally affecting the foreign relations of the Dominions takes place in pursuance and on the advice of their Governments responsible to their own Parliaments

The full international personality of the members of the Commonwealth is not inconsistent with the fact that their relations *inter se* are not, in many respects, primarily international in character Thus while the members of the Commonwealth send to and receive from other members of the Commonwealth representatives designated as High Commissioners, these representatives, though enjoying immunity from taxation and customs, do not appear in the diplomatic list and are not entitled to ordinary diplomatic immunities With the exception of the Irish Free State, members of the Commonwealth have declined to treat agreements concluded with one another as international treaties subject to registration under Article 18 of the Covenant of the League [1] When accepting the obligations of the Optional Clause of the Statute of the Permanent Court of International Justice the members of the Commonwealth, with the exception of Ireland, reserved from its operation disputes which might arise among them.[2] And although the conception of common British nationality [3] does not carry with it the full implications of equality of status in all the territories of the Commonwealth,[4]

[1] But see above, p 185, n 4, as to South Africa

[2] See vol II p 56, notes 1 and 2

[3] The successive British Nationality and Status of Aliens Acts, beginning with the Act of 1914, and the corresponding Acts passed in the Dominions, with the exception of the Irish Free State, recognise a common status of British subjects throughout the Empire In addition to common British nationality, Canada, South Africa and the Irish Free State have, by statute, created a separate nationality of their own The Irish Nationality and Citizenship Act of 1935 abolished for its citizens the status of British subject (S 33 (3))—a provision contrary to the British Nationality and Status of Aliens Act While it is now clearly established that since the Statute of Westminster a Dominion is for the purposes of its own law entitled to pass Acts repugnant to an Imperial Act—*Moore and Others* v *Attorney General of the Irish Free State* [1935] A C 484—it has been judicially stated with regard to the above mentioned provision of the Irish Act of 1935 that such an Act is not necessarily operative outside the Dominion enacting it *Murray* v *Parkes* [1942] 2 K B 123 Citizens of the Irish Free State are British subjects in other parts of the Empire provided that they satisfy the conditions of the British Nationality and Status of Aliens Act

[4] It appears that only in the United Kingdom are British subjects, in the wider sense, from other parts of the Commonwealth treated on the

it is not without significance or direct practical application [1]

The Legal Nature of the Commonwealth

§ 94bb While it is clear that Australia,[2] Canada,[3] the Irish Free State,[4] New Zealand, South Africa,[5] India,[6] Pakistan and Ceylon, are fully sovereign States in International Law, the question as to the particular category of International Persons in which the Empire regarded as a unit should be

same footing as persons born in the United Kingdom Other members of the Commonwealth do not, in most cases, admit equality of treatment in such matters as immigration and political franchise (though, for instance, in New Zealand the franchise is granted to all British subjects irrespective of race) The laws of all the Dominions provide for the deportation of British subjects from the territories of the other members of the Commonwealth in certain circumstances

[1] Thus, for instance, in New Zealand and Canada a white British subject becomes qualified to exercise the franchise after continuous residence of one year, in Australia the qualifying period is one month As to the United Kingdom see above, p 189, n 4 British diplomatic protection is granted to all British subjects Conversely, the duty of allegiance to the Crown, by which all British subjects are bound, imposes upon them certain duties in any part of the Commonwealth where they may happen to live, including the duty to serve in the armed forces of the Crown It is clear that no derogation from the sovereignty of the Dominions is implied in the conception of common allegiance But see Schmid, *Die 'common allegiance' als Beschrankung der volkerrechtlichen Handlungsfahigkeit der Britischen Dominien* (1938)

[2] See Latham, *Australia and the British Commonwealth* (1929)

[3] Corbett and Smith, *Canada and World Politics* (1928), Ollivier, *Problems of Canadian Sovereignty* (1945), Ewart in *Canadian Historical Review*, 9 (1928), pp 194-205, Russell in *A S Proceedings*, 1928, pp 19-26, Rowell in *Canadian Bar Review*, 8 (1930), pp 570-586, *Round Table*, 25 (1934-1935), pp 100 112, Scott in *Foreign Affairs* (*U S A*), April 1937, pp 429-442, Elkin in *R G*, 45 (1938), pp 658-693 On Canada's power to perform treaty obligations see MacDonald in *Canadian Bar Review*, 11 (1933), pp 581-599, 664 680 And see below, § 496a

[4] Faucon, *Le statut de l'État Libre d'Irlande* (1929), Rynne, *Die vol kerrechtliche Stellung Irlands* (1930), Kohn, *The Constitution of the Irish Free State* (1932), Phelan, *The British Empire and the World Community* (1932), Williams, 'Great Britain and the Irish Free State,' *Foreign Policy Reports*, 8 (1932), Jacquemard in *R I (Paris)*, 6 (1930), pp 204-224, Jennings in *R I*, 3rd ser, 13 (1932), pp 473-523, *Round Table*, 25 (1934 1935), pp 21-43

[5] Hoops, *Der Status der Südafrikanischen Union* (1935)

[6] The position of India as a subject of International Law was for a time anomalous She became a member of the League of Nations, she was invited to the San Francisco Conference of the United States in April 1945, she exercised the treaty making power in her own right However, so long as the control of her internal and external relations rested ultimately with the British Government and Parliament, she could not be regarded as a sovereign State and as a normal subject of International Law In 1947 she became a fully self governing Dominion and an independent State As to her position prior to that date see Sen, *The Indian States, their Status, Rights, and Obligations* (1930), Palmer, *Sovereignty and Paramountcy in India* (1930), Holdsworth, *The Indian States and India* (1930), Jennings in *R I*, 3rd ser, 10 (1929), pp 480 491, Sundaram in *International Affairs*, 9 (1930), pp 452-466, and in *Grotius Society*, 17 (1931), pp 35-51, Sethi in *Canadian Bar Review*, 14 (1936),

placed is more difficult to answer [1] It is apparently *sui generis* and defies classification It is not a Federal State because there is no organ which has power both over the member-States and their citizens It is not a Confederation because there is no treaty which unites the member-States and no organ which in fact and, for all material purposes, in law has power over them It is not a Real Union because there is no treaty which unites the member-States and because each of the Dominions can enter into separate treaties, and 'full powers' to sign them are issued upon the advice of the Dominion Cabinet Probably it is not a Personal Union [2] because it is the essence of that relationship that two or more distinct Crowns should be accidentally (and often temporarily) united in the same holder and may even (as in the case of Great Britain and Hanover) be governed by different laws of descent, whereas 'the Crown in the British Empire is one and undivided' [3] It is a community of States in which the absence of a rigid legal basis of the association is powerfully compensated by the bonds of common origin, history, legal tradition and solidarity of interests For this reason there is a distinct element of irrelevance in the contention, occasionally advanced, that the British Commonwealth of Nations provides an instructive example to be followed for the purposes of a more general or even universal association of States

pp 36 49, *The British Empire* (as cited above), pp 108 132

Newfoundland was not separate member of the League, and her international status is not as advanced as that of other Dominions In 1933 the British Parliament passed the Newfoundland Act (24 Geo 5, c 2) suspending the Constitution of Newfoundland and providing for the administration of the Dominion by a Governor acting on the advice of a Commission of Government See *Report of the Royal Commission on Newfoundland* (1933), Cmd 4480 See also Paton in *International Affairs*, 13, p 394, *The Round Table*, No 94, 24 (1934), pp 256-259, Keith in *J C L*, 3rd ser, 16 (1933), pp 25 39, Schule in *Z o V*, 4 (1934), pp 858 877

[1] A foreign observer describes it as 'a true League of Nations of Sovereign States of British race' Lowenstein in *Archiv des offentlichen Rechts*, New Ser, 12 (1927), at p 272 Kunz, *Staatenverbindungen* (1929), pp 796 *et seq*, regards it as a quasi-composite State approximating most nearly to a Real Union And see for a full discussion, Baker, *op cit*, pp 130, 208, 247 372

[2] See Hurst, *op cit*, p 52

[3] Amery in *Journal of Royal Institute of International Affairs*, 6 (1927), at p 16

IX

MANDATED AREAS

Higgins in Hall, § 38*d*—Winfield in Lawrence, § 43—Lindley, pp 247 269—Hyde, 1 § 26—Fauchille, §§ 192 (1) 200 (3), 580 595—Liszt, § 12—Verdross, § 55—Scelle, 1 pp 169-186—Schucking und Wehberg, pp 688 711—Hackworth, 1 §§ 21 24—Redslob, *Théorie de la Société des Nations* (1927), pp 175 216—Lauterpacht, *Analogies*, §§ 84 86—Millot, *Les mandats internationaux* (1924)—Diena, same title (1925), and in *Hague Recueil*, 1924 (IV), pp 215 263—Stoyanovsky, *La théorie générale des mandats internationaux* (1925)—Van Rees, *Les mandats internationaux* (1927)—Schneider, *Das volkerrechtliche Mandat* (1926)—Vallini, *I mandati internazionali* (1923)—Balladore Pallieri, *I mandati della Società delle Nazioni* (1928)—Knubben, *Die Subjekte des Volkerrechts* (1928), pp 457 487—Gsell Trumpi, *Zur rechtlichen Natur der Volkerbundsmandate* (1928)—Van Rees, *Les mandats internationaux*, vol 1 (*Le contrôle international*, 1927), vol II (*Les principes généraux*, 1928)—Van Maanen Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (1929)—Wright, *Mandates under the League of Nations* (1930) (a leading treatise)—Margolith, *The International Mandates* (1930)—Bentwich, *The Mandates System* (1930), and in *Hague Recueil*, vol 29 (1929) (IV), pp 119 182—Pic, *Le régime du mandat* (1932)—Pelichet, *La personnalité internationale distincte des collectivités sous mandat* (1932)—Comisetti, *Mandats et Souveraineté* (1934)—Monarca, *L'appartenenza della sovranità sui territori sotto mandato* (1936)—Rolin in *R I*, 3rd ser, 1 (1920), pp 329 363—Lewis in *L Q R*, 39 (1923), pp 458 475—Baty in *B Y*, 1921-1922, pp 109 121—Corbett, *ibid*, 1924, pp 128 136—Keith in *J C L*, 3rd ser, 4 (1922), pp 71 83—Mills in *A J*, 17 (1923), pp 50 62—Wright, *ibid*, pp 691 703, 18 (1924), pp 306 315, 20 (1926), pp 768-772—Bileski in *Z V*, 12 (1923), pp 65 85, and 13 (1924), pp 77 102, and in *Z o R*, 13 (1933), pp 8 67—Potter in *American Political Science Review*, November 1926—Rutherford in *A J*, 20 (1926), pp 323-325—Lee in *Grotius Society*, 12 (1927), pp 31 48—Buza in *Z o R*, 6 (1926), pp 235 245—Rolin in *Annuaire*, 34 (1928), pp 33 58—Tachi in *R I* (*Paris*), 14 (1934), pp 337 360—Bentwich in *Z o V*, 4 (1934), pp 277 295—Hales in *Grotius Society*, 23 (1937), pp 85 126, 25 (1939), pp 185 284, and 26 (1940), pp 153 210

The General Features of the Mandate System

§ 94*c* The method adopted at the end of the First World War for dealing with the colonies and territories of Germany and Turkey which it was decided to detach from them [1] is known as the mandate system It was embodied in Article 22 of the Covenant of the League of Nations, which was an integral part of the treaties of peace with Germany, Austria, Bulgaria, and Hungary [2] Under this system these detached territories were not in the ownership of any State, but were

[1] The German case against the taking away of her overseas possessions and the mandate system will be found in Schnee, *German Colonization, Past and Future* (1926)

[2] As regards Turkey see Article 16 of the Treaty of Lausanne, 1923

entrusted to certain States called 'Mandatory States,' to administer on behalf of the League upon the conditions laid down in written agreements called mandates between the League and each mandatory In conformity with the Charter of the United Nations the system of mandates is to be replaced by the International Trusteeship System, the details of which are set out below [1] However, it is considered necessary, for two reasons, to retain here an abridged account of the nature and of the working of the system of mandates In the first instance, various mandatory States have declared their intention to act in conformity with the obligations of the mandates pending the effective establishment of the system of trusteeship Secondly, as the basic idea of the two systems is the same, an account of the mandate system is bound to be of assistance for the understanding of the system of trusteeship

The main differences between the mandate system and annexation were as follows From the point of view of the mandatory and of the inhabitants of the mandated area, there was a substantial difference from annexation, as the mandatory was precluded by the terms of the mandate from doing a number of things which an owner of territory can lawfully do That Germany and Turkey divested themselves of all rights of ownership in the mandated areas was clear [2] That the mandatories had not acquired all of those rights was equally clear, for (i) by the terms of the mandates they agreed to exercise their mandates on behalf of the League, and the mandates, at any rate, contained no cession of the territory to the mandatory [3], (ii) the mandatory had no power without the consent of the Council of the League to annex, cede,[4] or

[1] §§ 94*g*-94*o*

[2] See below, § 94*f*, Note on Sovereignty in Relation to the Mandates

[3] French Courts have held in a series of cases that French civil servants by accepting office in a French mandated territory sever all connection with the French civil service Rousseau in *R G*, 43 (1936), pp 496 *et seq*

[4] See, for instance, the transfer from the British mandate to the Belgian mandate of a portion of Ruanda in East Africa at the instance of the Council of the League *Off J*, November 1923, p 1273 It is difficult to admit that in concluding on June 23, 1939, the agreement with Turkey in which she ceded the Sanjak of Alexandretta, France remained within the limits of her powers as mandatory See report of the Mandates Commission to the Council, Minutes of the 36th Session

otherwise to dispose of the mandated territory; (iii) he was subject to varying restrictions as to the recruiting and training of the inhabitants, so that, for instance, in the case of the 'B' and 'C' mandates, the mandatory had no right to train the natives except for the purpose of internal police and local defence,[1] and to establish military or naval bases[2]; (iv) the inhabitants did not *ipso facto* acquire the nationality of the mandatory[3], (v) economically, he was under an obligation, at any rate in the case of the 'A' and 'B' mandates, to adopt the policy of the 'open door,' that is, he was bound to ensure to the nationals of all States members of the League the same rights in respect of commerce and trade as are open to the nationals of the mandatory[4]

Secondly, the dominant element was that of trusteeship for the inhabitants of the mandated area, 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world'

Thirdly, the mandate system was under the supervision of the Council of the League, advised and assisted by the Permanent Mandates Commission[5] This Commission consisted of ten ordinary members and one extraordinary member The majority of the members were to be nationals of States which were not mandatories The annual reports which the mandatories were bound to make upon their administration were examined by this Commission in the presence of a representative of the mandatory State, who answered questions and supplemented the information contained in the report The right of the inhabitants of a

(1939), p 278 See also Toynbee, *Survey*, 1936, pp 767-782, *Documents*, 1937, pp 465 515, 1938 (i), pp 479-492, Sperduti, *Aspetti giuridici del Sangiaccatto di Alessandretta* (1939), Scupin in *Z V*, 24 (1940), pp 1-30, Khaduri in *A J*, 39 (1945), pp 406-425 As to Syria and Lebanon see below, p 197

[1] Note that Article 3 of the French mandates for the Cameroons and for Togoland contained a clause concerning native troops which did not appear in the corresponding British mandates for the Cameroons and Togoland

[2] As to the position of mandated territories in time of war see vol ii § 71*a*

[3] See below, § 94*e*, as to Nationality

[4] See Gerig, *The Open Door and the Mandates System* (1930), Yapou, *De la non discrimination en matière économique, notamment en pays de protectorat et sous mandat* (1935), Bileski in *Z o R*, 16 (1936), pp 214 264

[5] See Van Rees, *op cit*, pp 56-141, Toynbee, *Survey*, 1928, pp 115-135

mandated area to petition the League was recognised. Their petition had to be forwarded through the Government of the mandatory State in order to enable it to attach its own comments before the petition is examined by the Commission Petitions from other sources were communicated to the mandatory State for the same purpose.[1] The Commission reported to the Council of the League, with whom rested the main responsibility for the working of the system, but the Assembly was also free to discuss questions arising out of it.

The Different Types of Mandate

§ 94*d* The following clauses of Article 22 [2] of the Covenant indicated, in descending order of political individuality, the three types of mandate [3]

Type A—

'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone The wishes of these communities must be a principal consideration in the selection of the Mandatory'

The 'A' mandates were distributed,[4] and accepted by the mandatories, as follows

Iraq—Great Britain, Palestine (and Transjordan)—Great Britain, Syria and Lebanon—France

The development of each of these territories from the mandated status to political independence was determined

[1] On the jurisdiction of the Permanent Court of International Justice in the matter of mandates see Feinberg, *La juridiction de la Cour Permanente dans le système des mandats* (1930), and in *Hague Recueil*, vol 59 (1937) (1), pp 596-632, 682 702 All the mandates contained a clause providing that any dispute between a mandatory and a member of the League which cannot be settled by negotiation may be referred by either party to the Permanent Court See the *Mavrommatis Palestine Concessions Case*, P C I J, Series A, No 2

[2] Which, as Baty in *B Y*, 1921-1922, at p 119, remarks, 'was drafted with a high regard for Mr Wilson's supposed announcement that "he did not want a lawyer's treaty"'

[3] The different words employed in each case are not without significance 'communities,' 'communautés' ('A' mandates), 'peoples,' 'peuples' ('B' mandates), 'territories,' 'territoires' ('C' mandates)

[4] The distribution of the mandates ('A,' 'B,' and 'C') was effected by decisions of the Principal Allied Powers which were communicated to the Council of the League and are recorded in the preambles of the mandates

by its special conditions and the terms of the particular mandate

(a) *Iraq*.—In 1930 Great Britain and Iraq concluded a Treaty of Alliance, which was to come into force when Iraq was admitted to the League of Nations [1] In 1931 the Council adopted a resolution to the effect that the degree of maturity of mandated territories which it may in future be proposed to emancipate shall be decided, having regard to the circumstances of each particular case, in the light of principles laid down by the Mandates Commission in June 1931 [2] In 1932 the Council declared in favour of the termination of the mandate subject to certain guarantees to be given by Iraq on such matters as protection of minorities and respect of acquired rights [3] The Thirteenth Assembly thereupon admitted Iraq to membership of the League [4]

[1] For the Treaty of June 30, 1930, see (1930) Cmd 3627 and Treaty Series, No 15 (1931), Cmd 3797, for the Financial Agreement of August 19, 1930, (1930) Cmd 3675, and for the Judicial Agreement of March 4, 1931, providing for a uniform system of justice for foreigners and Iraqis, (1931) Cmd 3538 See also *Documents*, 1930, p 132 The Treaty of Alliance provides for consultation on matters of common policy affecting both Parties and for the mutual obligation not to take up in foreign countries an attitude inconsistent with the Alliance or likely to create difficulties for the other Party (Article 1) Iraq recognises that the permanent maintenance and protection in all circumstances of the essential British communications is in the common interest of the two countries and agreed to grant to Great Britain for that purpose certain sites for air bases and the right to maintain forces in the localities in question in accordance with the provisions of a special Annex (Article 5) The Treaty was to last for twenty-five years At the end of that period any disagreement as to a new treaty was to be submitted to the Council of the League (Article 11)

[2] *Off J*, 1931, p 2055 For the relevant portion of the Report of the Mandates Commission see *A J*, 26 (1932), p 749, and Minutes of the 20th Session of the Commission, p 228

[3] *Ibid*, 1932, pp 474, 1213, 1347, 1483

[4] See League Doc A 42 1932 VII On the Iraq mandate, its history, and especially on its termination, see Toynbee, *Survey*, 1930, pp 317 322, Lee, *The Mandate for Mesopotamia and the Principle of Trusteeship in English Law* (1931), Pic, *Le régime du mandat en Syrie, en Palestine, et en Mesopotamie* (1923), Hooper, *L'Iraq et la Société des Nations* (1928), Abdel Halim, *La fin des mandats internationaux et l'expérience Irakienne* (1932), Borsa, *La cessazione del mandato internazionale* (1934), Kluge, *Das Konigreich Iraq* (1934), Main, *Iraq From Mandate to Independence* (1935), v Elbe in *Z o V*, 1 (1929), pp 392 402, Wright in *A J*, 25 (1931), pp 436 446, Stoyanovsky in *R G*, 38 (1931), pp 297-339, Blondel, *ibid*, 39 (1932), pp 614-645, Bentwich in *Z o V*, 3 (1932-1933), pp 176-187, Bileski in *Z o R*, 13 (1933), pp 31 55, Davidson in *International Affairs*, 12 (1933), pp 60 78, Delos in *R G*, 41 (1934), pp 460 495, Tabouillot in *Z o V*, 4 (1934), pp 388 395 (on the Iraq Minorities, with a bibliography) As to Iraq's admission to the League see Toynbee, *Survey*, 1934, pp 109-210, and Hudson in *A J*, 27 (1933), pp 133 138 See also Ritsher, *Criteria of Capacity for Independence* (1934)

(b) *Syria and Lebanon* —Owing to various circumstances the development of these communities to independent statehood did not progress as rapidly as in the case of Iraq Following the abortive Treaty of November 1933,[1] France and Syria signed on September 9, 1936, a Treaty of Alliance and Friendship which provided for the cessation of the mandate and for steps to be taken for the admission of Syria to the League of Nations within three years after the ratification of the Treaty A similar treaty was concluded with Lebanon on November 13, 1936 [2] These treaties were still unratified when the Second World War broke out During the War France declared her willingness to recognise the full independence of Syria and Lebanon, subject to agreement in the matter of French rights in these countries [3] In 1944 Great Britain, the United States, and some other States recognised the full independence of Syria and Lebanon Both States were invited to the San Francisco Conference in 1945 and both became original members of the United Nations

(c) *Palestine* —The legal position of that mandated territory is governed, in addition to the general principles of Article 22, by the obligation of the mandatory Power, laid down in the mandate for Palestine, to put into effect a declaration made by Great Britain in November 1917 (the so-called Balfour Declaration), and accepted by the other Principal Allied Powers in favour of the establishment in Palestine of a national home for the Jewish people consistently with the civil and religious rights of existing non-

[1] For an analysis of that Treaty see Toynbee, *Survey*, 1934, pp 284-301 On the termination of mandates generally see Hales in *R I*, 3rd ser, 19 (1938), pp 550 592

[2] For the text of the Franco-Syrian Treaty of September 9, 1936, see *R I (Paris)*, 18 (1936), pp 767-780, and see *ibid*, pp 781 784, for the text of the Treaty of November 13, 1936, between France and Lebanon, for both texts see also *Documents*, 1937, pp 445 464 And see Pic, *op cit*, Joffre, *Le mandat de la France dans la Syrie et le Grand Liban* (1925), Toynbee, *Survey*, 1930, pp 304 314, on the question of the Syrian Constitution, Lapierre, *Le mandat français en Syrie* (1936), Morgan Jones, *Le fin du mandat français en Syrie et en Liban* (1938), Wright in *A J*, 20 (1926), pp 263 280, Lapierre in *R G*, 37 (1930), pp 659 670, Cardahi in *Hague Recueil*, vol 43 (1933) (1), pp 663 788, Toynbee, *Survey*, 1936, pp 748 766

[3] See Khaduri in *A J*, 38 (1944), pp 601-620

Jewish communities in Palestine [1] It follows from this dual character of the Palestine mandate that, so long as the mandate has not been revised,[2] independent statehood of that country and its membership of the League were possible only subject to the fulfilment or safeguarding of these principal obligations of the mandate [3]

[1] Toynbee, *Survey*, 1925 (1), pp 346 456, *ibid*, 1930, pp 222 304, and 1934, pp 247 284, Scelle, 1 pp 307 312, Stoyanovsky, *The Mandate for Palestine* (1928) (the leading monograph on the subject), Schwarzenberger, *Das Volkerbundsmandat für Palastina* (1929), Marcus, *Palastina—ein werdender Staat* (1929), Baumkoller, *Le mandat sur la Palestine* (1931), Andrews, *The Holy Land under Mandate*, 2 vols (1931 not legal), Bentwich, *England in Palestine* (1931), the same in *B Y*, 10 (1929), pp 137-143, and in *Z o V*, 1 (1929), pp 212 222, Feinberg, *Some Problems of the Palestine Mandate* (1936), Bileski in *Z o R*, 13 (1933), pp 53 55 In *Sheriff Es Shanti* v *Attorney General for Palestine* the Palestine Court of Appeal held in 1937 that the juridical position of Palestine is that of a dependency of the Crown in which the sovereign has full power to legislate by means of Orders in Council which are unchallengeable in the Courts even though their provisions go beyond the powers recognised by the Mandate *Annual Digest*, 1935-1937, Case No 31

[2] In view of the difficulty experienced by the Government of Palestine in reconciling the claims of the Arabs and the Jews, Great Britain, following upon the recommendations of a Royal Commission in July 1937 submitted for consideration by the Mandates Commission a scheme for the division of Palestine into an independent Jewish State, an independent Arab State united with Transjordan (see below, n 3), and a small section including places of general religious interest under a British mandate See Blue Book Cmd 5479 (1937) In 1938 the British Government discarded, as being impracticable, the proposal for partition (Cmd 5893 (1939)) In May 1939 it published a White Paper (Cmd 6019) the essence of which, in addition to drastic restrictions upon acquisition of land by Jews, was that after five years the growth of the Jewish National Home by immigration would be brought to an end (except with the consent of the Arab population) In the same year, the Mandates Commission declared that the policy set out in the White Paper was not in accordance with the interpretation which the Commission had placed upon the Palestine Mandate (Minutes of the Thirty Sixth Session, p 275) For a detailed account see Toynbee, *Survey*, 1938 (1), pp 414 479 In 1945 Great Britain and the United States jointly appointed a commission, composed in equal numbers of their nationals, to make recommendations for the settlement of the Palestine question The Commission, in its Report, recommended, *inter alia*, the cessation of the policy inaugurated in the White Paper of 1939 Cmd 6808 (1946) Great Britain was unable to accept the principal recommendations of the Commission and, in April 1947, submitted the entire question of Palestine to the United Nations A special session of the General Assembly, which met from 28th April to 15th May 1947, set up a Special Committee to investigate and report on the solution of the problem (see Robinson, *Palestine and the United Nations* (1947)) The Commission recommended the partition of Palestine into two independent States—Arab and Jewish—and a zone comprising the City of Jerusalem and surrounding localities to be administered by the United Nations under the system of trusteeship In November 1947 the Second General Assembly, by a two thirds majority, approved these proposals and appointed a Commission charged with the task of assisting in putting into effect the recommendations of the Assembly

[3] The relations between Great Britain and Transjordan were governed until 1946 by the Agreement of

Type B—

'Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases, and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League'

The 'B'[1] mandates were distributed, and accepted by the mandatories, as follows

British Cameroons—Great Britain, French Cameroons—France, British Togoland—Great Britain, French Togoland—France, Tanganyika—Great Britain, Ruanda Urundi—Belgium

Type C[2]—

'There are territories such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population'

February 20, 1928, between the two countries (1928) Cmd 3069, Treaty Series, No 7 (1930), Cmd 3488 Transjordan was originally included in the Palestine mandate, Article 25 of which gave the Mandatory the right, with the consent of the Council, to postpone or to withhold the application of such provisions of the mandate as he may consider inapplicable to local conditions In 1946 Great Britain concluded with Transjordan a Treaty of Alliance in which she recognised the latter as a fully independent State Cmd 6779

[1] See Lugard, *The Dual Mandate in British Tropical Africa* (4th ed, 1929), Rouard de Card, *Les Mandats français sur le Togoland et le Cameroun* (1924), Abendroth, *Die volkerrechtliche Stellung der B- und C-Mandate* (1936) And see the extensive bibliography in Wright, *op cit* (at p 192), pp 660-665 Se also Bottner, *Das Volkerbundmandat für Tanganyika* (1931), Thoss, *Die Selbstandigkeit der B-Mandate* (1933), Makowski in *R G*, 40 (1933), pp 374 390

[2] Toynbee, *Survey*, 1929, pp 238-286 (South African Mandate), *ibid*, pp 373 404 (Samoa), Clyde, *Japan's Pacific Mandate* (1935), Abendroth, *op cit*, Gregory in *A J*, 15 (1921), pp 419 427, Charteris in *B Y*, 1923-1924, pp 137-152, Matthews in *J C L*, 3rd ser, 8 (1926), pp 161-183, Moncharville in *R G*, 36 (1929), pp 623 645 (Japanese 'C' Mandate), Makowski, *ibid*, 40 (1933), pp 374-390.

The 'C' mandates were distributed, and accepted by the mandatories, as follows

South-West Africa—Union of South Africa, Samoa—New Zealand, Nauru—British Empire (Great Britain, Australia, and New Zealand jointly), other Pacific Islands south of the Equator—Australia, Pacific Islands north of the Equator—Japan [1]

National Status of the Inhabitants

§ 94e Article 22 of the Covenant did not directly touch the question of the national status of the inhabitants, but it was inevitable that this question should arise The two relevant questions were (1) Have the inhabitants lost their former German or Turkish nationality? (2) If so, have they acquired any new nationality?

(1) The normal effect of cession is twofold, namely, to divest the subjects of the ceding State of their nationality (at any rate when domiciled within the territory ceded), and to invest them with the nationality of the new sovereign [2] But the clauses of the treaties already quoted, whereby Germany and Turkey renounced their rights in respect of the territories now under mandate, suggested a dereliction rather than a cession [3] and it seems that the effect of these clauses was to divest the inhabitants of these territories (apart from the special case of the German subjects of European origin [4]) of their former German or Turkish

[1] The withdrawal of Japan from the League in 1935 did not have the effect of terminating Japan's mandate She continued to send the annual report and, for a time, to be represented before the Mandates Commission In 1938 Japan, in pursuance of her decision to discontinue her co-operation with the organs of the League, declined to send a representative The Commission, not without some doubt, decided to proceed with the examination of the Japanese report For details see Wright in *A J*, 33 (1939), pp 347-349 On the termination of mandates, especially in connection with the mandatory's withdrawal from the League, see Evans in *A J*, 26 (1932), pp 735-758, 27 (1933), pp 140-142, Wright in *B Y*, 16 (1935), pp 104 113, Gonsiorowski in *New York University Law Quarterly Review*, 13 (1936), pp 237 243, Miele in *Rivista*, 28 (1936), pp 219 235 On the transfer of Mandates see Honig in *J C L*, 3rd ser, 18 (1936), pp 204-211

[2] See Hall, §§ 205, 206

[3] See *R* v *Jacobus Christian* in the Appellate Division of the Supreme Court of South Africa in 1923, summarised by Mackenzie in *B Y*, 1925, pp 211 219, and in *Annual Digest*, 1923 1924, Case No 12, Matthews in *J C L*, 3rd ser, 6 (1924), pp 245 254, and Emmett, *ibid*, 9 (1927), p 117 As to the bearing of this decision on the question of sovereignty see below, § 94*f*, Note on Sovereignty

[4] Article 122 of the Treaty of Peace with Germany appeared to assume the continuance of the

nationality and not to invest them automatically with any new nationality. In April 1923 the Council of the League adopted certain resolutions [1] with regard to the national status of the inhabitants of 'B' and 'C' mandated areas, the substance of which was that they had a distinct status from that of the mandatory's nationals and, while not disabled from obtaining individual naturalisation from the mandatory, did not automatically become invested with its nationality In the case of the 'C' mandated area of South-West Africa, the mandatory, with the consent of the Council of the League and with the assent of the German Government, passed legislation offering collective naturalisation to all persons of German origin, subject to the right of any of them to decline the British nationality offered to them [2]

(2) Did the inhabitants of the mandated areas acquire any new nationality ? Such a creation did, in fact, take place in the case of all the 'A' mandates In Iraq (which was then a mandated territory), as the result of the Iraq Law of October 9, 1924, in Palestine, where by a British Order in Council of July 24, 1925, Palestinian 'citizenship' [3] has been created [4], and in Syria and Lebanon, in which case the existence of a distinct nationality was recognised by Article 3 of the mandate, and was established by decrees

German nationality of German subjects of European origin in mandated areas—a view which finds support in the minutes of the Permanent Mandates Commission, Second Session (cited by Wright in *A J*, 18 (1924), at p 313), and was assumed to be correct in the negotiations between the Governments of the Union of South Africa and of Germany preceding the automatic and collective naturalisation Act of 1924 (see Emmett, *supra*, pp 111 122, and *B Y*, 1925, pp 188 191)

[1] *Off J*, 1923, p 604 See also *The King* v *Ketter* where it was held that the appellant, a resident of Palestine, who had been issued with a passport entitled 'British Passport, Palestine,' was not a British subject [1940] 1 K B 787, *Annual Digest*, 1938-1940, Case No 21

[2] Act 30 of 1924 see Emmett, *op cit*, and *B Y*, 1925, pp 188-191, and Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp 177 201

[3] Which is equivalent to nationality see Bentwich, *B Y*, 1926, at p 102 See also Feinberg in *Z o V*, 1 (1929), pp 200 211 Nevertheless, some hold the view that, as a result of the constitutional relationship between Great Britain and the Government of Palestine, and because (according to this view) Palestine is not a 'foreign State' within the meaning of § 13 of the British Nationality and Status of Aliens Act, 1914, a British subject who acquires Palestinian citizenship by naturalisation does not thereby cease to be a British subject See also Jones in *B Y*, 22 (1945), pp 127-129

[4] But as to Transjordan see Bentwich, *op cit*, at p 106

of the French High Commissioner [1] On the other hand, the 'B' and 'C' mandated areas did not mint a nationality of their own

'Third States' and the Mandate System

§ 94f The expression 'third States' denotes in this connection States other than the mandatory It was mainly [2] with the United States of America that questions upon the relationship of States not members of the League to the mandate system arose That country entered into a number of treaties with the mandatory States securing for herself and her nationals the same rights in the mandated areas as those of States members of the League and their nationals [3]

[1] For details in all three cases see Bentwich, *op cit*, at p 106, and, as to Palestine, Stoyanovsky, *The Mandate for Palestine* (1928), Bentwich in *B Y*, 13 (1932), pp 132, 133, and, as to Syria and Lebanon, Nicolas in *Revue de droit international privé*, etc, 21 (1926), pp 481 503 See also Ambrosini in *Rivista di Diritto Pubblico e della Pubblica Amministrazione*, No 3 (1932)

[2] In 1935 the Japanese representative addressed a communication to the President of the Mandates Commission claiming that the withdrawal of Japan from the League could not have the effect of depriving Japan of her right to equality of opportunity in the 'A' and 'B' mandates He pointed out that as Japan was one of the Principal Allied and Associated Powers who distributed and received mandates, her rights could not be altered by the fact that she was no longer a member of the League See *Reports of the 28th Session of the Commission*, 1935, p 125, and Annex 4, pp 183, 184 See also *Z o V*, 6 (1936), pp 365 369

[3] For instance, with Great Britain Palestine, Treaty Series, No 54 of 1925, *A J*, 20 (1926), Suppl, pp 65 72, East Africa, Cameroons, Togoland, Treaty Series, Nos 22, 23, 24 (1926), *A J*, 20 (1926), Suppl, pp 166 167, with France, Cameroons and Togoland, *A J*, 18 (1924), pp 786, 787, and Suppl, pp 189 196, Syria and Lebanon, *A J*, 19 (1925), Suppl, pp 1 5, with Japan, Gregory in *A J*, 15 (1921), pp 419 427, and *ibid*, 16 (1922), pp 248 251 In the Treaty of January 9, 1930, between the United States and Iraq the latter agreed to grant to the United States and its nationals the rights and benefits enjoyed by other States in their capacity as members of the League Treaty Series, No 19 (1931), Cmd 3833 In March 1932 the United States claimed the right 'to demand consultation with respect to the conditions under which Iraq is to be administered upon the cessation of the mandatory relationship' Great Britain denied the existence of the right as claimed, but offered to keep the United States informed of the progress of events in connection with the termination of the mandate see Hudson in *A J*, 27 (1933), pp 136, 137

Note upon Sovereignty in Relation to the Mandates —Widely differing views were held upon the question, Where does sovereignty in respect of the mandated areas lie? The following are among the numerous answers that have been given —(1) *In the mandatory* see Rolin, *op cit*, Lindley, pp 263, 267, and *R* v *Jacobus Christian* (*Annual Digest*, 1923-1924, Case No 12), where the Appellate Division of the Supreme Court of South Africa held that the mandatory Government—that is, the Government of the Union of South Africa—had sufficient internal *majestas* to support a conviction of one of the inhabitants of the 'C' mandated area of South West Africa for high treason under Roman-Dutch common law That sufficed to uphold the conviction, but the judgments are also cited in support of the theory of full sovereignty in the mandatory With reference to the claim of General Hertzog, Prime Minister of the Union

IXA

TERRITORIES UNDER THE SYSTEM OF TRUSTEESHIP

Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948), and in *B Y*, 24 (1947)—Goodrich and Hambro, *Charter of the United Nations* (1946), pp 226 256—Mathiot in *R G*, 50 (1946), pp 159 209—Armstrong and Cargo in *Department of State Bulletin*, 16 (1947), pp 511 519—Wellons and Yeomans, *ibid*, pp 1089-1098—Berthaud in *Friedenswarte*, 47 (1947), pp 233 254

In General

§ 94*g* At the end of the Second World War it was felt generally that the basic principles of the mandates system had stood the test of experience, that they were fully in conformity with the great humanitarian objects which official declarations and public opinion included among the major purposes of the War, and that they ought to be made an integral part of the new international organisation of the United Nations Having regard to the organic association of the mandates system with the League of Nations, the replacement of which by the United Nations had been decided, it was considered necessary to substitute for the mandates system a new machinery with a different name—that of trusteeship [1] There is no reason for assuming that

of South Africa, for full sovereignty in respect of the mandated area of South West Africa subject to the terms of the mandate see the London *Times* newspaper of June 9 and August 13, 1927, the Minutes and Report of the Tenth Session (1926) of the Permanent Mandates Commission, pp 82 86, 182, and of the Eleventh Session (1927), and Minutes of the Council meetings of March and September 1927, *Off J*, 8 (1927), pp 347 and 1118-1120, and *Round Table*, December 1927, pp 217 222 The preamble of a boundary treaty (Treaty Series, No 29 (1926)) between the Union of South Africa and Portugal dated June 22, 1926, recites that the Government of the former 'possesses sovereignty over the territory of South-West Africa lately under the sovereignty of Germany' (ii) *In the mandatory, 'acting with the consent of the Council of the League'* see Wright in *A J*, 17 (1923), pp 691-703, *ibid*, 18 (1924), pp 306-315, *ibid*, 20 (1926), pp 768 772 (iii) *In the Principal Allied Powers* (iv) *In the League* (see Lauterpacht, § 86, while admitting that the exercise of sovereignty rests with the mandatory, see *In re Ezra Goralschvili*, mentioned in *A J*, 20 (1926), p 771, Redslob, *op cit*, pp 196, 197, Corbett in *B Y*, 1924, p 134, Bentwich, *The Mandates System* (1930), p 19, Scelle, i pp 170, 171) (v) *In the inhabitants of the mandated area, but temporarily in suspense* (see Stoyanovsky, *La théorie générale des mandats internationaux* (1925), Pelichet, *op cit* at p 183, Pic in *R G*, 30 (1923), pp 321 371 In the resolution adopted by the Institute of International Law in 1931 the communities under mandate are described as subjects of International Law, see *A J*, 26 (1932), p 91) This list by no means exhausts the variety of opinions which have been expressed

[1] The system of trusteeship was agreed upon in principle in February 1945 at the Conference at Yalta between the Heads of the British, Russian and United States Governments For a general history of the adoption of the proposal see the Official American Commentary on the Charter, *Hearings before the Senate Foreign Relations Committee*,' pp 112 118

the change of name and of machinery were intended as a limitation of the purpose or, except with regard to territories which were to be granted independence, of the territorial scope [1] of the system as adopted in Article 22 of the Covenant of the League of Nations

Territories under the Trusteeship System

§ 94*h* Article 75 of the Charter lays down that the United Nations shall establish under its authority an international trusteeship system for the administration and supervision of trust territories It is provided that 'the trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements' (Article 77) (*a*) Territories previously held under a mandate in conformity with Article 22 of the Covenant [2], (*b*) territories detached from the defeated States as a result of the Second World War, (*c*) other territories voluntarily placed under the trusteeship system by States hitherto exercising exclusive sovereignty over them (Article 77) It is further provided, in Article 79, that the terms of trusteeship for each territory placed under the system shall be agreed upon by the States directly concerned and approved either by the Security Council in case of so-called strategic areas (Article 83) [3] or by the General Assembly in case of other trust territories (Article 85)

Although, according to its wording, the Charter imposes no clear legal obligation upon States which were mandatories by virtue of Article 22 of the Covenant to place the territories in question under the system of trusteeship, it is clear that an obligation to this effect, closely approaching a legal duty, follows from the principles of the Charter [4] At the first Assembly of the United Nations in 1946 Great Britain, Australia, New Zealand, Belgium, and, with some

[1] See below, n 4

[2] But Article 78 lays down expressly that the trusteeship should not apply to territories which have become members of the United Nations (*i e* to Syria and Lebanon—see above § 94*d*)

[3] See below, § 94*k*

[4] Except with regard to mandated territories to be transformed into independent States Reference may be made here to Article 80 of the Charter which lays down that, until the individual trusteeship agreements have been concluded, 'nothing in this Charter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties'

qualifications, France,[1] made declarations announcing their intention to place their mandated territories under the trusteeship system South Africa, in an elaborate statement, invoked the special position of her mandated territory as a reason for making it part of her territory, subject to the proposed consultation of its inhabitants [2] There was no disposition on the part of the members of the Assembly to acknowledge such right of incorporation [3]

The Objects of the Trusteeship System

§ 94i The objects of the trusteeship system are set forth in some detail in Article 76 of the Charter It is a primary purpose of the system ' to promote the political, economic, social and educational advancement of the inhabitants of the trust territories ' This is the paramount obligation of the

[1] See for these declarations *Records of the First Assembly*, 1st Session, 1946, pp 176, 234, 248, 253 and 264 See also *ibid*, pp 482 489 The British declaration included an announcement of the intention to recognise the independence of Transjordan See also Duncan Hall in *International Affairs*, 22 (1946), pp 199 213

[2] *Ibid*, p 193

[3] It appears from an authoritative statement made in the Fourth Committee of the First Assembly that the Trusteeship Committee at the San Francisco Conference agreed, subject to an implied reservation by South Africa, that the mandatory Powers should, in the first instance, recognise the authority of the Trusteeship Council of the United Nations (*ibid*, No 11, Suppl, No 4, p 4, see also *ibid*, Nos 12 and 13, Suppl, No 4) In a unanimous Resolution the First Assembly invited ' the States administering territories now held under mandate to undertake practical steps for the implementation of Article 79 of the Charter ' *Records of the First Assembly*, First Session, p 665 In 1946 the First General Assembly declined to accede to the request of the Union of South Africa that the mandated territory of South-West Africa should be incorporated in the Union The request followed upon a vote of the inhabitants of the territory expressing the desire for incorporation The decision of the General Assembly was based on the view that the inhabitants of South West Africa had not yet reached a stage of political development ' enabling them to express a considered opinion which the Assembly could recognise on such an important question as incorporation of their territory ' The Assembly recommended that the territory be placed under the system of trusteeship and invited the Union to submit a trusteeship agreement for the territory (*U N Journal*, No 63/A, p 679, see also *ibid*, Nos 30 and 33, for the discussion on the subject) While refusing to accept this recommendation, the Union expressed its intention to continue to administer the territory as an integral part of the Union in accordance with the principles laid down in the mandate and to submit regularly to the Secretary General of the United Nations, in accordance with Article 73 (*e*) of the Charter, ' for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to the economic, social and educational conditions of South-West Africa ' The Second General Assembly maintained its previous recommendation that South West Africa be placed under the trusteeship system Doc A/422 For a presentation of the South African view see Gey van Pittius in *International Affairs*, 23 (1947), pp 202 209 See also Wright, *ibid*, pp 209-212

trustee Powers In contrast to the corresponding provisions of the Covenant, the duty of ensuring equal treatment for all members of the United Nations and their nationals in social and economic matters [1] is made subject to the obligation to safeguard the interests of the inhabitants To that extent the Charter has adopted a limitation upon the principle of the 'open door' [2] The idea, which runs throughout the Charter, of encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,' is expressly adopted as one of the objects of the trusteeship system [3] These fundamental human freedoms include the eventual right of every human being to a share in the political independence of his country, and Article 76 of the Charter therefore recognises as one of the objectives of the trusteeship system the promotion of the progressive development of the trust territories 'towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned and as may be provided by the terms of each trusteeship agreement' [4]

Finally—a provision which appears first in the enumeration of the aims of the system—the Charter lays down that the object of trusteeship is 'to further international peace and security' This somewhat general statement signifies the intention to abandon the drastic limitations which the Covenant imposed upon the mandatory in respect of recruitment in and fortification of the mandated territories Assuming that the general policy of the trustee Powers is in accordance with the purposes of the Charter in the matter of international peace and security, the provision in question cannot be regarded as a retrogressive step from the point

[1] Article 76 (*d*) It will be noted that, unlike in the Covenant, the principle of equality of opportunity is not limited to certain categories of trust territories

[2] See above, p 195 [3] Article 76 (*c*)

[4] The manner in which this provision is qualified is expressive of the inherent complexities of the problem It appears that while some Governments at San Francisco favoured express reference in the Charter to eventual political independence of trust territories, others considered the 'development of self-government' to be an adequate formulation of the purpose of the Charter See *Canadian Commentary on the Charter, Department of External Affairs*, Conference Series, 1945, No 2, p 50

of view of the interests of the inhabitants of the trust territories and of the purpose of the trusteeship system [1]

The Trusteeship Agreements

§ 94j As in the corresponding case of the mandates, the provisions of the Charter with regard to the system of trusteeship are of a general character The terms of the administration of the trust territories 'shall be agreed upon by the States directly concerned' [2]—a phrase of obvious

[1] Nevertheless the placing of the furtherance of 'international peace and security' as the first object of the trusteeship system probably betrays a certain lack of proportion—unless, perhaps, the intention was to give expression to the view that the object of the principle of trusteeship is to limit colonial imperialism which is widely considered as inimical to international peace Article 84 of the Charter reiterates that it is the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security and that, accordingly, it may make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken by the administering authority The wording of the Article seems to rule out conscription

[2] Article 79 For a, somewhat inconclusive, discussion of the meaning of that term see the Minutes of the Fourth Commission of the First General Assembly (Supplement No 4 to issues No 14, 15, 17 and 19 of the *Records of the First General Assembly* in 1945 and 1946) In announcing, on January 23, 1946, in the House of Commons the decision of the British Government to place Tanganyika, Togoland and the Cameroons under the trusteeship system the Prime Minister informed the House that, without prejudice to the ultimate determination of the meaning of the phrase 'States directly concerned,' the British Government considered that the following States must be regarded as directly concerned France in respect of Togoland and the Cameroons, Belgium in respect of Tanganyika, and the Union of South Africa in respect of all three The interpretation of that phrase gave rise to opposing views at the First General Assembly, to which the various Trusteeship Agreements were submitted for approval A minority of States, including Soviet Russia, urged a definition of that phrase, in the sense of an extensive interpretation of its terms, before the Trusteeship Agreements were approved According to the view put forward by the United States, the 'State directly concerned' was the trustee State itself, whose obligations were fulfilled by affording an opportunity to States claiming a special interest in the matter to express their views and to submit their proposals That interpretation may not be quite consistent with the terms of Article 79 of the Charter which lays down that the terms of trusteeship 'shall be agreed upon by the States directly concerned,' which would seem to exclude unilateral action by one State directly concerned (The French text is even more explicit It lays down that the terms of trusteeship 'feront objet d'un accord entre les Etats directement interesses') On the other hand, as Article 79 is silent on the vital question of the nature and the conditions of the necessary 'agreement' of the States directly concerned, it must be presumed to have left the matter to be settled, in the absence of an agreed solution, by a requisite majority of the General Assembly The Trusteeship Committee of the First General Assembly, in proceeding to approve the various Trusteeship Agreements, adopted a proposal of the United States according to which 'the General Assembly in approving the terms of Trusteeship does not prejudge the question of what states are or are not "directly concerned" within the meaning of Article 79' (General Assembly, Doc 2/258, December 12, 1946, p 13) In fact, all Members of the United Nations were given the opportunity

elasticity—subject to the approval of the General Assembly in case of ordinary trust territories and of the Security Council in case of strategic areas [1] Similar agreement and approval are required for the alteration or amendment of the trust instruments The Charter provides expressly that the authority administering the trust territories shall be either one or more States or the United Nations as a whole [2] The First General Assembly approved, in December 1946, Trusteeship Agreements submitted to it in respect of the following eight trust territories, hitherto subject to the mandates system Tanganyika,[3] British Togoland,[4] and the British Cameroons,[5] to be administered by Great Britain , French Togoland [6] and the French Cameroons,[7] to be administered by France , Ruanda Urundi,[8] to be administered by Belgium , Western Samoa,[9] to be administered by New Zealand , New Guinea,[10] to be administered by Australia In view of the approval of the terms of these Trust Agreements, the General Assembly found that the conditions for the setting up of the Trusteeship Council were fulfilled and proceeded to elect the required number of members of the latter In 1947 the Security Council approved the Trusteeship Agreement in respect of the Territory of the Pacific Islands, a strategic trust area comprising the Marianos, Carolina, and the Marshall Islands, which were formerly administered by Japan as a mandated territory In the same year the Second General Assembly approved the Trusteeship Agreement for Nauru While Australia, New Zealand, and the United Kingdom are the Administering Authority, Nauru is to be administered by Australia in accordance with an agreement concluded by the three Governments concerned

to present their views with reference to the terms of the Trusteeship Agreements approved by the General Assembly In voting against the approval of the Trusteeship Agreements Soviet Russia gave as one of the reasons for her action the fact that the 'states directly concerned' had not been specified

[1] See below, § 94*k*

[2] Article 81

[3] *Treaty Series* No 19 (1947) Cmd 7081

[4] *Ibid*, No 21 (1947), Cmd 7083

[5] *Ibid*, No 20 (1947), Cmd 7082

[6] *Ibid*, No 67 (1947), Cmd 7199

[7] *Ibid*, No 66 (1947), Cmd 7198

[8] *Ibid*, No 64 (1947), Cmd 7196

[9] *Ibid*, No 65 (1947), Cmd 7197

[10] *Ibid*, No 68 (1947), Cmd 7200

§ 94*ja* Notwithstanding some variations of language, the principal provisions of the several Trusteeship Agreements follow a uniform pattern in the attempt to give effect to the objects of the system of trusteeship as set up in the Charter Thus in Article 3 of the Trusteeship Agreement for the British Cameroons the 'Administering Authority' undertakes to administer the Territory in such a manner 'as to achieve the basic objectives of the international trusteeship system as laid down in Article 76 of the Charter' The Administering Authority undertakes to collaborate with the General Assembly and the Trusteeship Council in the discharge of their functions defined in Article 87 of the Charter in the matter of reports and petitions, and to facilitate, at times to be agreed upon, any periodic visits to the Territory which these organs may deem necessary The Administering Authority is to be responsible for the peace, order, good government and defence of the Territory In order to fulfil these obligations the Administering Authority is to possess full powers of legislation, administration and jurisdiction in the Territory It is to be entitled to constitute the Territory into a customs, fiscal or administrative union or federation with adjacent territories under its sovereignty or control In order to ensure that the Territory 'shall play its part in the maintenance of international peace and security'[1] the Administering Authority, unlike in the case of mandated territories, is entitled to establish naval, military and air bases, and to erect fortifications—in addition to possessing the right of stationing its own forces there and, generally, of taking such measures as are in its opinion necessary for the defence of the Territory However, so far as the native population is concerned, only volunteer forces may be used for that purpose

The Terms of the Trusteeship Agreements

The Agreements contain provisions obliging the Administering Authority to promote the development of free political institutions suited to the Territory and to give the inhabitants a progressively increasing share in the government of the country with a view to their political advance-

[1] Art 4 of the Togoland Agreement And see above, p 207, n 1

ment to self-government and eventual independence [1] in accordance with Article 76 (*b*) of the Charter Provision is made for safeguarding native laws and customs as well as native land and resources in the interest of the native population Although the Administering Authority is entitled to create monopolies, these must be either of a purely fiscal character in the interest of the Territory or calculated to promote the economic advancement of its inhabitants [2] Although the Administering Authority is bound to refrain from economic discrimination against the nationals of any Member of the United Nations, it is expressly provided that such equality of treatment shall be contingent upon the inhabitants of the Territory receiving most-favoured-nation treatment in the territories of the State concerned The Trusteeship System thus avoids the unconditional 'open-door' principle adopted in some of the mandates, a system which proved highly disadvantageous to the territories concerned The Administering Authority is under an obligation to ensure in the Territory complete freedom of conscience and, so far as is consistent with the requirements of public order and morality, freedom of religious teaching and the free exercise of all forms of worship Subject to requirements of public order it is to guarantee to the inhabitants freedom of speech, of the press, of assembly, and of petition Effective provision is to be made for the educational advancement of the inhabitants Disputes between the Administering Authority and another Member of the United Nations concerning the interpretation

[1] The words 'or independence' appear even in the Trusteeship Agreement on the Pacific Islands, an undeveloped strategic Trust Area to be administered by the United States (Art 6) They were inserted in the course of the consideration of the Agreement by the Security Council The United States originally opposed the insertion of these words because of the unlikelihood that such independence 'could possibly be achieved within any foreseeable future in this case'

[2] The provisions as to monopolies met with considerable criticism in the course of the consideration of the Draft Agreements by the General Assembly As a result the representatives of Great Britain and Belgium made a declaration before the General Assembly stating that their Governments had no intention of using the grant of private monopolies as a normal instrument of policy, that such monopolies would be granted only when such a course was essential in the interest of the inhabitants, and that they would be granted only for limited periods and promptly reported to the Trusteeship Council (Doc A/258, December 12, 1946, p 6)

or application of the provisions of the Trusteeship Agreement shall be submitted, if they cannot be settled by negotiation or other means, to the International Court of Justice

Strategic Trust Areas

§ 94*k* The Charter distinguishes between ordinary trust territories and so-called strategic areas which may include part or all of the trust territory With regard to these areas the strategic requirements of defence and security make it necessary that the functions which with regard to trust territories in general are exercised by the General Assembly should be performed by the organ which by virtue of its composition is able to act more expeditiously and which is more particularly associated with international peace and security, namely, the Security Council [1] But it is expressly provided that the general principles of trusteeship as laid down in Article 76 of the Charter apply to strategic areas and that, subject to the specific trusteeship agreements and requirements of security, the Security Council shall avail itself of the services of the principal organ of the trusteeship system, namely, the Trusteeship Council [2] The Trusteeship Agreement for the Territory of the Pacific Islands (formerly Japanese Mandated Islands), approved by the Council in April 1947, differs but little from other Trusteeship Agreements Thus the application of the provisions of Articles 87 and 88 of the Charter in the matter of annual reports and visits to the Territory can be limited in respect of areas which may from time to time be specified by the Administering Authority as closed for security reasons [3]

The Functions of the United Nations with regard to Trust Territories.

§ 94*l* The fundamental importance of the system of trusteeship in the scheme of the Charter is given expression by the fact that the ultimate responsibility for its operation rests with the General Assembly and, with regard to strategic areas, with the Security Council These bodies approve the trusteeship agreements , their consent is required for any alteration or modification of those agreements , they bear the general responsibility for the administration of such trust territories and strategic areas in regard to which the ad-

[1] Articles 82 and 83

[2] Article 83. See also *Canadian Commentary on the Charter*, p 51

[3] Art 13 And see, generally, Robbins in *Bulletin of Department of State*, 16 (1947), pp 783-790.

ministering authority is placed with the United Nations as a whole, and, finally, the General Assembly exercises, in principle, concurrent jurisdiction with the Trusteeship Council with regard to the supervision of the administration of the trust territories In particular, it is to the General Assembly that the administering authority is to make an annual report with regard to the territory entrusted to its administration [1]

The Trusteeship Council

§ 94*m* The normal function of supervision of the administration of trust territories is conferred upon the Trusteeship Council—one of the six principal organs of the United Nations In particular, the Trusteeship Council may, under the authority of the General Assembly [2] (*a*) consider reports submitted by the Administering Authority, (*b*) in consultation with the latter accept and examine petitions from the inhabitants of trust territories and, probably, from elsewhere, (*c*) arrange for periodic visits to trust territories at times agreed upon with the Administering Authority [3], (*d*) formulate questionnaires on the political, economic, social, and educational progress of the inhabitants of the trust territories—such questionnaires to form the basis of the annual reports submitted to the General Assembly by the Administering Authority, (*e*) take any other action in conformity with the Trusteeship Agreements The various Trusteeship Agreements lay down that the Administering Authority shall make to the General Assembly an annual report on the basis of the questionnaire drawn up by the Trusteeship Council [4]—such reports to include in-

[1] Articles 87 and 88 With regard to strategic areas the functions of the United Nations are exercised by the Security Council (Article 83)

[2] Article 87

[3] No corresponding provision is to be found in the mandates The liberal interpretation given by the Trusteeship Council to the provisions of the Charter concerning petitions from and visits to trust territory may be gauged from the fact that the first visiting mission sent by the Council was that sent to Western Samoa in 1947 to investigate a petition from the leaders and representatives of that Territory asking that it be granted self-government

[4] In April 1947 the Trusteeship Council approved provisionally the form of a questionnaire which, in accordance with Article 88 of the Charter, should form the basis of the annual reports on each Trust Territory The document contains questions on such matters as the status of the Territory (including the organisation of its legislative, administrative, and judicial systems) and its inhabitants, international and regional relations, and the advancement achieved in the political, economic, educational and social spheres The latter includes questions on standards of living, status of women, human rights, labour conditions, public health, sani-

formation bearing on the measures taken to give effect to the suggestions and recommendations of the General Assembly and the Security Council It is also provided that the Administering Authority shall designate a representative to attend the sessions of the Trusteeship Council at which the annual reports are considered

The composition of the Trusteeship Council [1] differs radically from that of the Mandates Commission under Article 22 of the Covenant The salient feature of the composition of the latter was that its members were not representatives of Governments and, secondly, that the majority of the members of the Commission were not nationals of the mandatories According to Article 86 of the Charter the Trusteeship Council consists of States members of the United Nations each of which has one vote [2] The Charter lays down that the representatives of these States must be persons 'specially qualified' [3] The States in question are (*a*) those which administer trust territories, (*b*) such permanent members of the Security Council as do not administer trust territories, (*c*) States elected by the General Assembly for a period of three years In this category as many States are to be elected as is necessary to ensure that the total number of members of the Trusteeship Council is divided equally between those members of the United Nations which administer trust territories and those which do not By the end of 1947 the composition of the Trusteeship Council was as follows members administering Trust Territories (Australia, Belgium, France, New Zealand, United Kingdom, United States), permanent members not administering Trust Territories (China, Soviet Russia), elected members (Iraq, Mexico, Costa Rica, Philippines)

The composition of the Trusteeship Council appears, at first sight, open to objection inasmuch as it substitutes governmental representation for the system which obtained with regard to the Mandates Commission The latter was composed of individuals not representing any Government, and this fact was generally regarded as a guarantee of its

tation, drugs, alcohol, population, social security and welfare, housing and town planning, and penal organ

isation (Doc T/44)

[1] Article 86 Article 89 (1)

[3] Article 86 (2)

impartiality and independence But it must be borne in mind that a substantial measure of such guarantee is implied in the fact that one half of the members of the Trusteeship Council are States not administering trust territories, that the Trusteeship Council is accountable to and acts under the authority of the General Assembly which has concurrent jurisdiction with it in the function of supervision normally exercised by the Trusteeship Council, that the latter is, in law, bound to perform its functions in a manner calculated to fulfil the purpose of the trusteeship system, and that the adoption of the principle of majority in the voting of the Trusteeship Council[1] minimises the danger of an undue tendency to political compromise alien to the objects of trusteeship but inherent in bodies acting under the requirement of unanimity Moreover, the circumstance that the decisions of the Trusteeship Council are decisions of Governments, as distinguished from those of private individuals, may be a factor increasing their effectiveness and authority

The Sovereignty over Trust Territories

§ 94*n* In considering the question of sovereignty over trust territories—a question which is by no means of mere academic importance—the distinction must be borne in mind between sovereignty as such (or what may be described as residuary sovereignty) and the exercise of sovereignty The latter is clearly vested with the trustee powers subject to supervision by and accountability to the United Nations For most practical purposes the consequences of such exercise of sovereignty are identical with those flowing from sovereignty proper Thus as the trustee States wield full power of jurisdiction as well as of protection, internal and external, over the inhabitants of the trust territories, the governments of these territories are entitled to exact allegiance from the inhabitants although, in strict law, these do not possess the nationality of the trustee powers[2] For it is fundamental that trust territories do not form part of the territory of the States entrusted with their administration For this reason the latter cannot cede or otherwise alter the status of trust territories except with the approval

[1] Article 89 (2)

[2] See the statement of the British Prime Minister in the House of Commons on January 23, 1946, to the effect that such persons have the status of 'British protected persons'

of the United Nations in which the residuary sovereignty must be considered to be vested [1]

The governing consideration is that, in the language of the Charter, it is the United Nations which establishes under its authority the system of trusteeship and that the status of the Power exercising sovereignty is that of 'the administering authority' [2] In essence the position is the same as in the corresponding case of mandates [3] The terms 'trust' and 'tutelle' (in the French text of the Charter) [4] are terms of generally accepted legal connotation implying a delegation and fundamental limitation of authority—a limitation inconsistent with the exclusive advantage or an unrestricted plenitude of power in the authority entrusted with the functions of administration The Charter is a legal instrument, and the technical terms used in it must be given an interpretation consonant with the general principles of law applicable to the terms in question Whatever may be the motives or incentives of direct advantages animating the State vested with the functions of administration, the relation of 'trust' or 'tutelage' or 'fideicommissum' [5] implies fundamentally a relation of service and delegation wholly incompatible with any exclusiveness of rights of sovereignty on the part of the State concerned Although the majority of Trusteeship Agreements provide that the territories in question shall be administered as an 'integral part' of the Administering State,[6] it was made clear at the time of the

[1] See above, p 211

[2] Article 81 When the Charter was drafted there was no disposition to rule out the possibility of the United Nations transferring the trust territory in case of a violation of the trusteeship agreement or of the withdrawal or expulsion of the trustee Power from the United Nations See *Canadian Commentary on the Charter*, p 52

[3] See above, § 94c

[4] The terms used are 'régime international de Tutelle,' 'territoire sous tutelle,' 'accords de Tutelle,' 'Conseil de Tutelle' The Spanish text refers to 'administracion fiduciaria,' 'territorios fideicometidos,' 'consejo de administración fiduciaria'

[5] See above, n 4

[6] Article 4 of the Agreement for New Guinea uses the expression 'as if it were an integral part of Australia' The expression 'as an integral part does not occur in the Agreement for Tanganyika—probably for the reason that the latter is a self contained territory of substantial size, while Togoland and the Cameroons are composed of narrow strips of territory adjoining, respectively, the Gold Coast and Nigeria, they had been administered in the past as integral parts of the latter territories, subject to the provisions of the mandates Finally, the phrase does not occur in the relevant Article 3 of the Agreement for the Pacific Islands administered by the United States (see above, § 94k), it appeared in the Draft submitted by the United States to the Security Council but was deleted by common agreement It will be noted that the expression in question was used in 'B' and 'C' mandates

approval of the Agreements that that phrase does not imply any claim to sovereignty over the trust territories [1] That fact of delegation implies also the ultimate power of revocation in case of abuse or failure of the trust vested in the Administering State Finally, the provisions of the various Trusteeship Agreements pointing to the eventual self-government or independence of the Trust Territories emphasise the absence of the intention to transfer sovereignty to the Administering States The inhabitants of Trust Territories do not acquire the nationality of the Administering State Treaties concluded by it do not apply automatically to the Trust Territory although provision is made for their application if, in the opinion of the Administering Authority, they are appropriate to the needs of the Trust Territory and are conducive to the accomplishment of the principles of the trusteeship system

Dependent Peoples outside the Trusteeship System

§ 94o It is in keeping with the character of the Charter of the United Nations, among the purposes of which figure prominently the encouragement and promotion of fundamental human rights and freedoms, that it should also concern itself with dependent territories, other than trust territories Fundamental freedoms include, ultimately, freedom from government imposed by another State or nation An international society committed in its Charter to the recognition of these principles cannot disinterest itself in peoples which have not yet attained a condition of self-government and the well-being of which is not safeguarded by the system of trusteeship From this point of view

[1] The French and Belgian delegates to the General Assembly stated that 'it was the interpretation of their Governments that the words "as an integral part" were necessary as a matter of administrative convenience and were not considered as granting to the Governments of Belgium and France the power to diminish the political individuality of the Trust Territories' The British delegate stated that the retention of the words 'as an integral part' in the Trusteeship Agreement for Togoland and the Cameroons under British administration 'did not involve administration as an integral part of the United Kingdom itself and did not imply British sovereignty in these areas' (General Assembly, Doc A/258, December 12, 1946, p 6) In the course of the discussion of the terms of the Trusteeship Agreement concerning the former Japanese mandated territories the representative of the United States in the Security Council wished it to be recorded as the view of the United States that the Trusteeship Agreement is 'in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other' *Security Council, Official Records*, Second Year, No 23 (1947), p 476 This statement, it is believed, accurately expresses the legal position

Chapter XI of the Charter, which bears the title 'Declaration Regarding Non-Self-Governing Territories,' is of special significance In that Declaration members of the United Nations administering territories 'whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories' That obligation includes, in particular, the duty, in the language of the Charter

(*a*) 'to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses,' and

(*b*) 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their stages of advancement' [1]

These, within their general compass, are legal obligations But they are obligations for the implementation of which no machinery is provided, and to that extent they may create the impression, which is not wholly justified, of establishing merely a moral obligation Thus while the States in question are required to transmit regularly to the Secretary-General statistical and other information relating to economic, social, and technical conditions, such information is described as being of a 'technical nature,' for 'information purposes,' and only in so far as this is consistent with 'security and constitutional considerations' [2] Yet although the United Nations does not in this case possess anything approaching the powers of supervision and scrutiny with which it is endowed with regard to trust territories, the subject matter of the Declaration is one of legitimate concern for the United Nations In particular, the General Assembly has in regard to it the same powers of discussion and, probably, of recommendation which it has in respect of 'any questions

[1] Article 73 [2] Article 73 (*e*)

or any matters within the scope' of the Charter (Article 10) [1]

X

NEUTRALISED STATES

Westlake, I pp 27 31—Lawrence, §§ 43 and 225—Taylor, § 133—Hershey, § 109—Moore, I § 12—Hyde, I §§ 29, 197, 198—Bluntschli, § 745—Keith's Wheaton, pp 110 114—Anzilotti, pp 238-249—Scelle, I pp 121-134—Heffter, § 145—Geffcken in *Holtzendorff*, IV pp 634 656—Gareis, § 15—Liszt, § 11—Ullmann, § 27—Hackworth, I § 15—Strupp, *Éléments*, § 3e — Fauchille, §§ 348 367 (5) — Despagnet, §§ 137 146 — Mérignhac, II pp 56 65—Pradier Fodére, II §§ 1001 1015—Nys, I pp 410 431 —Rivier, I § 7 — Calvo, IV §§ 2596 2610 — Cruchaga, I §§ 168 176—Cavaglieri, pp 164 174—Piccioni, *Essai sur la neutralité perpétuelle* (2nd ed, 1902)—Regnault, *Des effets de la neutralité perpétuelle* (1898)—Tswettcoff, *De la situation juridique des États neutralisés* (1895)—Wicker, *Neutralisation* (1911)—Descamps, *L'État neutre à titre permanent* (1912)—Richter, *Die Neutralisation von Staaten* (1913)—Krauel, *Neutralität, Neutralisation, und Befriedung im Volkerrecht* (1915) — Littell, *The Neutralisation of States* (1920)—Dupuis, *Le droit des gens et les rapports des Grandes Puissances avec les autres états* (1920)—Sottile, *Nature juridique de la neutralité à titre permanent* (1920)—Ekdahl, *La neutralité perpétuelle avant le pacte de la Société des Nations* (1923)—Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933) (a comprehensive treatise)—Morand in *R G*, 1 (1894), pp 522 537—Nys in *R I*, 2nd ser, 2 (1900), pp 467 and 583, 3 (1901), p 15—Westlake in *R I*, 2nd ser, 3 (1901), pp 389-397—Winslow in *A J*, 2 (1908), pp 366 386—Hagerup in *R G*, 12 (1909), pp 577 602—Wicker in *A J*, 5 (1911), pp 639 652—Erich in *Z V*, 7 (1913), pp 452 476—La Fontaine, Wicker, and others in *Proceedings of the American Society of International Law*, 11 (1917), pp 125 145—Graham in *A J*, 21 (1927), pp 79 94—Moscato in *Rivista*, 22 (1930), pp 379 395, 526 541, and 23 (1931), pp 54 66, 199 215—Dollot in *Hague Recueil*, 67 (1939) (1), pp 7 112

[1] In February 1946, the General Assembly approved a Resolution on Non Self Governing Peoples in which the Secretary-General was requested to include in his annual report on the work of the Organisation a summary of the information transmitted to him by Members under Article 73 In the course of that year Great Britain, France, the United States, Australia, New Zealand, Belgium, Denmark and Holland either offered or declared their intention of transmitting information with regard to certain of their dependent territories In December 1946, the General Assembly instructed the Secretary-General to convene a Committee composed in equal numbers of the representatives of the above mentioned States and of States elected by the General Assembly, and aided by representatives of certain specialised agencies in an advisory capacity, for the purpose of assisting the General Assembly in the consideration of the information received *Journal of the Assembly*, No 75, Suppl A/64, Add 1, p 884 As to the first Report submitted by the United States see Arnold in *Foreign Affairs*, 25 (1947), pp 655-666 In 1947, the Governments administering non self-governing territories in the South Pacific signed an agreement establishing the South Pacific Commission whose object is to promote the economic and social advancement of the two million inhabitants of the South Pacific see Sudy in *Bulletin of State Department*, 16 (1947), p 459.

Concep tion of Neutral ised States

§ 95 A neutralised State is a State whose independence and integrity are for all future time guaranteed by an international convention of the Powers, under the condition that such State binds itself never to take up arms against any other State except for defence against attack, and never to enter into such international obligations as could indirectly involve it in war The reason why a State asks or consents to become neutralised is that it is a weak State and does not want an active part in international politics, being exclusively devoted to peaceable development of welfare The reason why the Powers neutralise a weak State may be a different one in different cases The chief reasons have been hitherto the balance of power in Europe and the interest in keeping up a weak State as a so-called buffer-State between the territories of Great Powers

Not to be confused [1] with neutralisation of States is, in the first place, neutralisation of parts of States, of rivers, canals, and the like, which has the effect that war cannot be made and prepared there, secondly, the special protection arranged, for the term of war, in special conventions for certain establishments, and thirdly, the unilateral declaration of a State that it will always remain neutral [2]

[1] See below, § 207, and vol II § 72, with note on demilitarisation, neutralisation, and internationalisation As to Tangier see Cmd 2203 of 1924 for the Convention organising the Tangier zone, Treaty Series, No 25 (1928), for the Convention of 1928, *A J*, 23 (1929), Suppl, pp 235 284, below, vol II § 72 (9), and Ruzé in *R I*, 3rd ser, 5 (1924), pp 590 629, von Gravenitz, *Die Tangier Frage* (1925), Cot in 52 *Clunet* (1925), pp 609 627, Weir Brown in *J C L*, 3rd ser, 7 (1925), pp 86 90, Fitzgerald in *R G*, 34 (1927), pp 145 170, Hudson in *A J*, 21 (1927), pp 231-237 (the Mixed Court), Toynbee, *Survey*, 1929, pp 189 201, Charles, *Le statut de Tanger* (1927), Stuart, *The International City of Tangier* (1931), Baldoni, *La zona di Tangeri* (1931), and in *Rivista*, 22 (1930), pp 396 414, 542-582, Fenwick in *A J*, 23 (1929), pp 140-143, and see above, p 177, n 1, as to Danzig see above, § 93, and below, vol II § 72 (10)

[2] On so called 'autonomous neutralisation' see Robertson in *A J*, 11 (1917), pp 607 616 There is no doubt that any State can declare itself permanently neutral, but it is not 'neutralised' in the sense hitherto understood An instance of self neutralisation is afforded by Iceland, which in 1918 declared herself 'permanently neutral'—*British and Foreign State Papers*, 111 (1917-1918), p 706 Article 24 of the Conciliation Treaty of February 11, 1929, between the Holy See and Italy (the Lateran Treaty, see below, § 106) may be regarded as another instance In that Article the Holy See declares that 'it desires to take, and shall take, no part in any temporal rivalries between other States,' and that the Vatican City shall therefore 'be invariably and in every event considered as neutral and inviolable territory' *Documents*, 1929, p 224, It seems that self-neutralisation (or autonomous neutralisation) may have political but cannot have legal consequences see Graham, *op. cit* at

Act and Condition of Neutralisation

§ 96 Without thereby becoming a neutralised State, any State can conclude a treaty with another State and undertake the obligation to remain neutral if such other State enters upon war The act through which a State becomes a neutralised State for all time is always an international treaty of the Powers between themselves and between the State concerned, by which treaty the Powers guarantee collectively the independence and integrity of the latter State

The condition of the neutralisation is that the neutralised State abstains from any hostile action, and further from any international engagement which could indirectly drag it into hostilities against any other State And it follows from the neutralisation that the neutralised State can, apart from frontier regulations, neither cede a part of its territory nor acquire new parts of territory without the consent of the Powers [1]

International Position of Neutralised States

§ 97 Since a neutralised State is under the obligation not to make war against any other State, except when attacked, and not to conclude treaties of alliance, guarantee, and the like, it is frequently maintained that neutralised States are part sovereign only, and not International Persons occupying the same position as other States This opinion has, however, no basis if the facts and conditions of their neutralisation are taken into consideration If sovereignty is nothing else than supreme authority, a neutralised State is as fully sovereign as any not-neutralised State It is entirely independent outside as well as inside its borders, since independence does not at all mean unlimited liberty of action [2]

Switzerland

§ 98 The Swiss Confederation,[3] which was recognised by the Westphalian Peace of 1648, has pursued a traditional policy of neutrality since that time During the French Revolution and the Napoleonic Wars, however, it did not succeed in keeping up its neutrality French intervention

pp 87, 88, and, in particular, Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp 179 186

[1] This is a much discussed and very controversial point See Piccioni, *op cit*, p 82, Descamps, *La neutralité de la Belgique* (1902), pp 508 527, Fauchille in *R G*, 2 (1895), pp 400-439, Westlake in *R I*, 2nd ser, 3 (1901), p 396, Graux in *R I*, 2nd ser, 7 (1905), pp 33 52, Rivier, 1 p 172, Descamps, *L'État neutre à titre permanent* (1912), pp 215-217, de Louter, 1 pp 365, 366, Strupp, *op cit*, pp 279 289 See also below, § 215

[2] See below, § 126

[3] See Schweizer, *Die Geschichte der schweizerischen Neutralität*, 2 vols (1895), and Sherman in *A J*, 12 (1918), pp 241 250, 462 474, and 780 795

brought about in 1798 a new Constitution, according to which the several cantons ceased to be independent States and Switzerland turned from a Confederation of States into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance, linked to France It was not till 1814 that Switzerland became again a Confederation of States, and not till 1815 that she succeeded in becoming permanently neutralised. On March 20, 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia signed the declaration in which the permanent neutrality of Switzerland was recognised and collectively guaranteed, and on May 27, 1815, Switzerland acceded to this declaration Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated November 20, 1815, of the Powers assembled at Paris after the final defeat of Napoleon, recognised it again [1] Since that time Switzerland has always succeeded in maintaining her neutrality She has built fortresses and organised a strong army for that purpose, and in January 1871, during the Franco-Prussian War, she disarmed a French army of more than eighty thousand men who had taken refuge on her territory, and guarded them till after the war [2] The 'unique situation' of Switzerland was recognised by the Council of the League when she was admitted as an original member on the understanding that she 'shall not be forced to participate in a military action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory.' [3]

[1] See Martens, *N R*, II pp 157, 173, 419, 740

[2] See Mowat in *B Y*, 1923-1924, pp 90 94, Rappard, *L'entrée de la Suisse dans la Société des Nations* (1924), vol II § 292*g*, and Guggenheim in *Z o R*, 7 (1928), pp 266-273 See also Bonjour, *Geschichte der schweizerischen Neutralitat* (1946), (also in English translation, 1946) During the application of sanctions against Italy in 1935 and 1936 Switzerland interpreted the above quoted condition of her admission as meaning that the participation on her part in *economic* measures was conditional upon their not endangering her military neutrality See *Sixteenth Assembly, Plenary Meetings*, October 10, 1935, p 6, and the Message of the Swiss Federal Council of December 2, 1935 (*Bundesblatt*, 1935, pp 943, 944), both are quoted by Lauterpacht, 'Collective Security and Neutrality,' in *Politica*, November 1936, p 150

[3] See vol II § 292*g* See also Schindler in *R I*, 3rd ser, 19 (1938), pp 433-472 As to the position with regard to the United Nations see Guggenheim in *Neue Schweizer Rundschau*, November and December, 1945, the same, *Völkerbund, Dumbarton Oaks, und die schweizerische Neutralitat* (1945), and in *Annuaire Suisse de*

Belgium

§ 99 Belgium [1] became neutralised from the moment she was recognised as an independent State in 1831. The Treaty of London, signed on November 15, 1831, by Great Britain, Austria, Belgium, France, Prussia, and Russia, stipulated at the same time in Article 7 the independence and the permanent neutrality of Belgium, and in Article 25 the guarantee of the signatory five Great Powers [2] And the guarantee was renewed in Article 2 of the Treaty of London of April 19, 1839,[3] to which Great Britain, Austria, France, Prussia, Russia, and Holland were parties, and which was the final treaty concerning the separation of Belgium from the Netherlands [4]

The neutrality of Belgium was violated in 1914, when Germany attacked her for the purpose of invading France through Belgian territory [5] For this reason Belgium, at the conference after the First World War, asked that she should cease to be neutralised, and the Powers acceded to her demand It is believed that the only steps which were taken in the shape of treaties to give effect to this policy were as follows (1) By Article 31 of the Treaty of Versailles, Article 83 of the Treaty of St. Germain, and Article 67 of the Treaty of Trianon, Germany (as the successor of Prussia) and Austria and Hungary 'consent to the abrogation of the Treaties of April 19, 1839, and undertake immediately to recognise and to observe whatever conventions may be

droit international, II (1945), pp 9 47 See also Hageman, *Die neuen Tendenzen der Neutralitat und die volkerrechtliche Stellung des Schweiz* (1945)

[1] See Descamps, *La Neutralité de la Belgique* (1902), and *L'État neutre à titre permanent* (1912), Sanger and Norton, *England's Guarantee to Belgium and Luxemburg* (1915), *Neutrality of Belgium* (1920), Foreign Office Peace Handbook, Lingelbach in *American Historical Review*, 39 (1933 1934), pp 48 72

[2] See Martens, *N R*, xi pp 394 and 404

[3] See Martens, *N R*, xvi p 770

[4] Annexed to it is the Treaty of the same date between Belgium and Holland

[5] Charles de Visscher, *Belgium's Case* (1916), Strupp, *Die Neutralisation und die Neutralitat Belgiens* (1917), and *op cit*, pp 59-89, Garner, §§ 431-452, Nippold, *Die Verletzung der Neutralitat Luxemburgs und Belgiens* (1920), Kunz, *Das Problem von der Verletzung der belgischen Neutralitat* (1920), and in *Strupp, Wort*, i pp 122-124, Fleischmann in Liszt, § 11 (n 8), Le Roy, *L'Abrogation de la neutralité de la Belgique* (1923), Jaspar, *Belgium and Western Europe since the Peace Treaty* in *Journal of British Institute of International Affairs*, July 1924, p 172, Gottschalk, *Frankreich und das neutralisierte Belgien* (1926), Banning, *Les origines et les phases de la neutralité Belge* (1927), Ministère des Affaires Etrangères, *Documents Diplomatiques, La revision des traités de 1839* (Brussels, 1929), Tobin in A J, 26 (1932), pp 514 532.

entered into by the Principal Allied and Associated Powers . . . in concert with the Governments of Belgium and of the Netherlands to replace the said Treaties of 1839' (ii) By the 'Locarno Pact' of December 1, 1925,[1] Great Britain, France, Germany, Italy, and Belgium 'take note of the abrogation of the treaties for the neutralisation of Belgium' (iii) On May 22, 1926, by a treaty signed at Paris between Great Britain, France, Holland, and Belgium, the relevant parts of the Treaties of London of 1839 were abrogated, and it was arranged that Germany, Austria, Hungary, and Soviet Russia should be invited to accede to this treaty, it has, however, not yet been ratified, and accordingly the last-mentioned Powers have not yet been invited to accede to it.[2] Thus Belgium ceased *de facto* to be a neutralised State at the end of the First World War,[3] although certain legal formalities required for the formal discharge of her old status remained incomplete In March 1936, in view of the changes in the political situation of Europe since 1919 and the denunciation of the Treaty of Locarno by Germany,[4] Belgium, in pursuance of a policy of non-involvement, requested to be released from the obligations of the Treaty of Locarno and announced a somewhat restricted interpretation, on her part, of her obligations under Article 16 of the Covenant of the League.[5] These claims were conceded by Great Britain and France subject to the obligations of the Covenant.[6] However, no such

[1] See below, § 577*a*, and vol ii § 11*d* (*d*)

[2] For the text of the Treaty see Hudson, *Legislation*, iii p 1896

[3] Thus no special arrangement, as in the case of Switzerland (see § 98 (n 1), above) was considered necessary when she became an original member of the League

[4] See below, p 853, n 4

[5] On October 14, 1936, in a speech to his Council of Ministers, the King of the Belgians made a declaration as to future Belgian policy which was widely interpreted as a return to the status of neutrality See Lapradelle in *R I* (*Paris*), 18 (1936), pp 538 546 And see *ibid*, pp 695-697, for the text of the speech

[6] The first step of international importance in this direction was made on April 24, 1937, when Great Britain and France, in a joint communication addressed to Belgium, released the latter from her guarantee to these two Powers resulting from the Treaty of Locarno and from the London Agreement of March 19, 1936, concluded subsequently to the denunciation of the Treaty of Locarno by Germany (see below, p 853, n 4) At the same time Great Britain and France affirmed the continued validity of their own obligations of guarantee towards Belgium as laid down in these instruments, while Belgium expressly declared her continued adherence to the obligations of the Covenant of the League (Cmd 5437 (1937)) The latter included the obligation to grant the right of passage through Belgian territory to States co operating in

claims to a special status of neutrality or neutralisation were made when Belgium became a member of the United Nations, and her status of permanent neutrality must now be regarded as merged in the benefits and the obligations of the general system of collective security set up by the Charter of the United Nations

Luxemburg

§ 100 The Grand Duchy of Luxemburg [1] was from 1815 to 1890 in personal union with the Netherlands, but at the same time a member of the Germanic Confederation, and Prussia had after 1856 the right to keep troops in the fortress of Luxemburg In 1866 the Germanic Confederation came to an end, and Napoleon III made efforts to acquire Luxemburg by purchase from the King of Holland, who was at the same time Grand Duke of Luxemburg As Prussia objected to this, it seemed advisable to the Powers to neutralise Luxemburg A conference met in London, at which Great Britain, Austria, Belgium, France, Holland and Luxemburg, Italy, Prussia, and Russia were represented, and on May 11, 1867, a treaty was signed for the purpose of its neutralisation, which is stipulated and collectively guaranteed by all the signatory Powers, Belgium as a neutralised State herself excepted, by Article 2 [2]

The neutralisation took place, however, upon the abnormal condition that Luxemburg was not allowed to keep any armed force, with the exception of police for the maintenance of safety and order, nor to possess any fortresses Germany violated the neutrality of Luxemburg in 1914 [3] for the purpose of invading France, and its neutralisation, like that of Belgium, came apparently to an end as a result of the

the enforcement of the Covenant through common action to which Belgium had assented

[1] See Servais, *Le Grand Duché de Luxembourg et le traité de Londres* (1879), Eyschen in *R I*, 2nd ser, 1 (1899), pp 5 42, Wompach, *Le Luxembourg neutre* (1900), Sanger and Norton, *op cit*, Strupp, *op cit*, pp 90-149, Servais, *La neutralité du Grand Duché de Luxembourg pendant la guerre de* 1914 1918 (1919), Griessinger, *Die volkerrechtliche Stellung Luxemburgs nach dem Krieg* (1927), Wehrer, *La politique de sécurité et d'arbitrage du Grand Duché de Luxembourg* (1934), and in *R G*, 31 (1924), pp 169 202 Block, *Luxemburg und der Volkerbund* (1935), Borsi in *Rivista*, 17 (1925), pp 3 17, Whitton in *Hague Recueil*, vol 17 (1927) (II), pp 453 571, Wehrer in *R I*, 3rd ser, 13 (1932), pp 326 366, 641-663, Bech in *Dictionnaire diplomatique de l'Académie diplomatique internationale*, 1934, Bumiller in *Z V*, 22 (1938), pp 34-70

[2] See Martens, *N R G*, xviii p 448

[3] *Neutralité du Grand-Duché de Luxembourg pendant la guerre* 1914-1918, published by Ministère d'Etat, Luxemburg, 1919, Garner, §§ 453-459

First World War. By Article 40 of the Treaty of Versailles and Article 84 of the Treaty of St Germain in 1919, Germany and Austria respectively 'adhered to the termination of the régime of neutrality,' and agreed to accept in advance the arrangements which might be made regarding Luxemburg by the Allied and Associated Powers No arrangements were actually made for the abrogation by treaty of the neutralisation of Luxemburg [1] However, as in the case of Belgium, her permanent neutralisation must now be regarded as having been decisively affected by her unqualified membership of the United Nations By a treaty of July 25, 1921,[2] Luxemburg entered into an economic union with Belgium [3] That Union, in turn, entered into a Customs Union with Holland on September 5, 1944

The Free Territory of Trieste

§ 101 The Permanent Statute of the Free Territory of Trieste constituted in the Treaty of Peace with Italy of 1946 lays down that the Territory shall be demilitarised and declared neutral, that no armed forces, except upon direction of the Security Council of the United Nations, shall be allowed, and that the Government of the Free Territory shall not make or discuss any military arrangements or undertakings with any State

XI

NON-CHRISTIAN STATES

Westlake, 1 p 40—Phillimore, 1 §§ 27 33—Bluntschli, §§ 1-16—Heffter, § 7—Gareis, § 10—Rivier, 1 pp 13-18—Fauchille, §§ 40 44 (1)—Martens, § 41—Nys, 1 pp 126-137—Westlake, *Papers*, pp 141-143

§§ 102 and 103, which related to non-Christian States, are now omitted as being substantially comprised in § 28 above.

[1] By a note addressed to the League of April 28, 1923, the Government of Luxemburg asserted that the Treaty of May 11, 1867, was still in force and that Luxemburg was a perpetually neutral State (*Off J*, 1923, p 722) The position of Luxemburg as a member of the League was not free from obscurity Her representatives, when first applying for admission to the League, expressed a desire to retain her neutralisation, to have it placed under the guarantee of the League, and to be freed from such obligations of the Covenant as were incompatible with it (*Records of the First Assembly*, Fifth Committee, pp 184 and 225) Upon the withdrawal of this reservation Luxemburg was admitted to the League on December 16, 1920, and at the same time her Government undertook to introduce the legislation required for modifying her constitution so as to make it consistent with her obligations under the Covenant (*Off J*, 1921, pp 96 97, 706-708) See Wehrer in *R G*, 31 (1924), pp 169-202, Borsi in *Rivista*, 17 (1925), pp 3-17, Fauchille, § 365, Hudson in *B Y*, 16 (1935), p 141

[2] *L N T S*, 9 (1922), p 224

[3] Crockaert in *R I*, 3rd ser, 3 (1922), pp 203 221, and above, p 169, n 4

XII

THE HOLY SEE

Toynbee, *Survey*, 1929, pp 422 478—Scelle, 1 pp 290 307—Giannini, *Saggio di una bibliographia sugli accordi del Laterano* (1930)—Raeber, *Der neue Kirchenstaat* (1930)—Tostain, *Le traité politique du Lateran et la personnalité en droit international public* (1930)—Le Fur, *Le Saint Siège et le Droit des Gens* (1930)—the same in *R I (Paris)*, 3 (1929), pp 25-69—Donato, *La Città del Vaticano nella Teoria Generale dello Stato* (1930)—Brazzola, *La Cité du Vatican est elle un Etat ?* (1932)—Dilhac, *Les accords de Lateran* (1932)—Govella, *La Cité du Vatican et la notion d'Etat* (1933)—Falco, *The Legal Position of the Holy See* (transl from Italian, 1935)—Eckhardt, *The Papacy and World Affairs* (1937)—*Round Table*, 19 (1928 1929), pp 740 764—Anzilotti in *Rivista*, 21 (1929), pp 165 176—Diena, *ibid*, pp 177 187—Jemolo, *ibid*, pp 188-196—Morelli, *ibid*, pp 197-236—Scott in *A S Proceedings*, 1929, pp 13 23—De la Brière in *R I (Paris)*, 3 (1929), pp 13 24—the same in *R I*, 3rd ser, 10 (1929), pp 123 158, and in *Hague Recueil*, vol 33 (1930) (iii), pp 115 163—Ruzé in *R I*, 3rd ser, 10 (1929), pp 336 364—Fenwick in *A J*, 23 (1929), pp 370 374—Delos in *R G*, 36 (1929), pp 452 478—Ottolenghi in *Rivista*, 22 (1930), pp 180 195—Checchini, *ibid*, pp 196 211—Strupp in *Z V* 15 (1930), pp 531 574—Oeschey, *ibid*, pp 623 693—Balladore Pallieri in *Z o R*, 11 (1931), pp 505 525—Kaas in *Z o V*, 3 (1932 1933), pp 488 522 (with an extensive bibliography on pp 489, 490)—Ireland in *A J*, 27 (1933), pp 271 289—Schoen in *Z o R*, 14 (1934), pp 1 25—D'Avack in *Rivista*, 27 (1935), pp 83-124, 217 236

The Former Papal States

§ 104 When the Law of Nations began to grow up among the States of Christendom, the Pope was the monarch of one of those States—namely, the so-called Papal States [1] Throughout the existence of the Papal States, which were annexed by the Kingdom of Italy in 1870, the Pope was a monarch, and, as such, the equal of all other monarchs His position was, however, even then anomalous, as his influence and the privileges granted to him by the different States were due, not alone to his being the monarch of a State, but to his being the head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Pope existed within the province of precedence only

[1] This State owed its existence to Pepin le Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen II and Adrian I, who crowned them as Kings of the Franks It remained in the hands of the Popes till 1798, when it became a Republic for about three years In 1801 the former order of things was re established, but in 1809 it became a part of the Napoleonic Empire In 1814 it was re established, and remained in existence till 1870

The Italian Law of Guarantee

§ 105 When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the latter to the Roman Catholic Church It seemed impossible that the Pope should become an ordinary Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church To meet the case the Italian Parliament passed in 1871 an Act regarding the guarantees granted to the Pope and the Holy See, which is commonly called the 'Law of Guarantee'[1] No Pope recognised this Italian Law of Guarantee, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law But in practice foreign States as well as the Pope himself—although the latter never ceased to protest against the condition of things created by the annexation of the Papal States—made use of the provisions[2] of that law Several foreign States sent, side by side with their diplomatic envoys accredited to Italy, special envoys to the Pope, and the latter sent envoys to foreign States[3] They concluded with the Holy See agreements, usually called concordats,[4] which they treated in most respects as analogous to treaties The question of the legal

[1] Its principal provisions (Martens, *N R G*, xviii p 41) will be found in the former editions of this treatise

[2] But the Pope never accepted the allowance provided by the Law of Guarantee

[3] See *Strupp, Wort*, § ii pp 232-243 In 1935 the Italian Court of Cassation held that the Maltese Order was an international person In 1884 Italy recognised the Order's right of legation, and in 1929 by decree admitted its right to be described as sovereign and to receive certain ceremonial treatment *Nanni and Others* v *The Maltese Order, Giurisprudenza Italiana*, 1935, I (1) p 415, *Annual Digest*, 1935-1937, Case No 2 This seems to apply only to the Catholic branch of the Order under the 'Duke and Grand Master' in Rome Its diplomatic representative forms part of the diplomatic corps in Vienna and Budapest see Hold-Ferneck, i p 247 and Cansacchi, *La Personalità di diritto internazionale del S M O Gerosolimitano Detto di Malta* (1936)

[4] In a case decided in 1934 the Supreme District Court of Bavaria based its decision on the view that concordats had the same internal validity as treaties *In re A Nun's Dress, Annual Digest*, 1933-1934, Case No 176 And see on concordats generally de la Brière in *Hague Recueil*, vol 62 (1938) (i), pp. 371-464.

position of the Holy See was widely discussed in the literature of International Law, and many writers, including the author of this treatise, were of the view that although the Holy See was not an international person, it had by custom and tacit consent of most States acquired a quasi-international position [1]

The Lateran Treaty, 1929

§ 106 The hitherto controversial international position of the Holy See was clarified as the result of the Treaty of February 11, 1929, between the Holy See and Italy—the so-called Lateran Treaty [2] In that Treaty Italy acknowledged the sovereignty of the Holy See in international matters as inherent in its nature and as being in conformity with its tradition and the requirements of its mission in the world (Article 2) At the same time she recognised the State of the Vatican City under the sovereignty of the Supreme Pontiff (Article 26) [3] Italy also recognised the passive and active right of legation as belonging to the Holy See in accordance with International Law (Article 12) [4] Article 24

[1] On the position of the Holy See before 1929 see Hall, § 98, Westlake, I pp 37-39, Phillimore, II §§ 278 440, Twiss, I §§ 206-207, Taylor, §§ 277, 278, 282, Wharton, I § 70, p 546, Hershey, § 89, Moore, I § 18, Bluntschli, § 172, Heffter, §§ 40-41, Geffcken in *Holtzendorf*, II pp 151-222, Gareis, § 13, Liszt, § 7 (VI), Ullmann, § 28, Hatschek, § 8, Fauchille, §§ 370-396, Despagnet, §§ 147-164, Mérignhac, II pp 119 153, Nys, II pp 349 376, Rivier, I § 8, Fiore, I §§ 520, 521, Martens, I § 84, Anzilotti, pp 76 85, Cavaglieri, pp 123-133, Gemma, pp 45 51, Smith, I pp 207-229, De Louter, I pp 164-167, Cruchaga, I §§ 323-337, Fiore, *Della condizione giuridica internazionale della Chiesa e del Papa* (1887), Bompard, *Le Pape et le droit des gens* (1888), Imbart-Latour, *La Papauté en droit international* (1893), Olivart, *Le Pape, les États de l'Église et l'Italie* (1897), Le Fur, *Le Saint-Siège et la Cour de Cassation* (1911), Lampert, *Die volkerrechtliche Stellung des apostolischen Stuhles* (1916), Praag, §§ 6 and 272 274, Bastgen in *Strupp, Wört*, II 232 243, Wynen, *Die Rechts und insbesondere die Vermögensfähigkeit des apostolischen Stuhles nach internationalem Rechte* (1919), and *Die papstliche Diplomatie* (1922), De la Brière, *L'organisation internationale du monde contemporain et la Papauté souveraine* (1924), Chrétien in *R G*, 6 (1899), pp 281-291, Bompard in *R G*, 7 (1900), pp 369 387, Flaischlen in *R I*, 2nd ser, 6 (1904), pp 85 94, Higgins in *J C L*, New Ser, 9 (1909), pp 252-264, Gidel in *R G*, 18 (1911), pp 589 620, Donnedieu de Vabres, *ibid*, 21 (1914), pp 339 379, Scelle, *ibid*, 24 (1917), pp 244 255, Goyau in *Hague Recueil*, 1925 (I), pp 199-236, Ruzé in *R I*, 3rd ser, 7 (1926), pp 5 56

[2] For the texts of the Lateran Agreements see *Documents*, 1929, pp 216 241, *A J*, 23 (1929), Suppl, pp 187 195

[3] This is a reiteration of Article 3 in which Italy 'recognises the full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the Vatican'

[4] As to the foreign service of the Vatican City see Benson, *Vatican Diplomatic Practice* (1936) and De la Brière in *R I (Paris)*, 15 (1935), pp. 340-346 As to the position of diplomatic agents of Italian nationality

of the Treaty contained a declaration by the Holy See with regard to the sovereignty belonging to it in international matters. It was stated there that the Holy See does not desire to take and shall not take part in temporal rivalries between other States and in international conferences concerned with such matters 'save and except in the event of such parties making a mutual appeal to the pacific mission of the Holy See, the latter reserving in any event the right of exercising its moral and spiritual power' Accordingly, the same Article provided that the Vatican City shall in all circumstances be considered as neutral and inviolable territory.[1] The Law of Guarantees of 1871 was formally abrogated. The Holy See declared the Roman question to be definitely and irrevocably settled, and recognised the Kingdom of Italy with Rome as the capital of the Italian State. The Treaty was accompanied by a Concordat and by a Financial Convention which, in consideration of the material injury suffered by the Holy See by reason of the loss of the Patrimony of St Peter in 1870, provided for the payment of a substantial sum by Italy to the Holy See

The Status of the Vatican City in International Law

§ 107 The Lateran Treaty marks the resumption of the formal membership, interrupted in 1871, of the Holy See in the society of States Undoubtedly, the constituent elements of statehood are, in the case of the Vatican City, highly abnormal or reduced to a bare minimum The territory of the Vatican City does not exceed one hundred acres Its population does not reach seven hundred and is composed almost exclusively of persons residing therein by virtue of their office[2] Its independence as a government, while, on the one hand, somewhat impaired by the close

accredited to the Holy See see Morelli in *Rivista*, 26 (1934), pp 42 56 As to concordats see Bierbaum, *Das Konkordat* (1928), Lange Ronneberg, *Die Konkordate* (1929), Giannini, *I concordati post bellici* (1930), Huber, *Verträge zwischen Staat und Kirche im Deutschen Reich* (1930), Wagnon, *Concordats et Droit International* (1935) See also the decision of the Supreme District Court of Bavaria, given in December 1935, to the effect that concordats with the Holy See must be regarded as international treaties or at least treated as if they were such *Juristische Wochenschrift*, 1935, p 960

[1] See also above, § 95, p 218, n 1 On the immunity of the property of the Vatican City in connection with military operations see Herbert Wright in *A J*, 38 (1944), pp 452-457

[2] And of their descendants, who must emigrate when they marry or attain the age of twenty-five

association with the Italian State, has, on the other hand, a peculiar character by reason of the nature of the spiritual purpose for the better fulfilment of which it exists Also, having regard to the wording of the Treaty, it is not always easy to decide whether sovereign statehood in the field of International Law is vested in the Holy See or in the Vatican City In fact there are writers who maintain that, far from there being one, controversial, international person, there exist as the result of the Lateran Treaty two international persons —the Holy See and the Vatican City—the only point in dispute being whether these two persons are united by a personal or a real union [1]

The accurate view is probably that the Lateran Treaty has created a new international State of the Vatican City with the incumbent of the Holy See as its Head That State possesses the formal requirements of statehood and is an international person recognised as such by other States Its true significance in the field of International Law lies in the fact that international personality is here recognised to be vested in an entity pursuing objects essentially different from those inherent in national States such as those which have hitherto composed the society of States A way is thus opened for direct representation in the sphere of International Law of spiritual, economic, and other interests lying on a plane different from the political interests of States The possibilities, in a similar direction, inherent in the constitution of the International Labour Organisation are discussed below.[2]

[1] For a discussion of these views see Falco, *op cit* And see, in addition to the writers cited above at p 226, Jarrige, *La condition internationale du Saint Siège avant et après les accords du Latran* (1930), Bracci, *Italia, S Sede e Città del Vaticano* (1931), Arangio-Ruiz in *Rivista di diritto pubblico*, 1929, pp 615 *et seq* , Balladore Pallieri in *Rivista internazionale di scienze sociali*, etc , 1930, pp 195 *et seq* , Ruffini in *Atti della Reale Academia delle Scienze di Torino*, 66 (1931), pp 585 *et seq* , Giacometti in *Zeitschrift für die gesamte Staatswissenschaft*, xc , Part I (1931), pp 40 *et seq* , Petroncelli in *Rivista internazionale di scienze sociali*, etc , 1932, pp 169 *et seq*

[2] See § 340*gg*

XIII

STATES AT PRESENT INTERNATIONAL PERSONS

European States

§ 108. In Europe there are

Albania [1]
Austria [2]
Belgium
Bulgaria
Czecho-Slovakia
Denmark
Finland.
France
Germany [3]
Great Britain
Greece
Holland
Hungary
Iceland [4]
Italy
Luxemburg.
Norway
Poland.
Portugal
Roumania.
Spain
Sweden
Switzerland
Turkey
Union of Soviet Socialist Republics (Russia)
Yugoslavia

[1] In 1913 Albania was constituted a sovereign independent kingdom and neutralised, 'sa neutralité (*sic*) est garantie par les six Puissances' (Martens, *N R G*, 3rd ser, ix pp 650 651) In the consideration of Albania's application for admission to the League, doubt was expressed whether the status of 1913 continued to exist or not She was finally admitted to the League on December 17, 1920, no reference being made to her neutralisation (*Records of the First Assembly*, Fifth Commission, pp 189, 190, and 212 214, and *Journal of the First Assembly*, pp 276-278) Fauchille, § 366 (1), and the Declaration made by Great Britain, France, Italy, and Japan of November 9, 1921, in *L N T S*, 12, p 383 See Toynbee, *Survey*, 1927, pp 164-184, and 1934, pp 535, 536 In 1938 Italy invaded Albania and, for a time, brought her independence to an end See Sereni in *American Political Science Review*, 35 (1941), pp 311-317 Albanian sovereignty was restored in 1945 However, owing partly to the non-recognition of her government by a number of States, Albania was not invited to the Conference at San Francisco in 1945 and she did not become an original member of the United Nations

[2] In 1938 Austria was annexed by Germany See Toynbee, *Survey*, 1938 (1), pp 179-259, Klinghoffer, *Les aspects juridiques de l'occupation de l'Autriche* (1943), Herbert Wright in *A J*, 38 (1944), pp 621-635 On November 1, 1943, the Foreign Ministers of Great Britain, the United States and Soviet Russia signed at Moscow a Declaration in which they stated that they regarded the annexation imposed upon Austria by Germany as null and void and that they wished to see the re-establishment of a free and independent Austria In 1945 a number of States, including the Great Powers, recognised the Austrian Government An Austrian representative was admitted as observer to the last meeting of the Assembly of the League in 1946

[3] See below, § 237*a*

[4] See above, § 87, p 163, n 3

The following are very small, but yet full sovereign States
Monaco,[1] the Vatican City and Liechtenstein [2]

The following are half sovereign States.
Andorra (under the protectorate of France and Spain).
San Marino (under the protectorate of Italy) [3]

American States

§ 109 In North America there are:
The United States of America
Canada
The United States of Mexico.

In Central America there are

Costa Rica	Haiti
Cuba	Honduras
Dominican Republic (San Domingo).	Nicaragua
Guatemala	Panama
	El Salvador

In South America there are

The United States of Argentina	Ecuador.
Bolivia	Paraguay
The United States of Brazil.	Peru
Chile.	Uruguay.
Colombia.	The United States of Venezuela

African States

§ 110 In Africa there are Full sovereign States
Egypt.
Ethiopia [4]
Liberia
Union of South Africa.

[1] But see now the treaty between France and Monaco referred to above, § 93, p 175, n 4 In April 1937 the Principality of Monaco accepted generally the jurisdiction of the Permanent Court of International Justice and adhered to the Optional Clause of Article 36 of the Statute see *Monthly Summary*, May 1937, p 120

[2] Liechtenstein was refused admission to the League on the ground that it did 'not appear to be in a position to carry out all the international obligations imposed by the Covenant,' presumably on account of its small size *Records of the Second Assembly*, 1921, *Plenary Meetings*, p 686 And see above, p 169, n 4

[3] See, however, above, § 93

[4] As to the purported annexation of Ethiopia by Italy in 1936 see above, p 146, and below, p 522 In an agreement concluded in January 1942 between Great Britain and the Emperor of Ethiopia the former recognised Ethiopia as being a free and independent State and the Emperor its lawful ruler (Cmd 6334, Ethiopia No 1 (1942)) That agreement was replaced by one concluded in 1944 which did away with most of the restrictions, necessitated by the war, upon Ethiopian sovereignty (Cmd 6584, Ethiopia No 1 (1945)) See also Bentwich in *B Y*, 22 (1945), pp 275-278

Half sovereign States.

Tunis, Morocco (under French protectorate)

§ 111. In Asia there are the following States — Asiatic States

Afghanistan	Iran (Persia)	Pakistan	
Burma	Iraq [3]	Philippine Commonwealth	
China	Japan		
Hedjaz and Nejd (Saudi Arabia) [1]	Lebanon [4]	Siam	Syria [4]
	Mongolia [5]	Transjordan	
India [2]	Nepal [6]	Yemen [7]	

Half sovereign State: Thibet [8]

§ 111*a* Australia, New Zealand — Australasian States

[1] Hedjaz appeared in the Annex to the Covenant as an original member of the League. She never became a member. In 1927 she was united with the Kingdom of Nejd. See Toynbee, *Survey*, 1928, pp 284-319. In 1932 she assumed the name of 'Kingdom of Saudi Arabia'. See also the Agreement for Friendship and Neighbourly Relations between Great Britain and Saudi Arabia of April 20, 1942, *Treaty Series* No 17 (1947), Cmd 7084.

[2] As to India, see above, p 190, n 6.

[3] See above, § 94*d*.

[4] See above, p 199.

[5] In January 1946, following a plebiscite held in Outer Mongolia in October 1945, China recognised the independence of Outer Mongolia. See Wei Ying Pang in *R G*, 51 (1947), pp 172 186.

[6] Since 1934 an Envoy Extraordinary and Minister Plenipotentiary has been accredited from Nepal to Great Britain, and a British diplomatic representative of the same rank has been accredited to Nepal. For the Treaty of Friendship between Great Britain and Nepal of December 21, 1923, see Aitchison, *A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*, vol 14 (1929), p 75. In 1947 normal diplomatic and consular relations were established between the United States and Nepal: see *Bulletin of State Department*, 16 (1947), p 949, for the detailed Agreement on the subject.

[7] For the Treaty of February 11, 1934, in which the United Kingdom recognised Yemen's complete and absolute independence 'in all affairs of whatsoever kind,' see *Documents*, 1934, p 455, Treaty Series, No 34 (1934), Cmd 4752. On the Seven Weeks' War in 1932 between Saudi Arabia and Yemen see Toynbee, *Survey*, 1934, pp 310 321. See also Jacob in *Grotius Society*, 18 (1932), pp 131 153.

[8] Nominally Thibet (and, partly, Sinkiang) is regarded as being under the protection or suzerainty of China. With regard to Mongolia the political dependence on Soviet Russia, which seems to have included a treaty right of the latter to send troops to the Mongolian People's Republic, was not inconsistent with the nominal sovereignty of China. See Nemzer in *A J*, 33 (1939), pp 452 464. See also Makarov in *Z o V*, 7 (1937), pp 313-344. And see above, n 7.

In Article 2 of the Treaty of July 3, 1914, between Great Britain, China and Thibet, it was recognised that Thibet was under the suzerainty of China. See Aitchison, *op cit*, p 35. According to Article 9 of the Treaty of September 7, 1904, between Great Britain and Thibet the latter undertook not to cede or otherwise dispose of its territory, or to permit intervention by foreign Powers, or to admit their representatives, or to grant concessions or to pledge revenues to foreign Powers or their subjects, without the consent of Great Britain. Aitchison, *op cit*, p 25. See Toynbee, *Survey*, 1934, pp 675-691, 1935 (1), pp 332 335. See also Akzin for a survey of the membership of the Universal Postal Union, in *A J*, 27 (1933), pp 651-674.

CHAPTER II

POSITION OF THE STATES WITHIN THE FAMILY OF NATIONS

I

INTERNATIONAL PERSONALITY

Vattel, I §§ 13 25—Hall, § 7—Westlake, I pp 306 309—Lawrence, § 57—Phillimore, I §§ 144-147—Twiss, I § 106—Wheaton, § 60—Hershey, § 131—Moore, I § 23—Bluntschli, §§ 64-81—Hartmann, § 15—Heffter § 26—Holtzendorff in *Holtzendorff*, II pp 47 51—Gareis, §§ 24, 25—Liszt, § 13 (I III)—Ullmann, § 38—Fauchille, §§ 235 241—Despagnet, §§ 165, 166—Nys, II pp 216 222—Pradier-Fodéré, I §§ 165 195—Mérignhac, I pp 233-239—Rivier, I § 19—Fiore, I §§ 367-371—Martens, I § 72—De Louter, I pp 232 235—Gemma, pp 107 115—Fontenay, *Des droits et des devoirs des États entre eux* (1888)—Bustamante, pp 187 195—Fenwick, pp 143 149—Pillet in *R G*, 5 (1898), pp 66, and 236, 6 (1899), p 503—Cavaglieri, *I diritti fondamentali degli Stati nella società internazionale* (1906)—Kelsen, *Das Problem der Souveranität und die Theorie des Volkerrechts* (1920), pp 213 224—Knubben, *Die Subjekte des Volkerrechts* (1928), pp 202 238—Korte, *Grundfragen der volkerrechtlichen Rechtsfahigkeit* (1934), pp 98-101—Scelle, *Manuel élémentaire de droit international public* (1943), pp 87 95—Lord Phillimore in *Hague Recueil*, 1923, pp 29 71—Brown in *A J*, 9 (1915), pp 305-335—Luttger in *Z O*, 6 (1926), pp 203 212—Brierly, pp 39 41, and in *Hague Recueil*, vol 23 (1928) (III), pp 470 477—Bruns in *Z o V*, 1 (1929), pp 12 25—Bilfinger, *ibid*, pp 63-76—Petraschek in *Archiv für Rechts und Sozialphilosophie*, 27 (1934), pp 499 523

The so called Fundamental Rights

§ 112 Until the last two decades of the nineteenth century all jurists agreed that membership of the Family of Nations bestowed so-called fundamental rights on States[1] Such rights were chiefly enumerated as the rights of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse,

[1] As to the fundamental duties of States see Hershey, § 149*a*, Brierly in *B Y*, 1926, pp 20, 21, and Pearce Higgins in *A S Proceedings*, 1927, pp 17 22 It will be observed that the very notion of fundamental rights, if it is not abused as a cover for breaches of the law or for purely political assertions, implies and brings into prominence the corresponding duty to respect the fundamental rights of international personality In so far as it does that the notion of fundamental rights is beneficent and not wholly tautologous

and of good name and reputation. It was maintained that these fundamental rights are a matter of course and self-evident, since the Family of Nations consists of sovereign States But no unanimity existed with regard to the number, the appellation, and the contents of these alleged fundamental rights [1] That condition of things has led to a searching criticism of the whole matter, and several writers [2] have urged, rightly, it is believed, that the notion of fundamental rights of States should totally disappear from the treatises on the Law of Nations. Yet it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and that numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations They are rights and duties which do not arise from international treaties between States, but which the States customarily enjoy and are subject to simply as international persons, and which they grant and receive reciprocally as members of the Family of

[1] Contrast, for instance, Pillet in *R G*, 5 (1898), pp 66 and 236, and *ibid*, 6 (1899), p 503, with Kaufmann, *Das Wesen des Volkerrechts und die Clausula rebus sic stantibus* (1911), pp 106 204 And see now the same in *Hague Recueil*, vol 55 (1935) (IV), pp 574 *et seq* See also the 'Declaration of the Rights and Duties of Nations' proclaimed by the American Institute of International Law in 1916, at its first meeting at Washington, see *A J*, 10 (1916), p 212, and the Report This Declaration is repeated, with the addition of another paragraph, in Project No 7 of the American Institute of International Law for the codification of 'American International Law', see *A J*, 20 (1926), Special Suppl, pp 311, 312 See also for a similar declaration the resolution of the Interparliamentary Union of August 1928, quoted and commented upon by Bruns in *Z o V*, 1 (1929), pp 14 *et seq* And see the Convention on Rights and Duties of States adopted by the Seventh Pan-American Conference in December 1933 *A J*, 28 (1934), Suppl, p 75, Hudson, *Legislation*, VI p 620, *Z ö V*, 4 (1934), p 650 The British retaliatory Order-in-Council of November 27, 1939, opened with the statement that 'His Majesty has been compelled to take up arms against Germany in defence of the fundamental right of nations to a free and peaceful existence' *London Gazette*, November 28, 1939 See also Part I of the Act of Chapultepec adopted by American States in March 1945 *A J*, 39 (1945), Suppl, p 108 And see above, p 65, n 3

[2] See Stoerk in Holtzendorff's *Encyklopadie der Rechtswissenschaft*, 5th ed (1890), p 1291, Jellinek, *System der subjectiven offentlichen Rechte* (1892), p 302, Brierly, pp 39 41 The arguments of these writers have met, however, with considerable resistance, and the existence of fundamental rights of States is emphatically defended by other writers See, for instance, Pillet, *loc cit*, Bruns, *op cit* Bustamante, *op cit*, Liszt, § 13 (1), and Gareis, §§ 24 and 25 Westlake, 1 p 306, is in the ranks of those writers who deny the existence of fundamental rights See also *Annuaire*, 28 (1921), pp 218-224, and 32 (1925), pp 238-245

Nations.[1] They are rights and duties connected with the position of the States within the Family of Nations, and it is therefore only due to their importance to discuss them in a special chapter under that heading

International Personality a Body of Qualities

§ 113 International Personality is the term which characterises fitly the position of the States within the Family of Nations, since a State acquires international personality through its recognition as a member What it really means can be ascertained by going back to the basis [2] of the Law of Nations Such basis is the common consent of the States that a body of legal rules shall regulate their intercourse with one another Now a legally regulated intercourse between sovereign States is only possible under the condition that a certain liberty of action is granted to every State, and that, on the other hand, every State consents to a certain restriction of action in the interest of the liberty of action granted to every other State A State which enters into the Family of Nations retains the natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and to restrict its liberty of action in the interest of that of other States In entering into the Family of Nations a State comes as an equal to equals [3], it demands that certain consideration be paid to its dignity, and to the retention of its independence and of its territorial and personal supremacy. Recognition of a State as a member of the Family of Nations involves recognition of such State's equality, dignity, independence, and territorial and personal supremacy But the recognised State recognises in turn the same qualities in other members of that family, and thereby it undertakes responsibility for violations committed by it. All these qualities constitute as a body the international personality of a State, and international personality may therefore be said to be the fact, involved in the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State.

[1] See Strupp, *Éléments*, § 6
[2] See above, § 12
[3] See above, § 14

Other Characteristics of the Position of the States within the Family of Nations

§ 114. But the position of the States within the Family of Nations is not exclusively characterised by these qualities The States make a community because there is constant intercourse between them. Intercourse is therefore a condition without which the Family of Nations would not and could not exist Again, there are exceptions to the protection of the qualities which constitute the international personality of the States, and these exceptions are likewise characteristic of the position of the States within the Family of Nations. Thus, in time of war belligerents have a right to violate one another's personality in many ways Thus, further, in time of peace as well as in time of war, such violations of the personality of other States are excused as are committed in self-preservation [1] or through justified intervention And, finally, the question of jurisdiction is also important for the position of the States within the Family of Nations. Intercourse, self-preservation, intervention, and jurisdiction will, therefore, be discussed in turn in this Chapter

II

EQUALITY, RANK, AND TITLES

Vattel, II §§ 35 48—Lorimer, I pp 168-181, II p 260—Westlake, I pp 321 325—Lawrence, §§ 112-119—Phillimore, I § 147, II §§ 27-43—Twiss, I § 12—Halleck, I pp 125 155—Taylor, § 282—Wheaton, §§ 152-159—Hershey, § 146—Moore, I § 24—Hyde, II §§ 11, 51, 52, 246—Fenwick, pp 149-158—Bluntschli, §§ 81 94—Hartmann, § 14—Heffter, §§ 27, 28—Holtzendorff in *Holtzendorff*, II pp 11-13—Ullmann, §§ 36, 37—Fauchille, §§ 272 278—Despagnet, §§ 167-171—Pradier-Fodéré, II §§ 484-594—Mérignhac, I pp 310-320—Rivier, I § 9—Nys, II pp 235-255—Calvo, I §§ 210 259—Fiore, I §§ 428 451, and *Code*, §§ 393 426—Martens, I §§ 70, 71—De Louter, I pp 235-240—Cruchaga, I §§ 242 247—Suarez, I §§ 49, 50—Hold-Ferneck, I pp 164-171—Bustamante, pp 257-276—Keith's Wheaton, pp 323-331—Stowell, pp 343 348—*Harvard Research* 1932), pp 475-736 (a valuable treatise on the jurisdictional immunities of foreign States)—Lawrence, *Essays*, pp 191-213—Westlake, *Papers*, pp 86-109—Huber, *Die Gleichheit der Staaten* (1909)—Schücking, *Der Staatenverband der Haager Konferenzen* (1912), pp 216 229—Satow, I. §§ 21-88—Nelson, *Die Rechtswissenschaft ohne Recht* (1917), pp 96 106—Dickinson, *The Equality of States in International Law* (1920)—Rapisardi-

[1] See below, §§ 129-133*f*

Mirabelli, *Il principio dell' uguaglianza giuridica degli Stati* (1920)—Goebel, *The Equality of States* (1923)—Dupuis, *Le droit des gens et les rapports des grandes puissances avec les autres États avant le pacte de la Société des Nations* (1921), pp 13 167 and 421 529—Korte, *Grundfragen der volkerrechtlichen Rechtsfahigkeit und Handlungsfahigkeit der Staaten* (1934)—Weiss in *Hague Recueil*, 1923, pp 525 551—Nys and Streit in *R I*, 2nd ser, 1 (1899), pp 273 313, and 2 (1900), pp 5 25—Hicks in *A J*, 2 (1908), pp 530 561—Armstrong in *A J*, 14 (1920), pp 540 564—Charles de Visscher in *R I*, 3rd ser, 3 (1922), pp 149 170, 300-335—Praag, *ibid*, 4 (1923), pp 436 454—Baker in *B Y*, 1923-1924, pp 1 20—McNair in *Michigan Law Review*, 26 (1927), pp 131-152—Rappard in *Problems of Peace*, ix (1934), pp 14 53—Fischer Williams in *B Y*, 13 (1932), pp 35-37—Scott in *Hague Recueil*, vol 42 (1932) (iv), pp 566-583—Schindler, *ibid*, vol 46 (1933) (iv), pp 260 270—Strupp, *ibid*, vol 47 (1934) (i), pp 508 513—Bilfinger in *Z o V*, 4 (1934), pp 481-497—Myers in *A J*, 31 (1937), pp 437 448—Kelsen in *Yale Law Journal*, 53 (1944), pp 207 220 And see the literature quoted at p 240 on jurisdictional immunities of foreign States

Equality of States and International Legislation

§ 115 The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their international personality [1] According to the traditional doctrine, whatever inequality may exist between States as regards their size, population, power, degree of civilisation, wealth, and other qualities, they are nevertheless equals as International Persons This legal equality, which has now been modified in many respects, has four important consequences

The first is that, whenever a question arises which has to be settled by consent, every State has a right to a vote, but, unless it has agreed otherwise,[2] to one vote only

The second consequence is that legally—although not politically—the vote of the weakest and smallest State has as much weight as the vote of the largest and most powerful Any alteration of International Law by treaty has legal validity for the signatory Powers and those only who later on accede expressly or submit to it tacitly through custom Accordingly, one result of State equality—or, as some will prefer, of State sovereignty—in the international sphere is that International Law as at present constituted knows of no legislative process in the proper sense of the word, *i.e*

[1] See above, §§ 14 and 113 For a criticism of § 115 see Baker, *op cit* For the development of the doctrine of Equality since the publication of Dickinson, *op cit*, in 1920 see McNair, *op cit*, and Schindler and Bilfinger, quoted above

[2] See below, p 247.

the imposition of legally binding rules upon a dissenting State or minority of States

§ 115a. The third consequence of State equality [1] is that— according to the rule *par in parem non habet imperium*—no State can claim jurisdiction over another [2] Therefore, although States can sue in foreign courts,[3] they cannot as a rule be sued [4] Equality of States and Immunity from Jurisdiction

[1] The statement as to the third and fourth consequences assumes that the foreign State and its Government have been duly recognised by the State in whose courts the proceedings are being taken see above, §§ 71-75*f*, and note in particular *Wulfsohn* v *Russian Socialist Republic*, cited above in § 75 (immunity granted to an unrecognised but *de facto* Government) Many of the cases cited above, §§ 71 75*f*, are relevant to § 115*a* With regard to all the footnotes upon this 'third consequence,' it should be noted that the cases cited are almost exclusively English, and it must not be assumed that the courts of other States interpret the general principle in precisely the same way On the English rules generally see Westlake, *Private International Law* (7th ed) (1925), §§ 190 193, and Dicey, Rules 52, 55, and 57

[2] The Finance Act, 1925, s 25, subjects 'the Government of any part of His Majesty's Dominions' (including territory under protection or mandate) to British taxation in respect of any trading operations carried on in Great Britain and Northern Ireland, but not otherwise

[3] See Phillimore, II § 113 A, Young, *Foreign Companies and other Corporations* (1912), pp 300 309, Nys, II pp 340 348, Loening, *Die Gerichtsbarkeit über fremde Staaten und Souverane* (1903), van Praag, §§ 164-190, Koellreutter in *Strupp, Wort*, I pp 387 389, and the following cases *The United States* v *Wagner* (1867) L R 2 Ch App 582, *The Sapphire* (1870) 11 Wallace 164 See also below, § 348

[4] Even in respect of a personal act such as a promise of marriage and even when living incognito (*Mighell* v *Sultan of Johore* [1894] 1 Q B 149). The statement that a sovereign State cannot be sued in the courts of a foreign State is broadly true, but the Municipal Law of different States differs considerably in giving effect to it (*a*) As to England see *De Haber* v *The Queen of Portugal* (1851) 17 Q B 171, *Duff Development Co* v *Kelantan Government* [1924] A C 797 See also above, § 75*d*, *Godman* v *Winterton and Others*, below, p 776, n 5 (*b*) As to the United States of America see Hyde, I §§ 246, 258, Hayes in *H L R*, 38 (1925), pp 599 621 (*c*) The rule applies equally to prevent proceedings against or affecting the property of a foreign sovereign State *The Exchange* v *McFaddon* (1812) 7 Cranch 116, Scott, *Cases*, 300, *Vavasseur* v *Krupp* (1878) L R 9 Ch D 351, *The Constitution* (1879) 4 P D 39, *The Parlement Belge* (1879) 4 P D 129 (1880) 5 P D 197 But there is probably no immunity when the State is sued as owner of real property—for a survey of cases see Fairman in *A J*, 22 (1928), pp 567, 568—unless such property is itself in a privileged position, *e g* on account of being a legation building See the two judgments of the Supreme Court of Czecho Slovakia of April 1928 and December 1929, as reported in *Annual Digest*, 1927 1928, Cases Nos 111 and 251 And see, as to the first, Deák in *A J*, 23 (1929), pp 582 594, and Bosco in *Rivista*, 21 (1929), p 48 See also *Haig Limited* v *Polish State*, in which the Prussian Tribunal for Conflicts of Jurisdiction refused, in March 1928, to entertain an action brought by a landlord against the Polish State because of the exhibition of the insignia of Poland *Annual Digest*, 1927-1928, Case No 104 And see the interesting judgment of the Italian Court of Cassation, given in 1934, concerning the British cemetery in Naples owned by the British Government It was held that Italian Courts had no jurisdiction to entertain an action brought against the persons administering the cemetery on behalf of the British

there, unless they voluntarily submit [1] to the jurisdiction

authorities *Riccio* v *Little*, *Giurisprudenza Italiana*, 1934, I (1), p 976, *Annual Digest*, 1933 1934, Case No 68 The immunity of government ships, both naval and commercial, is discussed below, §§ 447-451*a* (*d*) As to French, Italian, Belgian, and Egyptian law see Walton in *Juridical Review*, 1919, p 225, and in *J C L*, 3rd ser, 2 (1920), pp 252 258, Fauchille, § 270, and, in particular, Allen, cited below in this note The three last-named States do not grant immunity to a foreign State in respect of acts which are not governmental, which means in most cases the acts of a foreign State as a trader See Fox in *A J*, 35 (1941), pp 632 640 (*e*) As to Germany see Liszt, § 13 (IV), and Kruckmann in *Zeitschrift für Ostrecht*, I (1927), pp 161-192 See also *The Visurgis* and *The Siena*, *Annual Digest*, 1938 1940, Case No 94

On the question of the right of the agent or official of a State to claim State immunity when sued in a foreign court see *Pilger* v *U S Steel Corporation* (N J 1925) 127 Atl 103, 130 Atl 523, where the English Public Trustee was allowed to be sued in an American court (see *Michigan Law Review*, 24 (1926), pp 729, 730) On the whole question see Report by Matsuda and Diena for the League of Nations Codification Committee on 'The Competence of the Courts in Regard to Foreign States,' C 204 M 1927 V, and *A J*, 22 (1928), Special Suppl, pp 118-132, and comment by Kuhn in *A J*, 21 (1927), pp 742-747 On the position of semi governmental corporations see *Compania Mercantil Argentina* v *United States Shipping Board* (1924) 40 T L R 601, and *Coale* v *Société Co opérative Suisse des Charbons* (N Y 1927) 21 Fed (2nd) 180 It was held in *Hannes* v *Kingdom of Roumania Monopolies Institute* (1940), 20 N Y S (2*d*) 825, *Annual Digest*, 1938-1940, Case No 72, that an autonomous corporation created and controlled by a foreign Government for exploiting commercial monopolies is not necessarily immune from suit Apparently corporations created by the State but possessing a distinct legal personality are not immune from suit unless it can be proved that the property which is the subject matter of the action is the property of the State *Ulen & Co* v *(Polish) National Economic Bank* (1940) 24 N Y S (2*d*) 201, *Annual Digest*, 1938-1940, Case No 74 For an unusual, and unsuccessful, action before the Polish courts against the German Treasury and the City of Berlin for alleged illegal exactions of rates and taxes see *Annual Digest*, 1935-1937, Case No 95 In *Lahalle and Levard* v *The American Battle Monuments Commission* the Court of Appeal of Paris held in 1936 that the latter, in its capacity as a department of the Government of the United States, was immune from the jurisdiction of French courts *Annual Digest*, 1935 1937, Case No 88

The following is a selection of the recent extensive literature on jurisdictional immunities of foreign States Puente, *International Law as applied to Foreign States* (1928), pp 38 86, Spruth, *Gerichtsbarkeit über fremde Staaten* (1929), Provinciali, *L'immunità giurisdizionale degli Stati stranieri* (1933), Allen, *The Position of Foreign States before National Courts chiefly in Continental Europe* (1933), Stoupnitzky, *Statut International de l'U R S S État commerçant* (1936), Fairman in *A J*, 22 (1928), pp 569 585, Hervey in *Michigan Law Review*, 27 (1928 1929), pp 751-775, Bosco in *Rivista*, 21 (1929), pp 35 62, Brinton in *A J*, 25 (1931), pp 50 62, Feller, *ibid*, pp 83 96, Ténékidès in *R G*, 38 (1931), pp 608 632, Fitzmaurice in *B Y*, 14 (1933), pp 101-124, Van Praag in *R I*, 3rd ser, 15 (1934), pp 652 682, Brookfield in *J C L*, 3rd ser, 20 (1938), pp 1-15, Block in *H L R*, 59 (1946), pp 1060-1086

[1] So far as Great Britain is concerned, the following acts do not amount to a submission to the jurisdiction living here and entering into contracts here (*Mighell* v *Sultan of Johore*, *supra*), assenting to an arbitration clause in a contract or moving to set aside an arbitrator's award (*Duff Development Co* v *Kelantan Government*, *supra*, *Compania Mercantil Argentina* v. *United States Shipping Board*, *supra*), or

of the court concerned [1] This rule applied not only to actions brought directly against foreign States, but also to indirect actions as when, for instance, a suit *in rem* is brought against a vessel in possession of a foreign State Although, in giving effect to this rule, courts occasionally refer to the 'comity of nations' as basis of their decision, the principle of immunity of sovereign States from the jurisdiction of the courts of other States must be regarded, within its agreed limits,[2] as a rule of International Law the disregard of which involves the international responsibility of the State

State Equality and Recognition of Foreign Official Acts

§ 115*aa* A fourth consequence of equality—or independence—of States is that the courts of one State do not, as a rule, question the validity or legality of the official acts of another

engaging in trade (*Compania Mercantil Argentina* case, *supra*), and see Keith's comments in *J C L*, 3rd ser, 5 (1923), pp 126, 127, and 277, 278, and 6 (1924), p 207 It appears to be still open whether a submission by a foreign State to the jurisdiction involves submission to execution against its property situate within the jurisdiction, but the weight of opinion seems to answer this question in the negative see *Duff Development Co* case, *supra*, and Note (1) to that case in *Annual Digest*, 1923 1924, Case No 65, *Dexter and Carpenter* v *Kunglig Jarnvagsstyrelsen et al*, decided in 1930 by the United States District Court of Appeals 43 F (2*d*) 705 *Annual Digest*, 1929 1930, Case No 70, Jessup and Deák in *A J*, 25 (1931), pp 335 339, and see Kruckmann, *op cit*, pp 190, 191

[1] But when a foreign State sues here, it submits itself to the ordinary incidents of procedure, so that, for instance, an order for security for costs (*Republic of Costa Rica* v *Erlanger* (1876) 3 Ch D 62) or an order for discovery (*Prioleau* v *United States of America* (1866) L R 2 Eq 659) may be obtained against it, and the defendant may set up against the foreign State a set off or a counterclaim arising out of the same matter in dispute (*South African Republic* v *La Compagnie Franco-Belge* [1898] 1 Ch 90), but he cannot take the opportunity of bringing against the foreign State what is substantially an independent action (*Union of Russian Soviet Socialist Republics* v *Belaiew* (1925) 42 T L R 21), and even in a strictly related counterclaim the defendant cannot recover any excess, the counterclaim is in such a case 'a shield but not a sword', see *Annual Practice* (1928), Order 21, rule 17 (notes), and Westlake and Dicey, *op cit* above, p 222, n 1 See also *United States* v *National City Bank of New York Annual Digest*, 1935 1937, Case No 82 As regards the German case of *Hellfeld* v *The Russian Government* see Kohler in *Z V*, 4 (1910), pp 309-333, the opinions of Laband, Meili, and Seuffert, *ibid*, pp 334 448, Baty in the *Law Magazine and Review*, 35 (1909 1910), p 207, Wolfman in *A J*, 4 (1910), pp 373 383, Fauchille, § 270

[2] There is for instance, no uniform practice with regard to so-called activities of a private law nature See above, p 239, and below, p 768 It has been held by an American court that the existence of a state of war does not deprive the opposing belligerent of the jurisdictional immunities to which he is otherwise entitled under international law See *Telkes* v *Hungarian National Museum* (No 11), *Annual Digest*, 1941-1942, Case No 169 And see for comments thereon in *Cornell Law Quarterly*, 29 (1944), pp 390 400

sovereign State or the official or officially avowed acts of its agents, at any rate in so far as those acts purport to take effect within the sphere of the latter State's own jurisdiction [1] It is not clear whether the rule in question can properly be regarded as a rule of Public International Law or whether it belongs to the province of Private International Law (Conflict of Laws) [2] Considerations of public policy have often prevented a full recognition of the validity of foreign legislation There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by International Law The question of foreign confiscatory, penal, and revenue legislation is referred to elsewhere [3]

Limitations of Jurisdictional Immunity

§ 115*ab* British and American courts have rigidly adhered to the principle of jurisdictional immunity and have declined to modify it either by distinguishing between activities of the State in the field of private law and activities *jure imperii* [4] or by readily implying waiver of immunity [5] On the other hand it must be noted that the mere claim by a foreign State, which is neither an actual nor a necessary party to the proceedings, that it has an interest in the case will not prevent the Court from adjudicating the action as

[1] *The Exchange* v *McFaddon* (1812) 7 Cranch 116, Scott, *Cases*, 300, *Underhill* v *Hernandez* (1897) 168 U S 250, 18 Sup Ct 83, *Wulfsohn* v *Russian Socialist Republic* (1923) 234 N Y 372, 138 N E 24, *A M Luther Co* v *Sagor & Co* [1921] 3 K B 532, *Russian Commercial and Industrial Bank* v *Comptoir d'Escompte* [1923] 2 K B 630, and *Banque Internationale* v *Goukassow*, *ibid*, p 682, both reversed, but without affecting the principle stated in the text, [1925] A C 112 and 150 For a criticism of the doctrine of 'the sacro sanctity of the foreign Act of State' see Mann in *Law Quarterly Review*, 59 (1943), pp 42 57, 155 171 In the *Amand* case (No 2)—[1942] 1 All E R 236, [1942] 1 K B 345—the Court examined the validity of a Dutch decree imposing military service upon a Dutch national, but the circumstances of the case were exceptional See McNair, *Legal Effect of War* (1944), p 377, for comments on this aspect of the case And see above, § 75, with regard to the consequences of recognition As to extra territorial operation of confiscatory decrees see below, p 296, n 3

[2] See above, p 6

[3] See below, p 296

[4] See above, p 239, n 4, and below, p 768, with regard to public ships See also *Kingdom of Roumania* v *Guaranty Trust Co of New York* (2nd) 250 Fed 341, 343, where the Court held that the purchase of shoes for the army constitutes the exercise of the 'highest sovereign function of protecting itself against the enemies' An Italian court considered a similar transaction to be an act of a private law nature and, as such, outside the principle of jurisdictional immunity (*Governo Rumeno* v *Trutta*, *Giurisprudenza Italiana* (1926) (1), p 774)

[5] See above, p 240, n 4

between the parties to it [1] Thus, for instance, the circumstance that a foreign Government is or may be interested in a trust or similar fund is not a sufficient reason for declining jurisdiction [2] Moreover, although courts will not assume jurisdiction when a foreign Government is made a party either directly or indirectly as the result of an action *in rem* against property in its possession, the mere assertion, unsubstantiated by proof, by a foreign Government that it is the owner of the property which is the subject of controversy between the parties does not oust the jurisdiction of the court [3] Finally, with regard to loans contracted by Governments abroad, the predominant view appears to be that the principle of immunity from jurisdiction does not entail the exemption of such governmental transactions from the operation of the law of the country where they have been made [4]

[1] *Haile Selassie* v *Cable and Wireless Ltd* (No 1) [1938] Ch 545, 839 See also *The Jupiter* (No 2) [1925] P 69, *The Jupiter* (No 3) [1927] P 122

[2] *In re Russian Bank for Foreign Trade* [1933] Ch D 745, *Annual Digest*, 1933 1934, Case No 55

[3] See *Lamont* v *The Travelers Insurance Company* (1939) 24 N E (2d) 81, *A J*, 34 (1940), p 349, *Annual Digest*, 1938 1940, Case No 73 See also *The Navemar* (1938) 303 U S 68, *A J*, 32 (1938), p 381, *Annual Digest*, 1938 1940, Case No 68, on the authority and the degree of conclusiveness of the declarations of the foreign Government In *The Kabalo* the Court accepted the statement of the Belgian Ambassador as conclusive evidence of possession resulting from requisition by the Belgian Government (1940) 67 *Lloyd's List Law Reports*, p 572, *Annual Digest*, 1938 1940, Case No 92 See below, § 357*a*, on the conclusiveness of the statement of the executive departments It has been held that jurisdictional immunity does not prevent statutes of limitation from running against foreign States *Guaranty Trust Company of New York* v *United States* (1938) 304 U S 126, *A J*, 32 (1938), p 848, *Annual Digest*, 1938-1940, Case No 69

[4] The House of Lords has held that a British Government loan contracted in the United States of America was, in the circumstances of the case, governed by subsequent United States legislation It declined to accede to the view, approved by the Court of Appeal, that, as States are sovereign, loans contracted by them abroad must invariably be governed by their own law *Rex* v *International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A C 500, *Annual Digest*, 1935 1937, Case No 6 This decision is not wholly inconsistent with the Judgment of the Permanent Court of International Justice in the *Serbian and Brazilian Loans cases*, P C I J Series A, Nos 20, 21, *Annual Digest*, 1929 1930, Case No 278 The decisions of the Supreme Courts of Sweden and Norway, given in 1937, equally denied that such governmental contracts are immune from the legislation of the State where the contract was made See *Annual Digest*, 1935-1937, Cases No 7 and 8 respectively These, and similar, cases arose in connection with the Joint Resolution of the United States Congress which declared any provision requiring payment in gold or in a particular kind of coin or currency to be contrary to public policy See Plesch, *The Gold Clause* (1936), Domke in *Clunet*, 63 (1936), pp 547 ff, Bagge in *R I*, 64 (1937), pp 791, 816, Jezè in *Hague Recueil*, vol 7 (1925), 174 See also the valuable article by Mann in *B Y*, 21 (1944), pp 11 33, on the law governing State contracts

In these and similar cases the equality of States cannot be regarded as even remotely affected in consequence of the subjection of the foreign State to local jurisdiction

Political and Legal Hegemony of Great Powers

§ 116 Legal equality must not be confused with political equality The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy Politically, States are in no manner equals, as there is a difference between the Great Powers and others Arrangements made by the body of the Great Powers tend to gain the consent or the acquiescence of the minor States The Great Powers are the leaders of the Family of Nations, and every advance of the Law of Nations during the past has been the result of their political hegemony, although the initiative towards progress was frequently taken by a minor Power

But, however important the position and the influence of the Great Powers may be, they were not, before the establishment of the League of Nations, derived from a legal basis or rule [1] It was nothing else than powerful example which made the smaller States agree to the arrangements of the Great Powers Great Powers did not enjoy any superiority of right, but only a priority of action Nor has a State the character of a Great Power by law It is nothing else than actual size, strength, and economic influence which make a State a Great Power Changes, therefore, often take place [2] Whereas at the time of the Vienna Congress in 1815 eight States—namely, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia—were still considered Great Powers, their number soon decreased to five, when Portugal, Spain, and Sweden lost that character But the so-called Pentarchy of the remaining Great Powers turned into a Hexarchy after the unification of Italy, because the latter became at once a Great Power The

[1] This is, however, maintained by a few writers See, for instance, Lorimer, 1 p 170, Lawrence, §§ 113 and 114, Westlake, 1 pp 321 323, Pitt Cobbett, *Cases and Opinions on International Law*, 2nd ed, vol 1 (1909), p 50, 4th ed (by Bellot), vol 1 (1922), pp 51, 52, and Somló, *Juristische Grundlehre* (1917), pp 156, 157

[2] For an important historical survey see Triepel, *Die Hegemonie Ein Buch von führenden Staaten* (1938)

United States rose as a Great Power out of her civil war in 1865, and similarly Japan out of her war with China in 1895. Thereafter until the outbreak of the First World War there were eight Great Powers—Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, and the United States of America and Japan outside Europe The end of the First World War found Germany and Austria-Hungary defeated and the latter dismembered Russia had undergone far-reaching internal changes and had, at that time, adopted a new international outlook The importance of the remaining five, who were described in the Treaties of Peace as the 'Principal Allied and Associated Powers,' was recognised by Article 4 of the Covenant of the League in the composition of the Council, whereon Great Britain, France, Italy, and Japan (the United States having abstained from joining the League) acquired permanent seats Thus the political hegemony of the Great Powers was, for the first time, given a legal basis and expression in that important international instrument [1] At the end of the Second World War, after the defeat of Germany, Italy, and Japan, the five Great Powers were the United States of America, Great Britain, Soviet Russia, France and China However, apart from the Covenant of the League, the hegemony of the Great Powers was, prior to the Charter of the United Nations,[2] a political and not a legal one [3]

State Equality and International Organisation.

§ 116a The provisions of the Covenant of the League in the matter of the composition of the Council and, to a

[1] In the former editions of this treatise the view was expressed that the Covenant had not altered the law in this respect

[2] See below, p 247

[3] In connection with the Great Powers mention should be made of an unofficial but important body known as the 'Conference of Ambassadors,' which came into existence after the First World War as the residuary legatee of the Supreme Council of the Allied Powers It consisted of the British and Italian Ambassadors in Paris and a French diplomatist of ambassadorial rank, and was occasionally reinforced by the presence of the Japanese and Belgian ambassadors in Paris and of an American 'observer' It was an Inter-Allied, not an international, body, devised for the purpose of saving time, and it exercised a considerable influence in some of the post war problems which were left over from the Paris Peace Conference, and in other matters for instance, disarmament questions and the settlement of the Corfu affair in 1923 (see below, II § 52a (n)) In a sense it acted, in regard to problems connected with the resettlement of Europe, as a bridge between the Supreme Allied Council and the Council of the League See Pink, *The Conference of Ambassadors (Paris, 1920-1931)* (1942)

smaller extent, the principles determining the membership of the Governing Body of the International Labour Organisation,[1] constituted a significant departure from the doctrine of the legal equality of States They mark the first attempt on a larger scale [2] to adapt that doctrine to the requirements of a progressive development of international organisation Already before the establishment of the League it was recognised by many that it would be of advantage for the small Powers to sacrifice a measure of theoretical equality in return for increased guarantees of their independence within the framework of an effective political organisation of States [3] In so far as the doctrine of equality of States results in the requirement of unanimity it has been abandoned to some extent in a number of international organisations and institutions [4] However, the rule of

[1] See below, § 340*f*

[2] In most international unions the voting strength of the members is determined substantially by the amount of their contributions to the finances of the organisation See *e g* Article 3 of the Convention establishing the International Institute of Agriculture (see below, p 776, n 5), Article 6 of the Organic Statute of the International Health Office (below, p 890), Article 3 of the Statutes of the International Hydrographic Bureau (below, p 896), Article 1 of the Agreement establishing the International Wine Bureau (below, p 889), Article 3 of the International Office of Chemistry (below, p 896) And see Dickinson, *op cit*, p 315, n 1, quoting Huber, *op cit*, p 102, n 2, to the effect that the inequality of voting is not in such cases relevant to the principle of equality of States seeing that each State decides as to its own classification See also Article 37 of the Agreement regarding the Regulation of Production and Marketing of Sugar of May 6, 1937, which lays down the number of votes to be exercised by the delegations of the various States to the Council set up by the Convention Misc No 3 (1937), Cmd 5461 See on the subject of inequality in voting and of weighting of votes Dickinson, *The Equality of States in International Law* (1920), pp 310 321, Decleva, *La contribuzione internazionale* (1936), Riches, *Majority Rule in International Organization* (1940), pp 245 290, Sohn in *American Political Science Review*, 38 (1944), pp 1192 1203, Jenks in *B Y*, 22 (1945), pp 40-42

[3] On the relative position of small and great Powers in the League see Zimmern in *Problems of Peace* (9th ser, 1934), pp 54 73, Rappard, *ibid*, pp 14 53, and in *American Political Science Quarterly*, 49 (1934), pp 544 575, Hambro in *International Affairs*, 15 (1936), pp 167 182 And see the communication of Esthonia, Latvia, and Lithuania to the Secretary General of February 6, 1935, on the setting up of a permanent combination of these States for the purpose of securing representation *Z o V*, 5 (1935), pp 414 418 See also Morley, *The Society of Nations* (1932), pp 348 350, 373-376, Yepes and da Silva, *Commentaire du Pacte*, 1 (1934), pp 124-130

[4] The International Commission for Air Navigation may amend the provisions of Annexes A-G by a three fourths vote which must include two thirds of all the votes which could be cast if all States were represented (Article 34 of the Air Navigation Convention of October 13, 1919, amended by proposal of June 15, 1929, which entered into force on May 17, 1933 *L N T S*, 138, p 418). For the interpretation of this power

unanimity is a consequence of State sovereignty rather than of State equality It is in the field of equality of representation that the doctrine of State equality has expressed itself most persistently, and it is a legitimate task of the science of International Law and politics to examine the desirability [1] and the methods [2] of further modifications of this aspect of equality of States

State Equality and the Charter of the United Nations

§ 116b. The Charter of the United Nations, though professing to be based on the principle of 'the Sovereign equality of all its members,' [3] constitutes a significant landmark in the gradual modification of the traditional doctrine of equality of States While in the General Assembly the principle of equality of representation and of voting

by the Commission see *Official Bulletin*, 15, p 37 Decisions of the International Committee of the Metric Union are taken by majority vote (Article 12, *Règlement* attached to the Convention respecting the Creation of an International Office of Weights and Measures Signed at Paris, May 20, 1875 *Br and For St P*, 66, p 562) As to the Universal Postal Union see Articles 13 and 16 of the Convention as revised on March 20, 1934 H M Stationery Office, London, 1935, and *Documents du Congrès Postal de Londres*, 1929 (II), p 33, as to the Definitive Statute of the International Danube Commission of July 23, 1921, Article 35, see *L N T S*, 26, p 14, as to the International Labour Organisation see Articles 403, 405, and 422 of the Treaty of Versailles And see generally Riches, *The Majority Rule in International Organization* (1940) See also, for an interesting example, the Protocol of December 18, 1929, between Switzerland, France, and Germany concerning works for the regulation of the Rhine between Strasbourg and Istein *L N T S*, 104, p 27, Hudson, *Legislation*, v, p 125 And see Hill, *The Public International Conference* (1929), pp 187 195, 218 219, and the same in *A J*, 22 (1928), pp 319 329, Meyers in *A J*, 31 (1937), pp 440-444 In the recent constitutions of international organisations the majority principle has been widely accepted This applies, for instance, to the UNRRA Organization (Articles III (1) and VIII of the Agreement of November 1943, Article X (4) of the Rules of Procedure), the Food and Agriculture Organization (Agreement of December 1944, Article III (8)), the European Central Inland Transport Organisation (Article 3 (2), 13) (Cmd 6685), the Inter-Allied Reparation Agency (Article 7) (Cmd 6721) Frequently, special majorities are required For a detailed survey see Jenks in *B Y*, 22 (1945), pp 34 40

[1] Thus in any future development in the direction of curtailing equality of representation care would have to be taken not to combine the change with the impairment of full freedom of discussion rendering possible the exercise of the frequently beneficent influence of small Powers

[2] The amount of the financial contribution to the organisation in question is one, but not the only, test See also Sohn in *A J*, 40 (1946), pp 71 99 and the literature cited above, p 246 And see generally Dickinson and McNair, referred to above, p 238

[3] Article 2 (1) For a discussion and criticism of the expression 'sovereign equality' see Kelsen in *Yale Law Journal*, 53 (1944), pp 207 220

power is, in general,[1] the guiding rule,[2] this is not the case in the more important organ of the United Nations, namely, the Security Council On that body the five Great Powers —Great Britain, the United States, Soviet Russia, France, and China—are given permanent representation, while the six remaining seats on the Council are filled by periodic elections [3] Moreover, the principle of equality of voting power in the Security Council is substantially impaired as the result of the requirement, as a rule, of the concurrence of all permanent members of the Security Council in decisions other than those relating to matters of procedure [4] One of the consequences of that inequality of voting power is that the ascertainment and enforcement, by an overriding decision of the Council, of obligations of pacific settlement and of International Law generally is legally possible only as against those members of the United Nations which are not permanent members of the Security Council To that extent the relevant provisions of the Charter must be deemed to be contrary to the principle, which is of a fundamental character, that, regardless of any other aspects of equality, all members of a political community ought to be equal before the law No such objection attaches to another important derogation from the doctrine of equality, namely, that members other than the Great Powers are bound, unless they elect to withdraw from the Organisation, by amendments of the Charter ratified by two-thirds of the members of the United Nations including all the permanent members of the Security Council [5]

Rank of States

§ 117. Although the States are equals as International

[1] The equality of voting power is in effect disregarded wherever a valid decision of the Assembly is required to include the votes of the permanent members of the Security Council See below, § 168*k* Such requirement means, upon analysis, that special and enhanced weight is attached to the votes of the permanent members of the Security Council Moreover, the general principle of equality of representation and voting power in the Assembly must be viewed in the light of the fact that its competence does not, as a rule, go beyond that of recommendation and co-ordination See below, § 168*i*

[2] See below, § 168*k*

[3] See below, § 168*k*

[4] See below, *ibid*

[5] Article 109 (2) The principle of equality of States is reaffirmed, with less violence to accepted terminology, in the Act of Chapultepec adopted in March 1945 by the Inter American Conference on War and Peace The Act laid down in simple language that 'all sovereign States are juridically equal among themselves' *A J*, 39 (1945), p 110

Persons, they are nevertheless not equals as regards rank [1] The differences as regards rank are recognised by International Law, but the legal equality of States within the Family of Nations is thereby as little affected as the legal equality of the citizens is affected within a modern State where differences in rank and titles of the citizens are recognised by Municipal Law The vote of a State of lower rank has, as a rule,[2] as much weight as that of a State of higher rank The difference in rank nowadays no longer plays such an important part as in the past, when questions of etiquette gave occasion for much dispute It was in the sixteenth and seventeenth centuries that the rank of the different States was zealously discussed under the heading of *droit de préséance* or *questions de préséance* The Congress at Vienna of 1815 intended to establish an order of precedence within the Family of Nations, but dropped this scheme on account of practical difficulties [3]

The 'Alternat'

§ 118 To avoid questions of precedence, on signing a treaty States of the same rank often observe a conventional usage which is called the 'Alternat' According to that usage the signatures of the signatory States of a treaty alternate in a regular order or in one determined by lot, the representative of each State signing first the copy which belongs to his State But sometimes that order is not observed, and the States sign either in the alphabetical order of their names in French or in no order at all (*pêle-mêle*)

Titles of States.

§ 119 At the present time, States, save in a few excep-

See [1] Satow, pp 23 51

[2] See above, p 238

[3] Thus the matter is entirely based on custom, which recognises the following three rules

(1) The States are divided into two classes—namely, States with, and States without, royal honours To the first class belong Empires and Kingdoms, to it belong Grand Duchies, to this class belong also the great Republics such as France, Germany, the United States of America, Switzerland, the South American Republics, and others All other States belong to the second class States with royal honours always precede other States

(2) Full sovereign States always precede those under suzerainty or protectorate

(3) Among themselves States of the same rank do not precede one another Empires do not precede kingdoms, and since the time of Cromwell and the first French Republic monarchies do not precede republics But the Roman Catholic States concede precedence to the Holy See, and the monarchs recognise among themselves a difference, with regard to ceremonials, between emperors and kings on the one hand, and, on the other, grand dukes and other monarchs.

tional instances, have no titles, although formerly such titles did exist [1]

III

DIGNITY

Vattel, II §§ 35 48—Lawrence, § 120—Phillimore, II §§ 27 43—Halleck, I pp 137 152—Taylor, § 162—Wheaton, § 160—Hershey, § 147—Bluntschli, §§ 82 83—Hartmann, § 15—Heffter, §§ 32, 102, 103—Holtzendorff in *Holtzendorff*, II pp 64-69—Ullmann, § 38—Fauchille, §§ 279 284—Despagnet, §§ 184-186—Pradier-Fodéré, II §§ 451-483—Rivier, I pp 260 262—Nys, II pp 254, 255—Calvo, III §§ 1300-1302—Fiore, I §§ 439-451—Martens, I § 78—De Louter, I pp 247 249—Hold-Ferneck, I pp 171-175—Stowell, pp 78-82, 98 104—Balladore Pallieri, pp 371 375—Dickinson in *A J*, 22 (1928), pp 840 844—Quadri in *Rivista*, 34 (1942), pp 161-189

Dignity a Quality

§ 120 The majority of text-book writers maintain that there is a fundamental right of reputation and of good name

[1] Thus the former Republic of Venice, as well as that of Genoa, was addressed as 'Serene Republic,' and the Republic of San Marino (see Treaty Series (1900), No 9) is still, it is believed, addressed as 'Most Serene Republic' Nowadays the titles of the heads of monarchical States are of importance to International Law in so far as they are connected with the rank of the respective States Since States are sovereign, they can bestow any titles they like on their heads Thus, according to the German Constitution of 1871, the Kings of Prussia had the title 'German Emperor', the British monarchs have since 1877 borne the title 'Emperor or Empress of India', the Prince of Roumania assumed in 1881, that of Serbia in 1822, and that of Bulgaria in 1908, the title of King But no foreign State is obliged to recognise such new title, especially when a higher rank would accrue to the State concerned in consequence of such a new title for its head In practice such recognition will regularly be given when the new title really corresponds with the size and the importance of the State History, however, reports several cases where recognition was withheld for a long time Thus the title 'Emperor of Russia,' assumed by Peter the Great in 1701, was not recognised by France till 1745, by Spain till 1759, nor by Poland till 1764 And the Pope did not recognise the kingly title of Prussia, assumed in 1701, till 1786 The effect of refusal to recognise a new title is merely that the State making the change cannot claim from the State refusing to recognise it any privileges connected with the new title (see above, § 75)

With the titles of the heads of States are connected predicates Emperors and Kings have the predicate 'Majesty,' Grand Dukes have the predicate 'Royal Highness,' Dukes that of 'Highness,' and other monarchs that of 'Serene Highness' The Pope is addressed as 'Holiness' (*Sanctitas*) Not to be confused with these predicates, which are recognised by the Law of Nations, are predicates which originally were bestowed on monarchs by the Pope and which have no importance for the Law of Nations Thus the Kings of France called themselves *Rex Christianissimus* or 'First born Son of the Church,' the Kings of Spain have called themselves since 1496 *Rex Catholicus*, and the Kings of England since 1521 *Defensor Fidei*, the Kings of Portugal after 1748 called themselves *Rex Fidelissimus*, and the Kings of Hungary after 1758 *Rex Apostolicus*

belonging to every State Such a right, however, does not exist, because no duty corresponding to it can be traced within the Law of Nations. Indeed, the reputation of a State depends just as much upon behaviour as that of every citizen within its boundaries A State which has a corrupt Government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an upright Government and behaves fairly and justly in its international dealings will be highly esteemed

On the other hand, a State as a member of the Family of Nations possesses dignity as an International Person Dignity is a quality recognised by other States, and it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays Just as the dignity of every citizen within a State commands a certain amount of consideration on the part of fellow-citizens, so the dignity of a State commands a certain amount of consideration on the part of other States, since otherwise the different States could not live peaceably in the community which is called the Family of Nations

Consequences of the Dignity of States

§ 121 Since dignity is a recognised quality of States as International Persons, all members of the Family of Nations grant reciprocally to one another by custom certain rights and ceremonial privileges These are chiefly the right to demand that their Heads shall not be libelled and slandered, that their Heads and likewise their diplomatic envoys shall be granted exterritoriality and inviolability when abroad, and that at home and abroad in the official intercourse with representatives of foreign States they shall be granted certain titles, that their men-of-war shall be granted exterritoriality when in foreign waters, that their symbols of authority, such as flags and coats of arms, shall not be used improperly and shall not be treated with disrespect on the part of other States [1] But while a Government of a State, its organs, and its servants are bound in this matter by rigid duties of respect and restraint, it is doubtful whether a State is bound to prevent its subjects from such acts as violate

[1] See Hackworth, II § 127

the dignity of foreign States, and to punish them for acts of that kind which it could not prevent [1] In any case a

[1] Many States have enacted legislation penalising defamation and libels of foreign Governments See *e g* the Revised Statutes of Canada of 1927, c 36, § 135, and the Ordinance of the Government of India of April 5, 1931, which provides against the publication of statements likely to promote unfriendly relations between His Majesty's Government and foreign Governments *Br and For St Papers*, 134, p 207, Article 261 (*bis*) of the Swiss Federal Code, which provides for penalties for insulting State delegates to the Assembly or Council of the League of Nations, the Secretary-General, or the Director of the International Labour Office For an enumeration of the relevant provisions of various countries see Preuss in *A J*, 28 (1934), p 650 According to the Criminal Law of England, 'everyone is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs' See Stephen, *A Digest of the Criminal Law*, Article 103 See also Dickinson in *A J*, 22 (1928), pp 840 844 During what has been called the 'reign of terror' in England at the end of the eighteenth century that rule received extended application in *King* v *Vint* (1799), 27 St Tr 627, 641, and *R* v *Peltier* (1803), St Tr 529, but these cases must be regarded as exceptional As to the United States see Hackworth, II § 129 For a distinction between insulting Adolf Hitler as Head of the German State and as Leader of the German National-Socialist Party see the decision given by a Dutch Court in 1935 in *Public Prosecutor* v *G* *Annual Digest*, 1935 1937, Case No 11 In a decision given in 1936 the Patent Office of the German Reich held, in connection with an application for the registration of a trade mark, that there exists a rule of International Law according ot which images of Heads of foreign States must not be used for commercial purposes *ibid*, Case No 10 In *Monaco* v *Monaco* the Court rejected the submission that it would be contrary to the dignity of the Head of a State to award to him costs in an action in which he has been successful (1937) 157 *T L R* 231, *Annual Digest*, 1935-1937, Case No 10 There is, of course, nothing to prevent a State from enacting legislation calculated to ensure rigid respect for the dignity of other States States may also conclude conventions with that object in view and, generally, in order to promote international goodwill See *e g* the Convention on the Teaching of History adopted by the Seventh Pan-American Conference in December 1933, in which the contracting parties undertook to revise the text-books used for instruction in their respective countries 'with the object of eliminating from them whatever might tend to arouse in the immature mind of youth aversion to any American country' (Article 1) *A J*, 28 (1934), p 72, Hudson, *Legislation*, VI p 612, and the Convention adopted in December 1936 by the Inter American Conference concerning Peaceful Orientation of Public Instruction *International Conciliation* (Pamphlet No 328), March 1937 See also for a similar suggestion the German Peace Plan of April 1, 1936, point 15 *The Times* newspaper, April 2, 1936 See also *School Textbook Revision and International Understanding* (2nd ed, 1933), where on pp 23 30, 189 192, there will be found the texts of the resolutions of the Council and Assembly in 1932 For a survey of the steps leading to these resolutions see Bailey in *The Education Year book* (London, 1936), pp 543-545 For the Resolution and a Draft Declaration of the Assembly in 1935 on ensuring impartiality of school text books, and especially history books, see *Off J*, 1936, p 65 In October 1937 the Assembly of the League approved a Draft, adopted by the Committee on Intellectual Co-operation, of a Declaration on the Teaching of History (Revision of School Text-books) The Declaration has now been signed by about twenty States, including Soviet Russia

State must prevent and punish such acts only as really violate the dignity of a foreign State Mere criticism of policy, historical verdicts concerning the attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs, need neither be suppressed nor punished [1] The position is different when the persons in question are in governmental service or otherwise associated with the Government of the country [2]

§ 122 Connected with the dignity of States are the maritime ceremonials between vessels, and between vessels and forts, which belong to different States In former times discord and jealousy existed between the States regarding such ceremonials, since they were looked upon as means of keeping up the superiority of one State over another Nowadays, so far as the open sea is concerned, they are considered as mere acts of courtesy recognising the dignity of States They are the outcome of international usages, and not of International Law, in honour of the national flags They are carried out by dipping flags or striking sails or firing guns [3] But so far as the territorial maritime belt is concerned, littoral States can make laws concerning maritime ceremonials to be observed by foreign merchantmen [4]

Maritime Ceremonials

Hudson, *Legislation*, vii p 850 On the possibility and projects of protecting international peace by municipal legislation against war propaganda as well as against acts injurious to foreign States see Pella, *La protection de la paix par le droit interne* (1933), and in *R G*, 40 (1933), pp 401 505, Mirkine Guetzévitch, *Droit constitutionnel international* (1933), pp 244 290, Rappaport in *Grotius Society*, 18 (1932), pp 41 64 As to the Convention of September 23, 1936, concerning the use of broadcasting in the cause of peace see below, p 261, n 2

[1] See Lauterpacht in *A J*, 22 (1928), pp 114, 115, and in *Grotius Society*, 13 (1928), pp 143 163, and *R* v *Antonelli and Barberi* (1905) 70 J P 4, and Fleischmann in Liszt, § 13 (n 19) And see below, § 127*a*

[2] Thus, when in January 1931 General Butler, of the United States Army, made at a banquet disparaging statements concerning the Italian Prime Minister, Italy complained The United States Government thereupon expressed their regret at this unauthorised action on the part of an officer on active duty and reprimanded General Butler See on this incident Stowell in *A J*, 25 (1931), pp 321-324

[3] See Halleck, i pp 133-152, and Satow, vol i ch vi See also below, § 257

[4] See below, § 187

IV

INDEPENDENCE AND TERRITORIAL AND PERSONAL SUPREMACY

Vattel, 1 *Prélıminaires*, §§ 15-17—Hall, § 10—Westlake, 1 pp 321 325—Lawrence, §§ 58 61—Phıllımore, 1 §§ 144, 149—Twıss, 1 § 20—Halleck, 1 pp 100-124—Taylor, § 160—Wheaton, §§ 72 75—Hershey, §§ 133, 134—Hyde, 1 §§ 51 64—Bluntschli, §§ 64 69—Hackworth, 11 §§ 150 159—Hartmann, § 15—Heffter, §§ 29, 31—Holtzendorff ın *Holtzendorff*, 11 pp 56 60—Gareis, §§ 25, 26—Ullmann, § 38—Fauchille, §§ 253 271, 295-295 (4)—Despagnet, §§ 187 189—Mérignhac, 1 pp 258 267—Pradier-Fodéré, 1 §§ 287-332—Rıvıer, 1 § 21—Nys, 11 pp 223 226—Calvo, 1 §§ 107-109—Fıore, 1 §§ 372 427, and *Code*, §§ 185 392—Martens, 1 §§ 74, 75—Westlake, *Papers*, pp 86 101—Cruchaga, 1 §§ 207 211—Suarez, 1 §§ 51 54—Bustamante, pp 217 230—Stowell, pp 87 111—Garner ın *American Polıtıcal Scıence Revıew*, February 1925, pp 1 24—Pella ın *Hague Recueıl*, vol 33 (1930) (III), pp 677 830—Delbez ın *R G*, 37 (1930), pp 461 475—Preuss, *ıbıd*, 40 (1933), pp 606-645

Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty.

§ 123 Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects [1] As excluding dependence upon any other authority, and in particular from the authority of another State, sovereignty is *independence* It is *external* independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is *internal* independence with regard to the liberty of action of a State inside its borders As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is *territorial* supremacy (*dominium, territorial sovereignty*) As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is *personal* supremacy (*imperium, political sovereignty*)

For these reasons a State as an International Person possesses independence and territorial and personal supremacy These three qualities are nothing else than three aspects of the very same sovereignty of a State, and there is no sharp boundary line between them The distinction is apparent and useful, although internal independence is

[1] For a judicial discussion of these aspects see *Rex* v *Jacobus Christian* in *B Y*, 1925, pp 211 219, and in *J C L*, 3rd ser, 6 (1924), pp 245-254

nothing else than sovereignty comprising territorial supremacy, but viewed from a different point of view.

Consequences of Independence and Territorial and Personal Supremacy

§ 124. Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States themselves abstain, and prevent their agents and subjects, from committing any act which constitutes a violation of its independence or its territorial or personal supremacy

In consequence of its external independence a State can, unless restricted by treaty,[1] manage its international affairs according to discretion, especially enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace [2]

In consequence of its internal independence and territorial

[1] See below, § 126

[2] While independence is a quality of statehood in the nature of a right it may, in certain circumstances, become a duty A State may in a treaty bind itself not to part with or impair its own independence Thus in Article 88 of the Treaty of St Germain Austria's independence was declared to be inalienable and she undertook to abstain from any act which might directly or indirectly compromise her independence, in particular by participating in the affairs of another State That undertaking was repeated and, to some extent, amplified in the Geneva Protocol of October 4, 1922, in which Austria agreed to abstain from any regulations or from any economic or financial engagement calculated to compromise this independence In 1931 the Permanent Court of International Justice held, by eight votes to seven and without, in effect, giving reasons for its decision, that a proposed régime of customs union between Austria and Germany establishing a common customs frontier and customs tariff, and providing for freedom from import and export duties between them, would not be compatible with the Geneva Protocol Series A/B, No 40 Seven out of eight majority judges held that the customs union would also be incompatible with the Treaty of St Germain The individual Opinion of Judge Anzilotti contains, in addition to weighty reasons in support of part of the Court's Opinion, some interesting observations on the effect of restrictions of State sovereignty on its independence (pp 57 59) For the literature, to a large extent critical, on this case see vol II § 25*ag* It was held by the Permanent Court in August 1932, in the *Case concerning the Interpretation of the Statute of the Memel Territory*, that the grant of autonomy to a territorial unit does not result in a division of sovereignty in a way disturbing the unity of the State P C I J, Series A/B, No 49, p 313 See also the various treaties of the United States with some of the Republics in the Caribbean (see below, § 135) which give the United States the right of intervention to preserve the independence of these Republics and oblige the latter not to conclude any treaty endangering their independence or providing for a cession of their territory to a foreign Power (see *e g* the Treaty of September 16 1915, with Haiti, below, p 258 (n))

supremacy, a State can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on According to the rule, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a State are under its dominion and sway, and foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier Aliens residing in a State can therefore be compelled to pay rates and taxes, and to serve in the police under the same conditions as citizens for the purpose of maintaining order and safety But aliens may be expelled, or not received at all On the other hand, hospitality may be granted to them whatever act they have committed abroad, provided they abstain from making the hospitable territory the basis for attempts against a foreign State And a State can through naturalisation adopt foreign subjects residing on its territory without the consent of the home State, provided the individuals themselves give their consent

In consequence of its personal supremacy, a State can treat its subjects according to discretion,[1] and it retains its power even over such subjects as emigrate without thereby losing their citizenship A State may therefore command its citizens abroad to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad to be recognised by the home authorities, and can punish them on their return for crimes they have committed abroad [2]

Violations of Independence and Territorial and Personal Supremacy

§ 125. The duty of every State itself to abstain, and to prevent its agents and, in certain cases, subjects, from committing any act which constitutes a violation [3] of another State's independence or territorial or personal supremacy is

[1] Subject to Minority treaties and other international obligations see below, §§ 340*b*-340*e* And see below § 137 on Humanitarian Intervention

[2] The exercise of the various rights enumerated in this section is subject to the existence of restrictions created by treaty, of which many examples exist see below, § 127.

[3] See below, § 155.

correlative to the corresponding right possessed by other States It is impossible to enumerate all such actions as might constitute a violation of this duty But it is of value to give some illustrative examples Thus, in the absence of treaty provisions to the contrary, a State is not allowed to interfere in the management of their internal or international affairs, nor to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse Further, in the interest of the territorial supremacy of other States, a State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission [1] Again, in the interest of the personal supremacy of other States, a State is not allowed to naturalise aliens residing on its territory without their consent,[2] nor to prevent them from returning home for the purpose of fulfilling military service

Restrictions upon Independence

§ 126 Independence is not unlimited liberty for a State to do what it likes without any restriction whatever The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States, because it is bound not to intervene in the affairs of other States And it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs Independence is a question of degree, and it is therefore also a question of degree whether the independence of a State is destroyed or not by certain restrictions [3] Thus it is

[1] See below, § 128 But neighbouring States very often give such permission to one another, for instance, one State may permit the customs officers of another State to be stationed at a railway station in the former's territory for the purpose of examining the luggage of travellers See *German Railway Station at Basle Case*, decided by a German Court in June 1928 *Annual Digest*, 1927-1928, Case No 90, and see Vali, *Servitudes of International Law* (1933), pp 117 127 See also Hackworth, II § 153 And see *ibid*, §§ 150 and 151

[2] See, however, below, § 299

[3] See Judge Anzilotti's Opinion, referred to above, p 255 Thus through Article 4 of the Convention of London of 1884, between Great Britain and the former South African Republic, stipulating that the latter should not conclude any treaty with any foreign State other than the

generally admitted that States under protectorate are so much restricted that they are not fully independent, but half sovereign On the other hand, the restrictions connected with the neutralisation of States do not, according to the correct opinion,[1] destroy their independence, although they cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty of action

Restrictions upon Territorial Supremacy

§ 127. Just like independence, territorial supremacy does not give a boundless liberty of action Thus, by customary International Law, every State has a right to demand that its merchantmen can pass through the maritime belt of other States Thus, further, navigation on so-called international rivers in Europe must be open to merchantmen of all States Thus, thirdly, foreign monarchs and envoys, foreign men-of-war, and foreign armed forces must be granted exterritoriality Thus, fourthly, through the right of protection over citizens abroad, which is held by every State according to customary International Law, a State cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own subjects,

Orange Free State, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the Republic was not an independent State, although the Republic itself and many writers were of a different opinion (See Rivier, 1 p 89, Holtzendorff in *Holtzendorff*, II p 115, Westlake, *Papers*, pp 419 460)

Thus, to give another example, through Article 1 of the Treaty of Havana (see Martens, *N R G*, 2nd ser, 32, p 79) of May 22, 1903, between the United States of America and Cuba, stipulating that Cuba shall never enter into any such treaty with a foreign Power as will impair, or tend to impair, the independence of Cuba, and shall abstain from other acts, the Republic of Cuba was so much restricted that some writers maintain—wrongly, it is believed—that Cuba was under an American protectorate and only a half sovereign State (See Whitcomb, *La situation internationale de Cuba* (1905), Hershey, p 168, n. 33, Machado y Ortega, *La enmienda Platt* (1922), and Hyde, 1 § 19) As to the present position see below, § 135

Again, the Republic of Panama is, by the Hay Varilla Treaty of Washington of 1903 (see Martens, *N R G*, 2nd ser, 31, p 599, and Hyde, 1 § 20), likewise burdened with some restrictions in favour of the United States, but here, too, it would be wrong to maintain that Panama is under an American protectorate Restrictions in favour of the United States, imposed upon San Domingo by a Treaty of February 8, 1907 (*A J*, 1 (1907), Suppl, p 23, see also *A J*, 11 (1917), p 394, and Hyde, 1 § 21), and upon Haiti by a treaty of September 16, 1915 (*A J*, 10 (1916), Suppl, p 234, *A J*, 16 (1922), pp 607 610, and Hyde, 1 § 22), raise similar questions As to Nicaragua see Hyde, 1 § 23

[1] See above, § 97

it cannot, for instance, compel them to serve [1] in its army or navy Thus, fifthly, a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory [2] Sixthly, a State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring State, *e g* as the result of working of factories emitting deleterious fumes [3] Finally, a State is not allowed to permit on its territory the preparation of a hostile expedition [4] against another country

In contradistinction to these restrictions by the customary Law of Nations, there are obligations of many a kind which a State can assume through treaties, without thereby losing its internal independence and territorial supremacy [5] Thus Napoleon I after the Peace of Tilsit of 1807 imposed upon Prussia the restriction [6] not to keep more than 42,000 men under arms during ten years from January 1, 1809, and after the First World War the Allies imposed upon Germany the restriction not to keep more than 100,000 men under arms, nor a navy larger than necessary for coast defence and purposes of police, nor any military or naval air forces. There is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with foreign Powers

§ 127*a* The duty of a State to prevent the commission

Subversive Activities against Foreign States

[1] See Hall, § 61, and Advisory Opinion of the Permanent Court upon the *Nationality Decrees in Tunis and Morocco* (1923), Series B, No 4, and Latey in *Grotius Society*, 9 (1924), pp 49-60, particularly at p 60 And see below, § 155*d*, on the Plea of Non discrimination

[2] See below, §§ 155*aa*, 178*c*

[3] See the decision of the Trail Smelter Arbitral Tribunal of April 16, 1938, with regard to the damage caused by the smelter situated at Trail, British Columbia, to the inhabitants of the State of Washington *A J*, 33 (1939), pp 182-212

[4] See below, § 127*a*

[5] The Permanent Court has several times taken occasion to point out that, so far from treaty obligations being restrictions upon sovereignty, 'the right of entering into international engagements is an attribute of State sovereignty' see, for instance, Series A, No 1, at p 25, Series B, No 10, at p 21, and Series A, No 23, at p 26 And see below, § 554, on restrictive interpretations of treaties

[6] See Clerq, *Recueil des traités conclus par la France* (1864), II p 272.

within its territory of acts injurious to foreign States [1] does not imply an obligation to suppress all such conduct on the part of private persons as is inimical to or critical of the régime or policy of a foreign State Thus there is no duty to suppress revolutionary propaganda on the part of private persons directed against a foreign Government So long as International Law provides no remedy against abuses of governmental power, international society cannot be regarded as an institution for the mutual insurance of established Governments On the other hand, States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions [2] or attempts to commit common crimes against life [3]

[1] As to the pollution of water and air see below, § 155*aa* See also Hackworth, II § 157

[2] Article 1 of the Pan-American Convention of February 1928 on Duties and Rights of States in the event of Civil Strife (see above, p 62, n) seems to go further than that It obliges the contracting parties to use all means at their disposal to prevent the inhabitants of their territories, nationals or aliens, from participating in, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil war The same Article obliges the parties to forbid, so long as the belligerency of the rebels has not been recognised, the traffic in arms and war material, except when intended for the Government It has been held that contracts made with a view to promoting a hostile expedition against a foreign State are unenforceable See *Florsheim* v *Delgado*, decided by the Civil Tribunal of the Seine in July 1932, *Sirey*, 1934, 2, p 75 (with a note by Niboyet), *Annual Digest*, 1931-1932, Case No 9, and see *Z ö V* 4 (1934), p 937, for references to similar cases For a detailed survey of the practice of the United States with regard to hostile expeditions see Curtis in *A J*, 8 (1914), pp 1-37, 224 255, and Hackworth, II § 156

[3] On the alleged activities of Yugoslav terrorists in Hungary and the resulting appeal by Yugoslavia to the League in November 1934 see Toynbee, *Survey*, 1934, pp 537 577 ' Liais in *R G*, 42 (1935), pp 126 145 ' Kuhn in *A J*, 29 (1935), pp 87 92 On December 10, 1934, the Council, ' considering that the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co operation in this matter,' decided to set up a committee of experts to study the position with a view to preparing a draft convention *Documents*, 1934, pp 111 116, Dumas in *R I*, 3rd ser, 16 (1935), pp 609 640, Eustathiadès in *R G*, 43 (1936), pp 385 415, Sottile in *Hague Recueil*, 65 (1938) (III), pp 91-178, Donnedieu de Vabres in *R I*, 3rd ser, vol 19 (1938), pp 37 62, with special reference to the suggested establishment of an international criminal court for the suppression of terrorism In 1936 the Assembly of the League considered the draft conventions prepared by the Committee of Experts See Doc A 7 1936 V and, for the replies of governments, Docs A 24 1936 V and A 24 (*a*) 1936 V It expressed the view that the contemplated convention should have as its principal object (1) to prohibit any form of preparation or execution of terrorist outrages, (2) to ensure effective co-operation for the prevention of such outrages, and (3) to ensure punishment of outrages of a terrorist and international character The Assembly noted that although the pro-

or property [1] Moreover, while subversive activities against foreign States on the part of private persons do not in principle engage the international responsibility of a State, such activities when emanating directly from the Government itself or indirectly from organisations receiving from it financial or other assistance or closely associated with it by virtue of the constitution of the State concerned, amount to a breach of International Law [2] The principles of inde-

posed international criminal court did not secure general acceptance, the proposal was valuable inasmuch as the trial by such a court might constitute an alternative preferable to extradition or prosecution For the Resolution of the Assembly see *Off J*, Special Suppl No 155 In May 1937 the Council decided to convene a Conference for the consideration of the matter *Monthly Summary*, May 1937, p 102 See also Caloyanni in *Grotius Society*, 21 (1935), pp 77 92, and in *R I (Paris)*, 15 (1935), pp 46 71, Gretschaninow in *Z o V*, 5 (1935), pp 181-185, Hudson in *A J*, 32 (1938), pp 549 554 And see generally on mutual aid for the repression of crime Travers, *L'entr'aide répressive internationale et la loi française du 10 mars* 1927 (1928), de Vabres in *R G*, 35 (1928), pp 553-570 See also Dumas, *La responsabilité internationale des États* (1930), pp 386-435, Lemkin, *Les actes constituant un danger général (interétatique)* (1934), Roux in *Hague Recueil*, vol 36 (1931) (II), pp 81 *et seq*, 168 *et seq* And see below, § 337*a*

[1] On the question of responsibility for boycott of goods from a foreign country see Walz, *Nationalboykott und Volkerrecht* (1939), Lauterpacht in *B Y*, 14 (1933), pp 125-140, Hyde and Wehle in *A J*, 27 (1933), pp 1-10, Preuss, *ibid*, 28 (1934), pp 667, 668, Bouvé, *ibid*, pp 19 42, Friedmann in *B Y*, 19 (1938), pp 142-145 And see Remer, *A Study of Chinese Boycotts* (1933), and Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp 604-622

[2] See Rapoport in *Répertoire*, II pp 237-239, Lauterpacht in *A J*, 22 (1928), pp 105 130, and in *Grotius Society*, 13 (1928), pp 143-163, Bourquin in *Hague Recueil*, vol 14 (1927) (I), pp 121-178, Pella, *ibid*, vol 33 (1930) (III), pp 677-830 (on offences against foreign States generally), Delbez in *R G*, 37 (1930), pp 461-475, Preuss, *ibid*, 40 (1933), pp 606-645, and in *A J*, 28 (1934), pp 649-668, Van Dyke, *ibid*, 36 (1940), pp 58 73, Smith in *Georgetown Law Journal*, 29 (1941), pp 809-828, Fenwick in *A J*, 35 (1941), pp 626 631, Cowles, *ibid*, 36 (1942), pp 242 251 As to the responsibility of Soviet Russia for the activities of the Communist Party and the Third International see Verdross in *Z o R*, 9 (1930), pp 577 582 For details as to various protests against propaganda conducted by the Communist International see Tabouillot in *Z o V*, 5 (1935), pp 851 860 On the Chinese Russian incident of May 1929, arising out of alleged Communist activities of the Russian authorities of the Chinese Eastern Railway, see Toynbee, *Survey*, 1929, pp 344 369 For the Statutes of the Communist International see *Documents*, 1928, pp 57 63 When in November 1933 the United States recognised the Soviet Government, the latter undertook 'to respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States,' and to prevent such interference on the part of persons in governmental service or organisations under its control or in receipt of its financial assistance See *A J*, 29 (1935), p 657, and see *ibid*, pp 656-662, for a note by Hyde on the protest of the United States, in August 1935, against a 'flagrant violation' of this pledge, and Garner

pendence and non-intervention enjoin upon Governments and State officials the duty of scrupulous abstention not only from active interference, but from criticism of foreign laws and institutions [1]

Restrictions upon Personal Supremacy

§ 128 Personal supremacy does not give unlimited liberty of action either Although the citizens of a State remain under its power when abroad, such State is restricted in the exercise of this power with regard to all those matters in which the foreign State on whose territory these citizens reside is competent in consequence of its territorial supremacy The duty to respect the territorial supremacy of a foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State A State must not perform acts of sovereignty in the territory of another State [2] Thus, for

in *B Y*, 17 (1936), pp 184-186 See also the Notes exchanged in December 1929 on the occasion of the resumption of diplomatic relations between Great Britain and Soviet Russia Treaty Series, No 2 (1930), Cmd 3467 For the German Japanese Agreement on Communism signed on November 29, 1936, at Berlin in which the parties agreed mutually to inform each other concerning the activities of the Communist International, to consult with each other as to the measures to combat its activity, and to co operate in executing these measures, see *International Conciliation*, Pamphlet No 327 (February 1937) On the National Socialist propaganda wireless and otherwise directed against Austria in 1933 see *Documents*, 1933, pp 385 398, Stenuit, *La radiophonie et le droit international public* (1932), pp 37 *et seq*, Preuss, *op cit*, Raestad in *Dossiers de la coopération internationale* (1933) For the International Convention of September 23, 1936, concerning the Use of Broadcasting in the Cause of Peace see *Off J*, 1936, p 1437, Cmd 5505, Misc No 6 (1937), *A J*, 32 (1938), p 113, Hudson, *Legislation*, vii p 409 In that Convention, ratified, among others, by Great Britain, France and the British Dominions, the Parties undertook to prohibit the broadcasting within their territories of any transmission calculated by reason of its inaccuracy or otherwise to disturb international understanding or to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a Contracting Party, See also above, p 252, n 1 (*in fine*) Fenwick in *A J*, 32 (1938), pp 339-343, Raestad in *R I*, 16 (1935), pp 289 298, Tomlinson, *International Control of Radiocommunications* (1938), pp 226 233 As illustrating the difficulty of distinguishing in some cases between the acts of governments and political parties closely associated therewith see Bunger's study on the relations of party and State in China in *Z o V*, 6 (1936), pp 286 302

[1] See above, p 253, n 2

[2] It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended Thus Germany restored to Switzerland, in 1935, a certain Herr Jacob-Salomon, an ex-German political refugee who had been abducted from Switzerland with the connivance of

instance, a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according to the Municipal Law of the land in which they reside [1]

German officials The case was submitted to arbitration, but soon after the commencement of the written proceedings Germany admitted in September 1935 that a State official ' acted in an inadmissible manner in this case ' and surrendered Jacob to the Swiss authorities For an account of this case and a survey of other cases of kidnapping of fugitives from justice on foreign territory see Preuss in *A J*, 29 (1935), pp 502 507, and *ibid*, 30 (1936), p 123 See also *Vaccaro* v *Collier, the United States Marshal*, where the United States Circuit Court of Appeals held on June 17, 1931, that an officer of the United States who forcibly arrested in Canada and forcibly carried across the frontier a person wanted by the United States police was guilty of kid napping The Court pointed out that an unlawful carrying of a person beyond the boundaries of a State to be dealt with by the laws of another State is a violation of the sovereignty of the former 51 F (2*d*) 17 *Annual Digest*, 1929 1930, Case No 180 And see *Villareal* v *Hammond* (1934), 74 F (2nd) 503, *Annual Digest*, 1933-1934, Case No 143, where the Court in granting extradition of the prisoners accused of kidnapping certain persons in Mexico with the view to handing them over to the United States authorities, pointed out that that act in any case constituted a violation of Mexican territorial sovereignty But see *United States* v *Insull et Al*, where the Court re jected the plea of the accused that as he had been unlawfully seized by the Turkish police while on a Greek vessel in Turkish waters the Court had no jurisdiction 8 F Supp 310, *Annual Digest*, 1933-1934, Case No 75 Similarly, in *Ex parte Lopez* the Court refused a writ of habeas corpus for which the accused applied on the ground that he had been forcibly seized in Mexico by some persons (whose subsequent extradition to Mexico was granted in the *Villareal Case*, above) and brought to the United States 6 F Supp 342, *Annual Digest*, 1933 1934, Case No 76 For a contrary decision by a French Court see *ibid*, Case No 77 (*In re Jolis*) And see generally on the question of jurisdiction with regard to persons apprehended in violation of International Law, *Harvard Research* (1935), pp 623 632, and Dickinson in *A J*, 28 (1934), pp 234-245 See also Hackworth, II § 152 Some countries make it a criminal offence to perform in their territory governmental activities on behalf of a foreign State See, *e g*, *Kampfer* v *Public Prosecutor of Zürich*, decided in 1939 by the Swiss Federal Tribunal *Annual Digest*, 1941 1942, Case No 2 While a Government cannot exercise jurisdictional rights in foreign territory, it has been held repeatedly that, in pursuance of requisition decrees or similar measures, it may take peaceful possession of a vessel in foreign waters *Ervin* v *Quintanilla* (1938), 99 F (2*d*) 935, *Annual Digest*, 1938-1940, Case No 76 It appears from the decision in *The Navemar*—(1938) 18 F Supp 153, 158, 24 F Supp 495, 497—that possession gained in American waters by force, even if subsequently ratified by the foreign Government, is not a sufficient ground for jurisdictional immunity For a somewhat different view see *The Cristina* (1938), 54 *T L R* 512, at pp 518, 521 And see generally on the requisitioning of merchant ships abroad McNair in *J C L*, 3rd ser, 27 (1945), pp 68 78

[1] For example, in time of war a belligerent is not entitled to prohibit one of its nationals, resident in a neutral State under the laws of which debts must be paid, from paying a debt due to a national of the other belligerent For a survey of the law

But a State may also by treaty obligation be for some parts restricted in its liberty of action with regard to its citizens. Thus the Treaty of Berlin of 1878 restricted the personal supremacy of Bulgaria, Montenegro, Serbia, and Roumania in so far as these States were thereby obliged not to impose any religious disabilities on any of their subjects,[1] and the policy of protecting racial, religious, and linguistic minorities by means of treaty obligations was carried further in the treaties concluded at the end of the First World War [2] Moreover, in so far as the principle of humanitarian intervention has become and is tending to become a rule of International Law, States are bound to respect the fundamental human rights of their own citizens [3] The Charter of the United Nations refers repeatedly to the promotion of human rights and fundamental freedoms, as well as of the observance thereof, as one of the principal purposes of the Organisation [4] And although the Charter provides for no clear or specific legal obligations in this field, it cannot be said that under the Charter a State possesses unfettered freedom of action as to the treatment of its own citizens regardless of their ' human rights and fundamental freedoms ' [5]

V

SELF-PRESERVATION

Vattel, II §§ 49 53, 119 121—Hall, §§ 8, 83 86—Westlake, I pp 312-317—Phillimore, I §§ 210 220—Twiss, I §§ 106 112—Halleck, I pp 119 124—Taylor, §§ 401 409—Wheaton, §§ 61 62—Hershey, § 132—Moore, II §§ 215 219—Hyde, I §§ 65 68—Fenwick, pp 142-147—Hartmann, § 15—Heffter, § 30—Holtzendorff in *Holtzendorff*, II pp 51 56—Gareis, § 25—Ullmann, § 38—Heilborn, pp 280 299—Bulmerincq, § 22—Fauchille, §§ 242 252 (3)—Despagnet, §§ 172-175—Mérignhac, I pp 239 245—Pradier-Fodéré, I §§ 211-286—Rivier, I § 20—Nys, II pp 218-221—Calvo, I §§ 208-209—Fiore, I §§ 452 466—Martens, I § 73—De Louter,

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of the United States as to the jurisdiction of courts of equity over persons to compel the doing of acts outside the territorial limits of the State see Messner in *Minnesota Law Review*, 14 (1929 1930), pp 494 529 As to enforcement of foreign public law see below, § 144*b*

[1] See above, § 73

[2] See below, §§ 340*b* 340*e*

[3] See below, § 137

[4] See Preamble and Articles 1 (3), 55, 62 (2), 68, 76 (*c*)

[5] See below, § 340*l*

1 pp 240 247—Bustamante, pp 199 213—Stowell, pp 112 130—Baty, pp 87-112—Anzilotti, pp 505 517—Hold-Ferneck, 1 pp 143-164—Westlake, *Papers*, pp 110 125—Cavaretta, *Lo stato di necessità nel diritto internazionale* (1910)—Cybichowski, *Studien zum internationalen Recht* (1912), pp 27 71—Cavaglieri, *Lo stato di necessità nel diritto internazionale* (1918)—Strupp, *Das volkerrechtliche Delikt* (1920), pp 122-129—Strisower, *Der Krieg und die Volkerrechtsordnung* (1919), pp 85 108—Rodick, *The Doctrine of Necessity in International Law* (1928)—Visscher in *R G*, 24 (1917), pp 74 108—Hindmarsh in *A J*, 26 (1932), pp 315 326—Giraud in *Hague Recueil*, vol 49 (1934) (III), pp 692 860—Hertz in *Friedenswarte*, 35 (1935), pp 137 142—Wright in *A J*, 29 (1935), pp 373 395, and 30 (1936), pp 45 46—Weiden in *Grotius Society*, 24 (1938), pp 105 132—Sperduti in *Rivista*, 35 (1943), pp 19 113 See also vol II § 52*m*, in connection with the conception of self defence

Self preservation an Excuse for Violations

§ 129 From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States Although, as a rule, all States are under a mutual duty to respect one another's personality, and are therefore bound not to violate one another, as an exception certain violations of another State committed by a State for the purpose of self-preservation are not prohibited by the Law of Nations Most writers maintain that every State has a fundamental right of self-preservation However, if every State really had a *right* of self-preservation, all the States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation But such duty does not exist On the contrary, although self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repel them It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations But, nevertheless, they remain violations, may therefore be repelled, and indemnities [1] may be demanded for damage done

What Acts of Self-preservation are Excused

§ 130 It is frequently maintained that every violation is excused so long as it was caused by the motive of self-preservation, but it becomes more and more recognised that violations of other States in the interest of self-preservation

[1] See below, § 154 (n 5)

are excused in cases of *necessity* only Only such acts of violence in the interest of self-preservation are excused as are necessary in self-defence, because otherwise the acting State would have to suffer, or have to continue to suffer, a violation against itself If an imminent violation, or the continuation of an already commenced violation, can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified [1] When, to give an example, a State is informed that a body of armed men is being organised on neighbouring territory for the purpose of a raid into its territory, and when the danger can be removed through an appeal to the authorities of the neighbouring country, no case of necessity has arisen But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises, and the threatened State is justified in invading the neighbouring country and disarming the intending raiders [2]

The reason of the thing, of course, makes it necessary for every State to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen But, unless the notion of self-preservation is to be eliminated as a legal conception, or unless it is used as a cloak for concealing deliberate breaches of the law, it is obvious that the question of the legality of action taken in self-preservation is suitable for determination and must ultimately be determined by a judicial authority or by a political body, like the Security Council of the United Nations, acting in a judicial capacity.

[1] Mr Webster, the American Secretary of State, defined the necessity which would be an excuse as a necessity of self-defence as being 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation', see Moore, II § 217, p 412 See also Grotius, II i v

[2] The term self defence must not here be understood in its narrower sense as meaning defence against an act of individuals only, but also in its wider sense as meaning the warding off of a disaster caused or threatened by the work of nature For instance, if a river flowing successively through the territories of two States is provided with a lock in the lower State, and if, through a sudden rise of the upper part of the river, the territory of the upper State be dangerously flooded, and if there be not sufficient time to approach the local authorities, it would be an excusable act on the part of the upper State to send some of its own officials into the lower State to open the lock

The refusal on the part of the State concerned to submit to or to abide by the impartial determination of that question must therefore be deemed to be *prima facie* evidence of a violation of International Law under the guise of action in self-preservation.[1] Thus the Charter of the United Nations leaves intact the inherent right of individual or collective self-defence in case of armed attack against a member of the United Nations until the Security Council takes action But the Charter lays down expressly that measures taken in the exercise of the right of self-defence must be immediately reported to the Security Council and that they do not affect the general responsibility of the Council for the maintenance and the restoration of peace [2]

Case of the Danish Fleet (1807)

§ 131 After the Peace of Tilsit of 1807, the British Government [3] was cognisant of a secret article of this treaty, according to which Denmark should, in certain circumstances, be coerced into declaring war against Great Britain, and France should be enabled to seize the Danish fleet so as to make use of it against Great Britain This plan, if carried out, would have endangered the position of Great Britain, who was then waging war against France As Denmark was not capable of defending herself against an attack of the French army in North Germany under Bernadotte and Davoust, who had orders to invade Denmark, the British Government requested Denmark to deliver up her fleet to the custody of Great Britain, and promised to restore it after the war And at the same time the means of defence against French invasion and a guarantee of her whole possessions were offered to Denmark by England Denmark, however, refused to comply with the British demands, whereupon the British considered that a case of

[1] See vol II § 52*m*, on the question of self defence, and the literature there cited As will be seen there, the question is of very great importance in connection with the General Treaty for the Renunciation of War The view stated in the text differs substantially from that expressed in previous editions

[2] Article 51

[3] This account follows Hall's (§ 85) summary of the facts See also Alison, *History of Europe*, etc, ed 1849, VIII pp 246 267, Holland Rose, *Napoleonic Studies* (1904), pp 133-152, and the same writer's paper in the *Transactions of the Royal Historical Society*, New Ser, 20 (1906), pp 61 77, and in *Cambridge History of British Foreign Policy*, I (1922), pp 361 364, Reddaway in *Baltic Countries* (published by the Baltic Institute), May, 1936, Kulsrud in *A J*, 32 (1938), pp 280-311.

necessity in self-defence had arisen, shelled Copenhagen, and seized the Danish fleet [1]

Case of Amelia Island (1817)

§ 132 Another example is supplied by the case of Amelia Island 'Amelia Island, at the mouth of St Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named McGregor, who in the name of the insurgent colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and of the United States The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels ' [2]

Case of the *Caroline* (1837)

§ 133 In 1837, during the Canadian rebellion, several hundreds of insurgents got hold of Navy Island on the Canadian side of the River Niagara and chartered a vessel, the *Caroline*, to carry supplies from the port of Schlosser, on the American side of the river, to Navy Island, and from there to the insurgents on the mainland of Canada The Canadian Government, informed of the imminent danger, on December 29, 1837, sent across the Niagara, to the port of Schlosser, a British force which obtained possession of the *Caroline*, seized her arms, set her on fire, and then sent her adrift down the falls of Niagara During the attack on the *Caroline* two Americans were killed and several others were wounded The United States complained of this British violation of her territorial supremacy, but Great Britain asserted that her act was necessary in self-preservation, since there was not sufficient time to prevent the imminent invasion of her territory through application to the United States Government The latter admitted that the act of Great Britain would have been justified if there had really been necessity in self-defence, but denied that, in fact, such

[1] The action of Great Britain in this case, while condemned by most Continental writers, is approved of by many British and American writers See, however, Reddie, *Researches*, II pp 37-41, who disapproves of it, as also does Walker, *Science*, p 138, and Holland Rose, *Cambridge History of British Foreign Policy*, I (1922), pp 361-364

[2] See Wharton, I § 50*a*, Moore, II § 216, and Hyde, I § 66 (n)

necessity existed at the time Nevertheless, since Great Britain had apologised for the violation of American territorial supremacy, the United States Government did not insist upon further reparation [1]

American Expeditions into Mexico, 1916-1919

§§ 133*a* and 133*b* During the period 1916 to 1919 the civil war in Mexico and the ensuing disorder necessitated on several occasions the despatch of expeditionary forces by the United States into Mexico for the purpose of protecting American citizens and their property and punishing violations of American sovereignty [2]

The German Invasion of Luxemburg and Belgium (1914)

§ 133*c* During the night of August 1, 1914, after having declared war on Russia, but before her declaration of war upon France, Germany marched troops into neutralised Luxemburg and occupied the country [3] At seven o'clock on the following evening, the German Minister at Brussels presented an ultimatum demanding from Belgium the right of passage for German troops through her territory, and threatening, in the event of refusal, to treat Belgium as an enemy As Belgium refused to accede to the demands of Germany, German troops invaded Belgium on August 4, and, in spite of the heroic resistance of the Belgian army, almost the whole of Belgium was conquered, and remained under German occupation throughout the First World War Germany justified this violation of the permanent neutrality of Luxemburg, as well as of Belgium, by pointing out that she was threatened by a Russian attack on one of her frontiers and by a French attack on another, and that necessity in self-preservation compelled her armies to break through

[1] See Wharton, 1 § 50*c*, Moore, II § 217, Hyde, 1 §§ 66, 248 (n), and Hall, § 84 With the case of the *Caroline* is connected the case of McLeod, which will be discussed below, § 446 As to both cases see Jennings in *A J*, 32 (1938), pp 82 99 Hall, § 86, Martens, 1 § 73, Hyde, 1 § 68, and others quote also the case of the *Virginius* (1873) as an example of necessity of self preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification for the capture of the vessel (see Moore, II § 309, pp 895-903) That a vessel sailing under another State's flag can nevertheless be seized on the high seas in case she is sailing to a port of the capturing State for the purpose of an invasion or bringing material help to insurgents, there is no doubt No better case of necessity of self-preservation could be given, since the danger is imminent and can be frustrated only by capture of the vessel

[2] See Hyde, 1 § 67, and *A J*, 10 (1916), pp 337 and 890, 11 (1917), pp 399 406, 13 (1919), p 557 For the landing of British troops in China in 1927 for the protection of British subjects see *L N Monthly Summary*, 7 (March 1927), p 48

[3] See above, § 100

Luxemburg and Belgium for the purpose of aiming a decisive blow at France Outside Germany, it is almost universally recognised that this plea of necessity in self-preservation was a mere pretext, and was not justified by the facts of the case Germany did not act in self-preservation at all, because she was not attacked and no attack was threatening It was Germany who declared war upon Russia and France, and she attacked France through Belgium because she thought in this way she would be able quickly to defeat France and then to turn all her might against Russia [1]

The Japanese Invasion of Manchuria (1931)

§ 133*d* In the course of the Manchurian dispute between China and Japan in 1931 and 1932 (see vol II § 52*aa*) the latter invoked the principle of self-defence as justifying her action in beginning military operations against China But the Assembly of the League fully endorsed the findings of the Commission of Enquiry to the effect that the Japanese action could not be regarded as a measure of legitimate self-defence, although it did not 'exclude the hypothesis that the officers on the spot may have thought they were acting in self-defence' [2] Japan, challenged the competence of the League to pronounce on the matter and claimed the right to remain judge of the legality of her action said to have been taken in self-defence [3] This was a claim which could not be admitted without reducing to an absurdity the notion of self-defence and the relevant international obligations of Japan [4]

Sinking of the French Fleet at Oran, 1940

§ 133*e* In June 1940, after Germany had invaded France and after the French Government signed an armistice with Germany, a substantial part of the French fleet took refuge in the French North African port of Oran On July 3 a British emissary presented the French naval commander with the demand that, in order to prevent the French ships from falling into the hands of Germany, these ships should

[1] See literature cited above, § 99 For the Japanese occupation of Chinese territory and the Allied occupation of Greek territory during the First World War see Garner, II §§ 460-473, and as to the latter, below, § 135, and vol II § 323

[2] *Report of the Commission*, League Doc C 663 M 320 1932 VII

[3] *Documents*, 1932, p 345

[4] See Brierly, pp 253 259, Lauterpacht, *The Function of Law*, pp 177-182, Wright, *op cit*, at p 243, Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp 552 568, and the literature referred to in vol II § 52*aa*

(*a*) either sail under British control to a British port and be restored to France after the War, (*b*) or sail to some distant French port, such as one in the West Indies or Martinique, to be demilitarised, (*c*) or be sunk by the French forces After that demand had been rejected, British naval and air forces opened an attack and sank or damaged most of the French ships at Oran and its adjacent port In the circumstances, the British action must be regarded as covered by the rigid legal requirements of action taken in self-preservation [1]

Modification of Neutrality Obligations by the United States during the Second World War

§ 133*f* In the course of the Second World War the United States, while remaining neutral, adopted measures which, on the face of it, could not be regarded as consistent with the law of neutrality as laid down in the Hague Conventions It has been submitted elsewhere [2] that these measures, including the transfer of destroyers to Great Britain in 1940 and the Lend-Lease Act of 1941, were in accordance with the changed position of neutrality consequent upon the General Treaty for the Renunciation of War In addition the United States relied, solemnly and repeatedly, on the right of self-preservation as justifying in law the unprecedented departure from the established rules of neutrality That appeal to the plea of self-preservation received a most persuasive addition of strength through the fact that, in the eyes of practically all the peoples of the world, the national cause of the United States, vitally menaced by the ostensible will for world domination on the part of Germany, became identified with the survival of the Law of Nations as an effective code of international conduct [3]

VI

INTERVENTION

Vattel, II §§ 54-62—Hall, §§ 88 95—Westlake, I pp 317-321—Lawrence, §§ 62 70—Phillimore, I §§ 390-415*a*—Brierly, pp 247-259—Halleck, I pp 102 124—Taylor, §§ 410-430—Walker, § 7—Hershey, §§ 135-145—Wharton, I §§ 45-72—Moore, VI §§ 897-926—Wheaton, §§ 63-71—Hyde, I §§ 69-97—Fenwick, pp 162-172—Bluntschli, §§ 474-480—Hartmann, § 17—Heffter, §§ 44-46—Geffcken in *Holtzendorff*, IV pp

[1] For a detailed explanation of the motives of the British action see the statement of the Prime Minister in the House of Commons on July 4, 1940.

[2] See below, vol II § 292A*a*

[3] *Ibid*

131-168 — Gareis, § 26 — Liszt, § 13, III — Ullmann, §§ 163, 164— Fauchille, §§ 300 333—Despagnet, §§ 193 216—Mérignhac, I pp 284-310—Pradier Fodéré, I §§ 354-441—Rivier, I § 31—Nys, II pp 226 234, 242-247—Calvo, I §§ 110 206—Fiore, I §§ 561-608, and *Code*, §§ 548-562 —Martens, I §§ 76, 77—Gemma, pp 117-125—De Louter, I pp 250-258 — Cruchaga, I §§ 276 322 — Suarez, I §§ 64 73 — Bustamante, pp 312 343—Keith's Wheaton, pp 154 203—Stowell, pp 69 228—Scelle, II pp 50 54—Bernard, *On the Principle of Non intervention* (1860)—Hautefeuille, *Le principe de non intervention* (1863)—Stapleton, *Intervention and Non intervention, or the Foreign Policy of Great Britain from* 1790 *to* 1865 (1866)—Geffcken, *Das Recht der Intervention* (1887)—Kebedgy, *De l'intervention* (1890)—Floecker, *De l'intervention en droit international* (1896)—Drago, *Cobro coercitivo de deudas publicas* (1906)—Moulin, *La doctrine de Drago* (1908)—Wachter, *Die volkerrechtliche Intervention als Mittel der Selbsthilfe* (1911)—Cavaglieri, *L'intervento nella sua definizione giuridica* (1913)—the same, *Nuovi studi sull' intervento* (1928)—Schoenborn, *Die Besetzung von Veracruz* (1914)—Hodges, *The Doctrine of Intervention* (1915)—Stowell, *Intervention in International Law* (1921) (containing an admirable bibliography)—Redslob, *Histoire des grands principes du droit des gens* (1923), *passim*—Brown, *International Society* (1923), pp 90-100—Redslob, *Les principes du droit des gens moderne* (1937), pp. 113-148—Mosler, *Die Intervention im Volkerrecht* (1937)—Dupuis in *Hague Recueil*, 1924, I pp 369 406—Strisower in *Strupp, Wort*, I pp 581 591—Winfield in *B Y*, 1922 1923, pp 130 149, and *ibid*, 1924, pp 149-162—Hettlage in *Z I*, 37 (1927), pp 11 88—Guerrero in *R G*, 36 (1929), pp 40-51—Potter in *Hague Recueil*, vol 32 (1930) (II), pp 611-685—Séfériadès, *ibid*, vol 34 (1930) (IV), pp 386-400—Yepes, *ibid*, vol 47 (1934) (I), pp 51 90—Strupp, *ibid*, pp 513 521—Kaufmann, *ibid*, vol 55 (1935) (IV), pp 589 607—Ellis in *A S Proceedings*, 1933, pp 78 88—Fenwick in *A J*, 39 (1945), pp 645 663

Conception and Character of Intervention

§ 134 Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things Such intervention can take place by right or without a right, but it always concerns the external independence or the territorial or personal supremacy of the State concerned, and the whole matter is therefore of great importance for the international position of States That intervention is, as a rule, forbidden by the Law of Nations which protects the international personality of the States, there is no doubt On the other hand, there is just as little doubt that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless admitted by the Law of Nations, and are excused in spite of the violation of the personality of the respective States which they involve

Intervention can take place in the external as well as in the internal affairs of a State. It concerns, in the first place, the external independence, and in the second either the territorial or the personal supremacy. But it must be emphasised that intervention proper is always *dictatorial* interference, not interference pure and simple.[1] Therefore intervention must neither be confused with good offices, nor with mediation,[2] nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference Thus for example, in 1826, at the request of the Portuguese Government, Great Britain sent troops to Portugal in order to assist that Government against a threatening revolution on the part of the followers of Don Miguel, and in 1849, at the request of Austria, Russia sent troops into Hungary to assist Austria in suppressing the Hungarian revolt [3]

[1] It also seems desirable to exclude from the category of intervention the toleration by a State upon its territory of the acts of private persons which endanger the safety of other States, though some writers do not make this distinction, see Redslob, *op cit*, at p 511, and Hettlage, *op cit*, at p 25 See also Gemma in *Hague Recueil*, 1924, III p 365, and Fauchille, § 300 (3) And see above, § 127*a*

[2] See below, vol II § 9

[3] See *A J*, Suppl, 22 (1928), pp 118-124, on the request, in May 1927, by the Government of Nicaragua to the Government of the United States for assistance and good offices in order to ensure free and impartial elections in Nicaragua As to the so called Non intervention Agreement of August 1936, between various European States in connection with the Civil War in Spain, see Lapradelle in *New Commonwealth Quarterly*, II (1936), pp 295-308, and in *R I (Paris)*, 18 (1936), pp 153 *et seq*, Dean in *Geneva Special Studies*, VII No 8 (1936), Jessup in *Foreign Affairs (U S A)*, January 1937, Garner in *A J*, 31 (1937), pp 66-73, Smith in *B Y*, 18 (1937), pp 17 31, Scelle in *Friedenswarte*, 37 (1937), pp 65-70, McNair in *L Q R*, 53 (1937), Padelford in *A J*, 31 (1937), pp 226-243 That Agreement, and the subsequent arrangements and agreements, while of importance as instances of the possibilities and limitations of *ad hoc* international co-operation in political matters affecting the peace of the world, cannot be easily brought within the accepted principles of International Law in the matter of intervention Inasmuch as Italy and Germany undertook not to supply the rebellious forces with munitions of war, these agreements consisted in an undertaking on the part of certain Powers to refrain from committing an international illegality in consideration of the promise of other Powers to refrain from acting in a manner in which they were entitled—and, according to some, legally bound—to act On the regulation of exports of munitions, in particular in connection with foreign civil wars, see Atwater, *American Regulation of Arms Exports* (1941) It is doubtful whether the interference of various European States which sent or encouraged the sending of troops and munitions in support of the parties to the Spanish Civil War in the years 1936-1939 constituted intervention in the accepted sense There is, however, no doubt that interference of that kind which amounts to denial of the right of every independent State to decide its form of government and political system is contrary to International Law See, on intervention in the Spanish Civil War generally, Toynbee, *Survey*, 1937 (II), Vedovato, *Il non*

Intervention by Right

§ 135 It is apparent that such interventions as take place by right must be distinguished from others Wherever there is no right of intervention, an intervention violates either the external independence or the territorial or personal supremacy But if an intervention takes place by right, it never constitutes such a violation, because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention Now a State may have a right of intervention against another State, mainly for seven reasons

(1) A State which holds a protectorate has a right to intervene in all the external affairs of the protected State

(2) If an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in case the former deals with that affair unilaterally

The events of 1878 provide an illustrative example Russia had concluded the preliminary Peace of San Stefano with defeated Turkey , Great Britain protested because the conditions of this peace were inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, and Russia agreed to the meeting of the Congress of Berlin for the purpose of arranging matters [1]

(3) If a State which is restricted by an international treaty in its external independence or its territorial or personal supremacy does not comply with the restrictions concerned, the other party or parties have a right to intervene Thus

intervento in Spagno (1938), Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939), Rousseau in *R I*, 3rd ser, vol 19 (1938), pp 217-293, 473-549, 700 775, and vol 20 (1939), pp 114 149, Scelle in *R G*, 45 (1938), pp 265 274, 473-549, and 46 (1939), pp 197-228, Raestad, *ibid*, pp 613 637, 809-826 See *A J*, 25 (1931), p 125, for the pronouncement by the United States Secretary of State on October 23, 1930, in connection with the revolution in Brazil

[1] Another example is provided by the Bryan Chamorro Treaty between the United States and Nicaragua of August 5, 1914, granting to the former an exclusive option to construct another interoceanic canal across Nicaraguan territory, and a naval base in the Gulf of Fonseca, and ceding to the former Great Corn Island and Little Corn Island in the Caribbean Sea The Republics of Costa Rica, San Salvador, and Honduras protested against this Treaty on the ground that it violated treaty rights previously acquired by them Costa Rica and San Salvador brought an action against Nicaragua before the Central American Court of Justice for the purpose of vindicating their rights, and the Court, on September 30, 1916, and March 9, 1917, pronounced judgment against Nicaragua, but, the United States of America not being a party to the litigation,

the United States of America, in 1906, intervened in Cuba in conformity with Article 3 of the Treaty of Havana [1] of 1903 (now virtually abrogated [2]) for the purpose of re-establishing order, and in 1904 in Panama in conformity with Article 7 of the Treaty of 1903 [3] (re-iterated in Article 10 of the Treaty of 1936) [4] Great Britain, France,

the Court declared its inability to declare the Treaty null and void See *A J*, 10 (1916), pp 344 351, and 11 (1917), pp 156 164, 181 229, 674 730, Hyde, 1 § 23, and below p 460, n 6

[1] See Martens, *N R G*, 2nd ser, 32, p 79, Robertson *Hispanic American Relations with the United States* (1923), pp 113, 114

[2] By the Treaty of May 29, 1934 see *A J*, 28 (1934), Suppl, p 97, Woolsey, *ibid*, 28 (1934), pp 530 534 See also Torriente in *Foreign Affairs (U S A)*, 8 (1930), pp 364 378, Toynbee, *Survey*, 1933, pp 361 393, *Documents*, 1934, pp 443 447, *U S Treaty Series*, No 866 (1934), Lliteras in *International Conciliation* (Pamphlet No 296, January 1934)

[3] Which provides that the same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon, and the territories and harbours adjacent thereto, in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order See Martens, *N R G*, 2nd ser, 31 (1905), p 599, and see Jones, *The Caribbean Since 1900* (1936), pp 339 352 Section 14 of the United States Act of March 24, 1934, providing for the independence of the Philippine Islands lays down that, during an interim period of ten years, the United States may intervene for the maintenance of the Government and for the protection of life and property and for other reasons see Fisher in *American Bar Association Journal*, 19 (1933), p 465, Jessup in *A J*, 29 (1935), p 84 And see above, p 177 On the intervention of the United States in Nicaragua in the years 1926 1930 see Toynbee, *Survey*, 1927, pp 479 516, and 1930, pp 397 406 (with a bibliography on p 397) As to the intervention in Haiti in 1929 and 1930 see Toynbee, *Survey*, 1930, pp 407 418 (with a bibliography on p 407), and 1933, pp 352 361 See also Millspaugh in *Foreign Affairs (U S A)*, 7 (1929), pp 556 570, and Calcott, *The Caribbean Policy of the United States* (1942) And see the Exchange of Notes of July 4, 1947, between Haiti and the United States in which the latter agreed to the flotation of an internal loan in Haiti of $10,000,000 (*Bulletin of State Department*, 17 (1947), p 149) Such consent was required by the Agreement of 1941 between the two countries which provided that the public debt of Haiti should not be increased except by previous agreement between the two Governments See also the Agreement of June 20, 1947, between the United States and Greece providing, at the request of the latter, for financial, material and technical assistance by the United States (*Bulletin of State Department*, 16 (1947), p 1300) The Agreement provides for the sending of an American Mission to Greece to determine the details of the assistance to be given The Agreement is to terminate, *inter alia*, at the request of the Government of Greece 'representing a majority of the Greek people' or if the continuation of the assistance is found undesirable or unnecessary by the General Assembly or the Security Council (the United States undertaking in the latter case to waive the exercise of any veto) See also *ibid*, 17 (1947), p 144 for a similar Agreement, signed on July 12, 1947, between the United States and Turkey And see *ibid*, 16 (1947), pp 827 909, for a collection of documents on the subject

[4] Which provides that the two Governments may, subject to consultation, take the necessary measures of prevention and defence in case of an international conflagration or the existence of a threat of aggression endangering the security of Panama or the neutrality or security of the Panama Canal *A J*, 34 (1940), Suppl, p 147

and Russia, the guarantors of the independence of Greece, intervened in Greece during the First World War in 1916 and 1917 for the purpose of re-establishing constitutional government in conformity with Article 3 of the Treaty of London of 1863.[1] King Constantine had to abdicate, and his second son, Alexander, was installed as King of the Hellenes

(4) If a State in time of peace or war violates such rules of the Law of Nations as are universally recognised by custom or are laid down in law-making treaties, other States have a right to intervene and to make the delinquent submit to the rules concerned If, for instance, a State undertook to extend its jurisdiction over the merchantmen of another State on the high seas, not only would this be an affair between the two States concerned, but all other States would have a right to intervene because the freedom of the open sea is a universally recognised principle Or if a State which is a party to the Hague Regulations concerning Land Warfare were to violate one of these regulations, all the other signatory Powers would have a right to intervene

(5) A State that has guaranteed by treaty the form of government of another State, or the reign of a certain dynasty over the same, has a right [2] to intervene in case of a change of form of government or of dynasty, provided that the treaty of guarantee was concluded between the respective States and not between their monarchs personally

(6) The right of protection [3] over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned [4]

[1] Which provides that 'Greece, under the sovereignty of Prince William of Denmark and the guarantee of the three Courts, forms a monarchical, independent, and constitutional State' See Martens, *N R G*, 17, part II p 79, and Ion in *A J*, 12 (1918), pp 562 588

[2] But this is not generally recognised, see, for instance, Hall, § 93, who denies the existence of such a right It is difficult to see why a State should not be able to undertake the obligation to retain a certain form of government or dynasty That historical events can justify such State in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see below, § 539) is another matter

[3] See below, § 319

[4] The so called *Drago Doctrine*, which asserts the rule that intervention is not allowed for the purpose of making a State pay its public debts, is unfounded, and has not received general recognition, although Argentina and some other South American

(7) Finally, the Covenant of the League of Nations provided, as does the Charter of the United Nations, for the collective intervention of the member-States for the purpose of restraining States which disturb the peace of the world by resorting to war or force generally or to threats of force in breach of the provisions of the Covenant [1] Moreover, the Covenant contemplated collective intervention in certain events against States which are not members of the League [2] The Charter of the United Nations imposes upon the Organisation the duty of ensuring that States which are not its members shall act in accordance with its principles so far as this is necessary for the maintenance of international peace and security [3]

Admissibility of Intervention in default of Right

§ 136 In contradistinction to intervention by right there are other interventions which cannot be considered illegal, although they violate the independence or the territorial or personal supremacy of the State concerned, and although such State has by no means any legal duty to submit

States tried to establish this rule at the second Hague Peace Conference of 1907 But this Conference adopted, on the initiative of the United States of America, a 'Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts' According to Article 1 of this Convention, the contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders the settlement of the *compromis* impossible, or, after the arbitration, fails to submit to the award It must be emphasised that the stipulations of this Convention concern the recovery of all contract debts, whether or not they arise from public loans The Drago Doctrine originates from Louis M Drago, sometime Foreign Secretary of the Republic of Argentina See Drago, *Cobro coercitivo de deudas publicas* (1906), Barclay, *Problems of International Practice*, etc (1907), pp 115 122, Moulin, *La Doctrine de Drago* (1908), Vivot, *La Doctrina Drago* (1911), Borchard, §§ 119-126, 371-378, and pp 861 864, Higgins, *The Hague Peace Conferences*, etc (1909), pp 184-197, Scott, *The Hague Peace Conferences* (1909), 1 pp 415-422, and in *A J*, 2 (1908), pp 78 94, Calvo in *R I*, 2nd ser, 5 (1903), pp 597-623, Drago in *R G*, 14 (1907), pp 251-287, Moulin in *R G*, 14 (1907), pp 417 472, Hershey in *A J*, 1 (1907), pp 26 45, Drago in *A J*, 1 (1907), pp 692 726, Spielhagen in *Z I*, 25 (1915), pp 509-565, Dupuis, *Le droit des gens et les rapports des grandes puissances* (1921), pp 270-282, Fischer Williams in *Bibliotheca Visseriana*, II (1924) pp 1-55, and *Chapters*, pp 257-324, Scelle, II pp 121-128 With regard to State Responsibility for the Non-payment of Contract Debts and Damages see below, § 155*a*

[1] See below, vol II §§ 25*b*-25*i*, 52*b*-52*e*, 66*a* And see below, § 168*b*

[2] Especially Articles 10, 11, and 17 See Fauchille, § 333 (1), and Schücking und Wehberg, pp 168, 169 And see Bava, *L' interpretazione dell' article 17* (1931)

[3] Article 2 (6)

patiently and suffer the intervention Of such interventions in default of right there are two kinds, namely, such as are necessary in self-preservation and such as are necessary in the interest of the balance of power

(1) As regards interventions for the purpose of self-preservation, it is obvious that, if any necessary violation—committed in self-defence—of the international personality of other States is, as shown above (§ 130), excused, such violation must also be excused as is involved in an intervention

(2) As regards intervention in the interest of the balance of power, it was, in the absence of an international organisation of States such as the League of Nations or the United Nations, regarded as admissible Since the Westphalian Peace of 1648 the principle of the balance of power played a preponderant part in the history of Europe It found express recognition in 1713 in the Treaty of Peace of Utrecht, it was the guiding star at the Vienna Congress in 1815,[1] when the map of Europe was rearranged, at the Congress of Paris in 1856, the Conference of London in 1867, the Congress of Berlin in 1878, and at the end of the Balkan War in 1913 Most of the interventions exercised in the Balkan Peninsula must, in so far as they are not based on treaty rights, be classified as interventions in the interest of the balance of power Examples of this are supplied by collective interventions exercised by the Powers in 1886 for the purpose of preventing the outbreak of war between Greece and Turkey, in 1897 during the war between Greece and Turkey with regard to the island of Crete, and in 1913, towards the end of the Balkan War, for the purpose of establishing an independent State of Albania [2]

[1] See Elbe in *Z o V*, 4 (1934), pp 226 260 (a valuable study) See also generally Quincy Wright in *A J*, 37 (1943), pp 97 103 and the same, *The Study of War* (1942), ii pp 743-766

[2] *Financial Intervention and Control* —Intervention, or something very like it, has sometimes taken place for the purpose of rehabilitating the financial situation of a State which is insolvent or suffering from serious embarrassment One or more States whose nationals are creditors have stepped in and reorganised the finances of the debtor State, sometimes appointing collectors of customs revenues and other officers Action of this nature has not infrequently led to prolonged military occupation or to a permanent condition of dependence of the debtor State See, generally, Lippert, *Das internationale Finanzrecht* (1912), Manes, *Staatsbankrotte* (1922), Merkl in *Z o R*, 3 (1923), pp 599

§ 137 There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals [1] according to discretion But there is a substantial body of opinion [2] and of practice in support of the view that

Humanitarian Intervention

627, Andreades in *Hague Recueil*, 1924 (IV), pp 5 105, Fischer Williams, *ibid*, pp 113 154, and *Chapters*, pp 324 419, Jèze, *Hague Recueil*, 1925 (II), pp 155 234, Borchard in *A S Proceedings*, 1932, pp 134-170, Winkler, *Foreign Bonds A Study of Defaults and Repudiations of Government Obligations* (1933), Hodson in Toynbee, *Survey*, 1934, pp 43 94, on some State defaults in the post-war period Among States which have been the subject of intervention or similar measures on financial grounds may be mentioned Egypt (see *Das internationale Recht der aegyptischen Staatschuld* (1891), Murat, *Le contrôle internationale sur les finances de l'Égypte, de la Grèce, et de la Turquie* (1899)), Greece, Turkey (see Murat, *op cit*), and the Dominican Republic and Haiti (see Hyde, I §§ 21, 22), Beman, *Intervention in Latin America* (1928), Beauvoir, *Le contrôle financier du gouvernement des États Unis d'Amérique sur la République d'Haiti* (1930), Millspaugh, *Haiti under American Control, 1915-1930* (1931), Jones, *The Caribbean since 1900* (1936), Montague, *Haiti and the United States, 1714-1938* (1940)

The League of Nations, through its Financial Committee, did important work in assisting the financial reconstruction and rehabilitation of States whose finances had been plunged into chaos as the result of the First World War, or who for other reasons would have been unable to raise loans upon satisfactory conditions without the support of a powerful external authority The following instances of such work may be mentioned the Austrian financial reconstruction and loans of 1924 to 1932 under a Commissioner General appointed by the League, the Hungarian financial reconstruction from 1924 to 1926, the Greek Refugee Settlement scheme and loan in 1924, the Bulgarian Refugee Settlement scheme and loan in 1926, the Esthonian loan in 1927, and the Danzig loans in 1925 and 1927 The distinctive merit of financial assistance rendered by and through the League was that it avoided the dangerous international jealousies and the domination over the debtor State which are apt to result from financial intervention or assistance rendered otherwise than through a common international agency See Saint-Germès, *La Société des Nations et les emprunts internationaux* (1931), Poortenaar, *L'œuvre de la restauration financière sous les auspices de la Société des Nations* (1933), Cosoiu, *Le rôle de la Société des Nations en matière d'emprunts d'État* (1934), Basdevant, *La Condition Internationale de l'Autriche* (1935), Plesch and Domke, *Die osterreichische Volkerbundanleihe* (1936) See also Austrian Loan Guarantee Act, 1933 (23 Geo 5, c 5), authorising the Treasury to guarantee 100 million gold schillings towards the loan to Austria provided for by a Protocol of July 15, 1932 As to the Liberian request for financial assistance in 1932 see League Doc C 469 M 238 1932 VII, and for the report of the Commission appointed to investigate the position Doc C 658 M 272 1930 VI See also Du Bois in *Foreign Affairs* (*U S A*), 11 (1933), pp 682-695

[1] See below, § 292

[2] See, *e g*, Grotius, II 20, 38, Vattel, II 4, 56, Westlake, I pp 319, 320 See also Stowell, pp 51-194 and in *A J*, 30 (1936), pp 102-106, Fauchille, I (1), pp 510 512, Martens, II pp 109, 110, Bluntschli, p 270, Janovsky and Fagen, *International Aspects of German Racial Policies* (1937), pp 1 43, Rougier in *R G*, 17 (1910), pp 468 526, Straus in *A S Proceedings*, 1912, pp 45-54 In the previous editions of this treatise the view was expressed that 'whether there is really a rule of the Law of Nations which admits such interventions may well be doubted' See also Hall, §§ 92 and 95, and Stowell, p 58, for an examination of writers who deny or doubt the legality of humanitarian intervention

there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle Intervention was often resorted to in order to put a stop to the persecution of Christians in Turkey Undoubtedly the practice of intervention had not been as frequent as occasion seems to have demanded The disinclination to take the responsibility for an international conflagration likely to follow upon such intervention or the consideration of the interests of the persecuted likely to suffer rather than to benefit from intervention unless fully backed by force,[1] have been to some extent responsible for the relative infrequency of humanitarian intervention The fact that, when resorted to by individual States, it may be—and has been—abused for selfish purposes tended to weaken its standing as a rule of International Law That objection does not apply to collective intervention [2] The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation,[3] marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society This is so although under the Charter as adopted in 1945 the degree of enforceability of fundamental human rights is still rudimentary and although the Charter itself expressly rules out intervention in matters which are essentially within the domestic jurisdiction of the State [4]

The Monroe Doctrine

§ 139.[5] The *de facto* political character of much of the sub-

[1] See Jessup in *A J*, 32 (1938), pp 116 119

[2] See below, § 140*b* But it must be noted that, possibly, to the extent to which 'human rights and fundamental freedoms' have become a persistent feature of the Charter (see below, § 340*l*) they may have ceased to be a matter which is essentially within the domestic jurisdiction of States

[3] See below, § 168*a*

[4] See below, § 140*a*

[5] § 138 has been omitted

ject of intervention becomes clearly apparent through the so-called Monroe Doctrine [1] of the United States of America This doctrine, at its first appearance, was indirectly a product of the policy of intervention in the interest of legitimacy which the Holy Alliance pursued in the beginning of the nineteenth century after the downfall of Napoleon The Powers of this Alliance were inclined to extend their policy of intervention to America, and to assist Spain in regaining her hold over the former Spanish colonies in South America, which had declared and maintained their independence, and which were recognised as independent sovereign States by the United States of America To meet and to check the imminent danger, President James Monroe delivered his celebrated Message to Congress on December 2, 1823 This Message contains three quite different, but nevertheless equally important, declarations

[1] Wharton, § 57, Dana's Note, No 36, to Wheaton, pp 97-112, Hyde, 1 §§ 85 97, Baty, pp 378 399, Lindley, pp 74-79, Fauchille, §§ 313-313 (29), Cruchaga, 1 §§ 290-312, Suarez, 1 §§ 71-73, Tucker, *The Monroe Doctrine* (1885), Moore, *The Monroe Doctrine* (1895), and *Digest*, 6, §§ 927-968, Mérignhac, *La Doctrine de Monroe à la fin du XIX^e Siècle* (1896), Beaumarchais, *La Doctrine de Monroe* (1898), Reddaway, *The Monroe Doctrine* (1898), Pétin, *Les États-Unis et la Doctrine de Monroe* (1900), Anderson in *A S Proceedings*, 6 (1912), pp 72 82, Lehr in *R I*, 2nd ser, 15 (1913), pp 50 60, and 16 (1914), pp 51-59, Hoeberlin in *Z V*, 7 (1913), pp 11-38, Kraus, *Die Monroedoktrin* (1913), Bartlett in the *Law Magazine and Review*, 39 (1914), pp 385 427, Zeballos in *R G*, 21 (1914), pp 297-339, Root and Chandler in *A J*, 8 (1914), pp 427-442 and 515 519, Hull, *The Monroe Doctrine* (1915), *A S Proceedings*, 8 (1914), pp 6-230, Armstrong in *A J*, 10 (1916), pp 77 103, Hart (A B), *The Monroe Doctrine* (1915) (most useful on account of its bibliography), Tower in *A J*, 14 (1920), pp 1-25, Brown, *ibid*, pp 207-210, Hall, *The Monroe Doctrine and the Great War* (1920), Elliott in *International Law Association's Thirtieth Report*, vol 1 (1921), pp 74-112, Cresson, *The Holy Alliance The European Background of the Monroe Doctrine* (1922), Hughes in *A J*, 17 (1923), pp 611-628, Thomas, *One Hundred Years of the Monroe Doctrine* (1923), Cleland, same title (1923), Robertson, *Hispanic-American Relations with the United States* (1923), pp 101-142, Alvarez, *The Monroe Doctrine* (1924), Pearce Higgins in *B Y*, 1924, pp 103 118, Planas Suarez in *Hague Recueil*, 1924 (IV), pp 271 365, Temperley, *Foreign Policy of Canning* (1925), ch v, Perkins, *The Monroe Doctrine, 1823-1826* (1927), *The Monroe Doctrine, 1826-1867* (1932), *The Monroe Doctrine, 1867-1907* (1937), Montluc in *R I (Geneva)*, 6 (1928), pp 22 42, Trelles, *Doctrina de Monroe* (1931), and in *Hague Recueil*, vol 32 (1930) (II), pp 397 602, Baty in *R I*, 3rd ser, 9 (1928), pp 157-172, Barratt in *Grotius Society*, 14 (1928), pp 1 27, Garner in *Political Science Quarterly*, 45 (1930), pp 231-258, Bailey, *ibid*, pp 220 239, Bellegarde in *R I (Geneva)*, 8 (1930), pp 119 127, Whitton in *R G*, 40 (1933), pp 5 44, 140 180, 273-325, De la Barra in *R I (Paris)*, 17 (1936), pp 311 321, Yepes in *R I F*, 3 (1937), pp 143-158 And see Phillips Bradley, *A Select Bibliography of the Monroe Doctrine, 1919-1929* (1929)

(1) In connection with the unsettled boundary lines in the north-west of the American continent, and with special reference to the challenging Russian ukase of September 28, 1821, the Message declared 'that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European Power' This declaration was never recognised by the European Powers, and Great Britain and Russia protested expressly against it In fact, however, no occupation of American territory has since then taken place on the part of a European State

(2) The Message, in continuance of the policy recommended by President Washington in his farewell address in 1796, then states that 'In the wars of the European Powers, in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so '

(3) In regard to the contemplated intervention of the Holy Alliance between Spain and the South American States, the Message declared that while the United States had not intervened, and never would intervene, in wars in Europe, they could not, on the other hand, in the interest of their own peace and happiness, allow the allied European Powers to extend their political system to any part of America, and try to intervene in the independence of the South American republics [1]

Since the time of President Monroe, the Monroe Doctrine has been gradually somewhat extended in so far as the United States claims a kind of political hegemony over all the States of the American continent Whenever a conflict occurs between such an American State and a European Power, at any rate if it is likely to have territorial consequences on the American continent, the United States is ready to exercise intervention [2] Through the Civil War her

[1] Note also in President Monroe's message the germ of the doctrine of self determination Temperley, *Foreign Policy of Canning* (1925), ch v, citing Reddaway, *op cit*

[2] All the cases of intervention on the part of the United States in the interest of the Monroe Doctrine are discussed in the thorough work of Kraus, *Die Monroedoktrin* (1913), pp 82 267

hands were to a certain extent bound in the sixties of the last century, and she could not prevent the occupation of Mexico by the French army, but she intervened in 1865 Again, she did not intervene in 1902 when Great Britain, Germany, and Italy took combined action against Venezuela, because she was cognisant of the fact that this action was intended merely to make Venezuela comply with her international duties. But she intervened in 1896 in the boundary conflict between Great Britain and Venezuela [1] when Lord Salisbury had sent an ultimatum to Venezuela, and she retains the Monroe Doctrine as a matter of principle [2]

Merits of the Monroe Doctrine.

§ 140 The importance of the Monroe Doctrine is largely of a political, not of a legal, character Since the Law of Nations is a law between all the civilised States as equal members of the Family of Nations, the States of the American continent are subjects of the same international rights and duties as the European States The European States are, in principle, free to acquire territory in America as elsewhere The same applies to intervention on the part of European Powers in American [3] affairs But it is evident that the Monroe Doctrine, as one of the guiding principles of the policy of the United States, is not only of the greatest

[1] See Cleveland, *The Venezuelan Boundary Question* (1913), Hyde, 1 pp 143-147

[2] Not so much an extension as an extensive interpretation of the Monroe Doctrine took place in the so called Magdalena Bay case in 1912 when the Senate adopted the following resolution 'When any harbour or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or safety of the United States, the Government of the United States could not see, without grave concern, the possession of such harbour or other place by any corporation or association which had such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes'

The Magdalena Bay Company, an American company which owned a tract of land of over 400,000 acres, including the Magdalena Bay in Mexico, intended to sell this land to a Japanese company, but, before carrying out its intention, communicated with the Department of State in Washington for the purpose of ascertaining whether there was any objection to the intended transaction See Kraus, *op cit*, pp 230 238

[3] Many American writers, however, assert that the Monroe Doctrine could be established as a rule of 'American' International Law See, for instance, Alvarez in *R G*, 20 (1913), p 50, and Anderson in *A S Proceedings*, 6 (1912), p 81 Alvarez in *The Monroe Doctrine* (1924), p 560, prints an address by President Wilson in which the President said 'The Monroe Doctrine is not part of international law The Monroe Doctrine has never been formally accepted by any international agreement The Monroe Doctrine merely rests upon the statement of the United States that if certain things happen she will do certain things'

political importance While its claim to legal validity has never been admitted, it has not been actively opposed by the European Powers It was given a quasi-legal status by Article 21 of the Covenant which lays down that it does not affect 'regional understandings like the Monroe doctrine' [1] The Monroe Doctrine owed its origin to the necessity of establishing and maintaining the independence of the South American States But these States consider that, in its original formulation, it is a reflection upon their independence As members of the League of Nations they often expressed opposition to it [2] Some of them refused in 1928 to become a party to the General Treaty for the Renunciation of War on the ground that the United States in signing and ratifying it affirmed its compatibility with the traditional principles of the Monroe Doctrine [3]

The Development of the Monroe Doctrine

§ 140*a* It is possible that, with the growing strength of the Latin-American States, the Doctrine may be transformed from what was originally an unilateral policy of the United States into a common principle of all the American Republics The Declaration of the Principles of Solidarity of America adopted at the Pan-American Conference at Lima on December 24, 1938, went in that direction The parties to the Declaration affirmed their determination to maintain these principles 'against all foreign intervention or activity that may threaten them' [4] On June 19, 1940, the United States informed Germany and Italy that 'in accordance with its traditional policy relating to the Western Hemisphere, the United States would not recognise any transfer,

[1] See *e g* Kraus, *op cit*

[2] See below, § 167*oo*

[3] See Toynbee, *Survey*, 1928, pp 37 44 And see the Report of the United States Senate Committee on Foreign Relations, January 14, 1929 *Documents*, 1928, p 6

For a Mexican suggestion, made in 1933, to generalise the Monroe Doctrine by raising it 'to the rank of an American doctrine,' see Jessup in *A J*, 29 (1935), pp 105-109

[4] See Fenwick in *A J*, 33 (1939), pp 257 268, Wilcox in *American Political Science Review*, 36 (1942), pp 434-453 In the Declaration of Lima the American States proclaimed their common concern and their determination to make effective, by consultation and otherwise, their solidarity in case the peace, security or territorial integrity of any American Republic should be threatened by foreign intervention or activity This step in the direction of what may be regarded as an extension of the Monroe Doctrine was tempered by the qualification that the 'Governments of the American Republics will act independently in their individual capacity, recognising fully their juridical equality as sovereign States' *A J*, 34 (1940), Suppl, p 200

and would not acquiesce in any attempt to transfer, any geographic region of the Western Hemisphere from one non-American power to another non-American power'[1] In a declaration of the Ministers of Foreign Affairs of the American Republics adopted at Habana in July 1940 it was stated that any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty, or the political independence of an American State shall be considered as an act of aggression against all the American States signatories to the declaration[2] At the same time, in the Convention on the Provisional Administration of European Colonies and Possessions in America, the various American States declared, in language both strikingly approximating to and going beyond the Monroe Doctrine, that any transfer or attempted transfer of the sovereignty, possession, or any interest in or control over colonies of non-American States located in the Western Hemisphere 'would be regarded by the American Republics as being against American sentiments and principles and the rights of American States to maintain their security and political independence'[3] This attitude was reaffirmed, in the form of a declaration on assistance and American solidarity, in the Act of Chapultepec of March 3, 1945, adopted by the Inter-American Conference on War and Peace[4] The Act, in anticipation of the forthcoming Charter of the United Nations, described the declaration in question as a regional arrangement not inconsistent with the purposes and the principles of the general organisation The Act of Chapultepec was re-affirmed and its provisions rendered more effective in the Treaty of Rio de Janeiro of September 2,

[1] *Bulletin of State Department*, June 22, 1940, p 681 For a criticism of the tendency to assert, by reference to the Monroe Doctrine as distinguished from the more general right of self-defence, the interest of the United States in outlying parts of the Western Hemisphere like Greenland or Iceland see Jessup in *A J*, 34 (1940), pp 709 711 On August 18, 1938, the President of the United States declared that 'the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire' For comment on this passage and its bearing on the Monroe Doctrine see Fenwick in *A J*, 32 (1938), pp 782-785, and Laing, *ibid*, pp 793-796 See also Sebilleau, *Le Canada et la doctrine de Monroe* (1937)

[2] *The International Conference of American States, First Supplement, 1933-1940* (1940), p 360

[3] *Ibid*, p 373

[4] *A J*, 39 (1945), Suppl, p 108

1947 [1] The Charter of the United Nations leaves room for regional arrangements or agencies for maintaining international peace and security in a manner compatible with the objects of the United Nations [2]

The Monroe Doctrine has been said to have found some imitation in the so-called British [3] and Japanese [4] Monroe Doctrines.

The Limits of Prohibition of Intervention.

§ 140b As a matter both of history and of principle the prohibition of intervention must be regarded primarily as a restriction which International Law imposes upon States for the protection of the independence of other members of the international community. For this reason the notion and the prohibition of intervention cannot accurately extend to collective action undertaken in the general interest

[1] See below, p 867

[2] Article 52 (1) See below, § 571

[3] See the British Note of May 19, 1928, addressed to the United States in connection with the proposed Treaty for the Renunciation of War The relevant passage of that Note is as follows 'There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered Their protection against attack is to the British Empire a measure of self-defence It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect The Government of the United States have comparable interests any disregard of which by a foreign Power they have declared that they would regard as an unfriendly act' See Cmd 3109, p 25, and Cmd 3163, p 10, *Documents*, 1928, p 5 The former declarations referred to in the Note are probably those of 1903 and 1907 relating to the Persian Gulf (cited by Lindley, pp 73, 74) and of 1922 regarding Egypt (*ibid*, p 246)

[4] In the years following upon the invasion of Manchuria, Japan made a series of statements claiming a special position in China. In April 1934 the Japanese Government announced that they would oppose any attempt on the part of China to avail herself of the influence of any other country in order to resist Japan, including 'any joint operations undertaken by foreign Powers even in the name of technical or financial assistance' as bound to acquire political significance For the text of the statement see *Documents*, 1934, p 472 The British Government declared that it could not admit the right of Japan alone to decide whether any particular action, such as provision of technical or financial assistance, constituted a danger to peace House of Commons, April 30, 1934, cols 13 14, *Documents*, 1934, p 476 The United States Government refused to admit that any nation 'can, without the assent of the other nations concerned, rightfully endeavour to make conclusive its will in situations where there are involved the rights, the obligations, and the legitimate interests of other sovereign States' *Documents*, 1934, p 477 And see *ibid*, pp 477 486, for the other relevant statements, Blakslee in *Foreign Affairs* (*U S A*), 11 (1933), pp 671-681, Klévanski, *Le 'monroisme' japonais* (1935), *Z o V*, 4 (1934), pp 596 608, Hyde in *A J*, 28 (1934), pp 431-443, Long in *R I* (*Paris*), 13 (1934), pp 267-278, Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), pp 623-654

of States or for the collective enforcement of International Law [1] This means that while prohibition of intervention is a limitation upon States acting in their individual capacity in pursuance of their particular interests, it does not properly apply to remedial or preventive action undertaken by or on behalf of the organs of international society [2] Accordingly, any apparent limitation of the right of intervention on the part of the latter must be interpreted restrictively in that sense Although it is expressly laid down in the Charter of the United Nations that it does not authorise intervention with regard to matters which are essentially within the domestic jurisdiction of States,[3] the provision in question does not exclude action, short of dictatorial interference, undertaken with the view to implementing the purposes of the Charter Thus with regard to the protection of human rights and freedoms—a prominent feature of the Charter—the prohibition of intervention does not preclude study, discussion, investigation and recommendation on the part of the various organs of the United Nations [4]

[1] This point is perhaps not sufficiently appreciated by Loewenstein, *Political Reconstruction* (1946), pp 14-85—a work otherwise notable for a valuable criticism of the traditional doctrine of non intervention

[2] It will be noted that the successive affirmations, on the part of American States, of the prohibition of intervention refers to intervention by States acting, apparently, in their individual capacity The Convention of 1933 on Rights and Duties of States signed at the Seventh International Conference of American States laid down that 'no State has the right to intervene in the internal and external affairs of another' (Article 8) Hudson, *Legislation*, vi p 623 In the Additional Protocol Relative to Non-Intervention, adopted in 1936 at the Inter-American Conference for the Maintenance of Peace, the Parties declared 'inadmissible the intervention of any of them in the internal or external affairs of any other of the Parties' (Article 1) *International Conferences of American States, First Supplement, 1933-1940* (1940), p 191 In the Act of Chapultepec adopted on March 3, 1945, the American States reaffirmed the condemnation of intervention 'by a State in the internal or external affairs of another' (*A J*, 39 (1945), Suppl, p 108) At the same time the main purpose of the Act was to give expression to the principle and the obligations of collectivesecurity in a manner which, but for its collective character, would be tantamount to intervention And see the suggestive observations by Fenwick in *A J*, 39 (1945), pp 645 663, on the decisive difference between individual intervention and collective action

[3] See below, § 168*f*

[4] See below, § 340*l* It will be observed that, apart from the abovementioned principle of non intervention with regard to matters of domestic jurisdiction, the system of the Charter is based on collective intervention, in matters affecting international peace and security, in relation both to members and to non members of the United Nations See below, § 522*a*

VII

INTERCOURSE

Grotius, II c 2, §§ 13-17—Vattel, II §§ 21-26—Hall, § 13—Taylor, § 160—Hershey, § 148—Bluntschli, § 381 and p 26—Hartmann, § 15—Heffter, §§ 26, 33—Holtzendorff in *Holtzendorff*, II pp 60 64—Gareis, § 27—Liszt, § 7—Ullmann, § 38—Fauchille, §§ 285 289—Despagnet, § 183—Mérignhac, I pp 256-258—Pradier-Fodéré, IV §§ 1899-1904—Rivier, I pp 262-264—Nys, II pp 263-274—Calvo, III §§ 1303-1305—Fiore, I § 370—Martens, I § 79—De Louter, I pp 249, 250—Cruchaga, I §§ 248-254—Hold-Ferneck, I pp 175, 176—Stowell, pp 137-156, 229 246—Fenwick, pp 393-401—Scelle, II pp 68 82—Baty, *International Law* (1909), chapters II and III (Penetration)—Kaufmann in *Hague Recueil*, vol 55 (1935) (IV), pp 586 588—Heilperin in *Hague Recueil*, 68 (1939) (II), pp 331 447—Quincy Wright in *A S Proceedings*, 1941, pp 30 39

Intercourse a Presupposition of International Personality

§ 141 Many adherents of the doctrine of fundamental rights include therein also a right of intercourse for every State with all others [1] This right of intercourse is said to comprise a right of diplomatic, commercial, postal, telegraphic intercourse, of intercourse by railway, a right for foreigners to travel and reside on the territory of every State, and the like There is, in law, no such fundamental right of intercourse All the consequences which are said to follow from the right of intercourse are not at all consequences of a right, but nothing else than consequences of the fact that intercourse between the States is a condition without which a Law of Nations would not and could not exist The civilised States make a community of States because they are knit together through their common interests, and the manifold intercourse which serves these interests. Through intercourse with one another, and with the growth of their common interests, the Law of Nations has grown up among the civilised States Where there is no intercourse, there cannot be a community and a law for such community Intercourse is therefore one of the characteristics of the position of the States within the Family of Nations, and it may be maintained that intercourse is a presupposition of the International Personality of every State But no special right or rights of intercourse between the States exist according to the Law of Nations.

[1] For the views of the scholastic writers on liberty of commerce see Catry in *R G*, 39 (1932), pp 193 218

§ 141*a*. It is because such special rights of intercourse do not exist that the States conclude treaties regarding matters of post, telegraphs, telephones, railways, and commerce Thus Article 23 (*c*) [1] of the Covenant of the League obliged members to make provision for securing and maintaining freedom of communications and of transit [2] and equitable

Rights of Intercourse and Economic Co operation

[1] In pursuance of that article an Organisation for Communications and Transit was established by the League, to which the Transit Section of the Secretariat corresponded The Conventions negotiated under the guidance of this Organisation relate to such matters as Freedom of Transit, Navigable Waterways of international concern, the right of States having no sea coast to a maritime flag, and Recommendations relative to the international régime of Railways and to the use of Ports subject to an international regime were adopted These Conventions are referred to in Appendix A, below, and see also §§ 178 (Rivers), 258 (Maritime Flag), 190c (Ports) See also Charles de Visscher, *Le droit international des communications* (1924), Toulmin in *B Y*, 1922 1923, pp 167 178, Hostie in *R I*, 3rd ser, 2 (1921), pp 83 124, Hollander in *A J*, 17 (1923), pp 470 488, Ripert in 52 *Clunet* (1925), pp 14-23, Haas in *Problems of Peace* (2nd ser, 1928), pp 212 220, Kunz in *Z o R*, 13 (1933), pp 408 *et seq* (a useful survey) For the Statute of the Organisation see Hudson, *Legislation*, vol iii p 2106 See also Jenks in *B Y*, 18 (1937) On the various questions of international communications which came before the Permanent Court of International Justice see Hostie in *R I* (*Paris*), 12 (1933), pp 58 129, and 17 (1936), pp 481-537 And see, generally, as to the rules of International Law in the matter of transit and communications, the same in *Hague Recueil*, vol 40 (1932) (ii), pp 403 518, Leener, *ibid*, vol 55 (1936) (i), pp 5 81

See also Convention on Motor Traffic of April 24, 1926 Treaty Series, No 11 (1930), Cmd 3510, *L N T S*, 108, p 123, Hudson, *Legislation*, iii p 1859, *Répertoire*, iii pp 439-447 For the similar Convention signed at Washington by nineteen American States on October 6, 1930, see *Bulletin of the Pan-American Union*, 64 (1930), p 1100 And see Convention on Road Traffic of April 24, 1926 *L N T S*, 97, p 83, Hudson, *Legislation*, iii p 1872 See further the international conventions for facilitating motor traffic like the Convention of March 30, 1931, for the Unification of Road Signals, providing for the reduction of signs employed for regulating motor traffic to a minimum compatible with efficiency and indicating the inscriptions and signs on the signals *L N T S*, 150, p 247, the Convention, of the same date, on the Taxation of Foreign Motor Vehicles, providing for the exemption of private touring cars from taxes or charges levied in the country visited Treaty Series, No 4 (1933), Cmd 4246, *Br and For St Papers*, 134, p 444, Hudson, *Legislation*, v p 950, and the Agreement of March 28, 1931, to facilitate the procedure in the case of undischarged or lost triptychs *L N T S*, 119, p 47 As to the postal, railway, and telecommunications conventions see below, Appendix A

A great number of agreements have been made for the purpose of facilitating travel by removing or modifying passport restrictions See below, p 617, n 3

See also the agreements for dispensing with bills of health and consular visas on bills of health of December 22, 1934 Treaty Series, No 12 (1935), Cmd 4869, and Convention of October 11, 1933, for facilitating international circulation of films of an educational character Treaty Series, No. 6 (1936), Cmd 5155

[2] For an interpretation of this clause in connection with the closure of the railway traffic between Poland

treatment of the commerce of all other members of the League Economic nationalism, stimulated by unsettled international conditions, did, notwithstanding the initiative of the League,[1] prevent the full development of the possibilities of that article Most States keep up protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture, and also, their self-sufficiency in the event of war [2] In the period following

and Lithuania see Advisory Opinion of October 15, 1931 *P C I J*, Series A/B, No 42, p 119

[1] See the Final Report of the Geneva Economic Conference held by the League in May 1927 Doc C E 140 As to the World Monetary and Economic Conference of June and July 1933 see *Documents*, 1933, pp 1-108, League Doc, Conf, M E 22 See Guillain, *Les Problèmes douaniers internationaux et la Société des Nations* (1930), Winslow, *The League and Concerted Economic Action, Geneva Special Studies*, II (1931), No 2, van Woerden *La Société des Nations et le rapprochement économique international* (1932), Bresler, 'Trade Barriers and the League of Nations,' in *Foreign Policy Reports*, 7 (1931), No 11, Staley, *Raw Materials in Peace and War* (1937) And see on international economic co operation generally, Hodson in Toynbee, *Survey*, 1930, pp 443 495, 1931, pp 162 242, 1932, pp 1 41, *International Conciliation*, Pamphlets Nos 267 271 (1931), Patterson in *Hague Recueil*, vol 37 (1931) (III), pp 419 521, MacIver in *Problems of Peace* (9th ser, 1934), pp 205 225, Bonn, *ibid* (10th ser, 1935), pp 199 215, Morished, *ibid*, pp 104-125, Veiga Simões in *Hague Recueil*, vol 50 (1934) (IV), pp 752 839, Martin in *A S Proceedings*, 1934, pp 44 72, Cordell Hull and Molyneux in *International Conciliation* (Pamphlet No 311, June 1935) On international co-operation in currency matters see Rist, *La question de l'or* (1931), Canina in *Hague Recueil*, vol 37 (1931) (III), pp 209 317, Jèze, *ibid*, vol 38 (1931) (IV), pp 471 536, Griziotti, *ibid*, vol 49 (1934) (III), pp 7-126, Raestad in *Nordisk T A*, 6 (1935), pp 5-32, Rappard in *Hague Recueil*, vol 61 (1937) (III), pp 103 248 And see below, n 2 As an example of the objects pursued by a monetary agreement see the British-Belgian Monetary Agreement of October 5, 1944 (Cmd 6557), which fixes the rate of exchange between the Belgian franc and the £ sterling and provides machinery for payments from one monetary area to another See also the Financial Agreement of March 27, 1945, between Great Britain and France (Cmd 6613)

[2] See the Charter of the International Trade Organisation set up in 1947 A General Agreement on Tariffs and Trade (Cmd 7258) was signed at Geneva on October 30, 1947, by twenty three countries including Southern Rhodesia A protocol of provisional application was signed by Australia, Belgium, Canada, France, Luxemburg, Netherlands, United Kingdom, United States of America, and later by Cuba, which came into effect on January 1, 1948, in respect of their metropolitan territories The procedure for formal ratification of the Agreement is normal It is a multilateral agreement which contains basically (1) tariff reductions and concessions, negotiated bilaterally between each pair of signatory countries, (2) a most favoured nation clause, and (3) a number of articles laying down certain rules of commercial policy designed to protect the tariff concessions The General Agreement is intimately related to the Draft Charter for an International Trade Organisation (as to which see Fawcett in *B Y*, 24 (1947)) For a list and description of twenty one international economic organisations see *International Economic Organisation* (H M Stationery Office, 1947)

the First World War they limited freedom of migration to insignificant dimensions when compared with that obtaining before 1914 [1] In thus interfering with the free flow of goods and persons States do not act in contravention of International Law But it is being increasingly recognised that such interference, in its extreme form, is a dangerous source of international injustice and friction and that some measure of regulation by International Law is both desirable and feasible The Agreement, in 1944, for the creation of an International Monetary Fund [2] and an International Bank for Reconstruction and Development [3] as well as for the establishment of the Food and Agriculture Organisation of the United Nations [4] are recent examples of such international co-operation in the economic and financial fields Similar developments took place in the sphere of transport by the establish-

[1] See below, § 296

[2] The object of the Fund, which was to be established by quotas of subscriptions on behalf of the member-States, is to assist in maintaining a stable standard of international exchange

[3] The purpose of the Bank is to extend long term credits to countries the industry and agriculture of which have been destroyed and to assist not fully developed countries As to both the Bank and the Fund see *United Nations Monetary and Financial Conference*, Bretton Woods, July 1-July 22, 1944, Final Act, Cmd 6546 and 6597 (1944) See also Hulm, *International Monetary Co operation* (1945), Rasminsky in *Foreign Affairs*, 22 (1944), pp 589 604, J H Williams, *ibid*, 23 (1944), pp 38 54, Morgenthau, *ibid*, 23 (1945), pp 182-195, Mann in *B Y*, 22 (1945), pp 251 258, Pehle in *Yale Law Journal*, 55 (1946), pp 1127 1139 And see Lemkin, *La réglementation des paie ments internationaux* (1939), and Nussbaum in *A J*, 38 (1944), pp 242-257 See also above, p. 290

[4] See *Documents Relating to the Food and Agriculture Organization of the United Nations*, August-December, 1944, Cmd 6590 (1945) The object of the Organisation as stated in the Preamble is to contribute towards an expanding world economy by raising levels of nutrition and standards of living, by securing improvements in the production and distribution of food and agricultural products, and by bettering the condition of rural populations See also Brandt, *The Reconstruction of World Agriculture* (1945) For the Agreement of January 4, 1946, establishing the European Coal Organisation for the effective co ordination of the demand for and supply of coal see Cmd 6732 The Agreement on Petroleum between the United States and Great Britain of September 24, 1945 (Cmd 6683), is a significant example of the recognition of the principle of exploitation of raw materials not only for the benefit of the exploiting countries, but also in the interest of 'nationals of all peaceable countries at fair prices and a non discriminatory basis' and of the sound economic development of the countries producing petroleum The Agreement also recognises the prin ciple of equality of opportunity for areas not yet under concession, of respect of valid concessions, and of avoidance of restrictions inconsistent with the principles of the Agreement See Feis in *Yale Law Journal*, 55 (1946), pp 1174-1190, and *Bulletin of State Department*, 16 (1947), pp 1167-1172

ment of a European Central Inland Transport Organisation [1] and of a corresponding organisation in the field of shipping [2] In setting up, within the framework of the Charter, the Economic and Social Council as one of the principal organs of the United Nations,[3] its members gave expression to the importance of planned co-operation for the achievement of the required conditions of economic and social progress and development

Consequences of Intercourse as a Presupposition of International Personality

§ 142 Intercourse being a presupposition of International Personality, the Law of Nations favours intercourse in every way The whole institution of legation serves the interest of intercourse between the States, as does the consular institution The right of legation,[4] which every fully sovereign State undoubtedly holds, is held in the interest of intercourse, as is certainly the right of protection over citizens abroad [5] which every State possesses The freedom of the open sea,[6] which has been universally recognised since the end of the first quarter of the nineteenth century, the right of every State to the passage of its merchantmen through the maritime belt [7] of all other States, and, further, freedom of navigation laid down by treaties on so-called international rivers,[8] are further examples of provisions of the Law of Nations in the interest of international intercourse

[1] Agreement of September 27, 1945 (Cmd 6685) replacing the provisional Agreement of May 8, 1945, Cmd 6640 (1945) The object of the organisation is to co ordinate efforts to utilise all means of transport for the improvement of transport communi cations so as to provide for the restoration of normal conditions of economic life The organisation was dissolved in 1947

[2] See the Agreement of August 5, 1944, on principles having reference to the continuance of co-ordinated control of merchant shipping The Agreement sets up a central authority consisting of a United Maritime Council and United Maritime Executive Board Cmd 6556 (1944) The purpose of the agreement is to ensure the provision of shipping for all military tasks in connection with the completion of the war in Europe and the Far East and for supplying liberated areas and the territories of the United Nations

[3] See below, § 168*m* And see Staley in *Peace, Security and the United Nations* (1946, N W Harris Memorial Lectures), pp 107-129 And see below, Appendix, p 885 On the international organisation of shipping see Marx in *Yale Law Journal*, 55 (1946), pp 1214 1232

[4] See below, § 360

[5] See below, § 319

[6] See below, § 259

[7] See below, § 188

[8] See below, § 178

JURISDICTION

Hall, §§ 62, 75-80—Westlake, I pp 246 281—Lawrence, §§ 93 109—Phillimore, I §§ 317-355—Brierly, pp 172-189—Twiss, I §§ 157-171—Halleck, I pp 198 270—Taylor, §§ 169 171—Wheaton, §§ 77 151—Moore, II §§ 175 249—Hershey, § 149—Hyde, I §§ 218, 219, 238 243—Bluntschli, §§ 388 393—Heffter, §§ 34 39—Fauchille, §§ 263-266—Rivier, I § 28—Nys, II pp 304 310—Fiore, I §§ 475 558—Praag, §§ 25 48—Cruchaga, I §§ 212 231—Suarez, I §§ 55 63—Schwarzenberger, pp 79 85—Keith's Wheaton, pp 269-275—Fischer Williams, *Chapters*, pp 209 231—Beale in *Harvard Law Review*, 36 (1923), pp 241 262, and in *Cambridge Legal Essays* (1926), pp 41-56—Wegner, *Uber den Geltungbereich staatlichen Strafrechts* (1930)—Mennacker, *Das Schutzprinzip*, etc (1931), *Actes de la Conférence Internationales du droit pénal de 1928* (Rome, 1931)—Beckett in *B Y*, 1925, pp 44 60, and *ibid*, 1927, pp 108 128—Cybichowski in *Hague Recueil* 1926 (II), pp 264 382—Rousseau in *R G*, 37 (1930), pp 420 460—Mercier in *R I*, 3rd ser, 12 (1931), pp 439 490—Monaco in *Rivista*, 24 (1932), pp 36 52, 161-183—Morelli, *ibid*, 25 (1933), pp 382 411—Overbeck in *Schweizerische Zeitschrift für Strafrecht*, 47 (1933), pp 310 *et seq* —Travers in *Répertoire*, IV pp 361 447—*Harvard Research* (1935), pp 466 632 (a valuable exposition of the subject)

Importance of Jurisdiction

§ 143 Jurisdiction is for several reasons a matter of importance as regards the position of the States within the Family of Nations States possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like However, as members of the Family of Nations and International Persons, the States must exercise self-restraint in the interest of one another in using this natural power [1] Since intercourse of all kinds takes place between the States and their subjects, the matter ought to be thoroughly regulated by the Law of Nations But such regulation has as yet only partially grown up The consequence of both the regulation and non-regulation of jurisdiction is that concurrent jurisdiction of several States can often at the same time be exercised over the same persons and matters [2]

Restrictions upon Territorial Jurisdiction

§ 144 As all persons and things within the territory

[1] For the jurisdiction of English courts see Dicey, Rules 52-90, and Westlake, *Private International Law* (7th ed) (1925), and on the subject in general, Travers, *Le droit pénal international*, 5 vols (1920-1922), and Donnedieu de Vabres, *Les principes modernes du droit pénal* (1928)

[2] As regards the taxation of aliens and the problem of double taxation see below, § 317 (n)

of a State fall under its territorial supremacy, each State has jurisdiction over them The Law of Nations, however, gives a right to every State to claim so-called exterritoriality, and therefore exemption from local jurisdiction, chiefly for its Head,[1] its diplomatic envoys,[2] its men-of-war,[3] and its armed forces [4] abroad And partly by custom and partly by treaty obligations, certain non-Christian States were restricted [5] in their territorial jurisdiction with regard to foreign resident subjects of Christian Powers

Relaxation of Territorial Supremacy in Favour of Allied Governments and Allied Armed Forces

§ 144a During the Second World War the presence in Great Britain of a number of Governments of countries invaded by Germany as well as of allied armed forces gave rise to certain relaxations, for the benefit of such Governments and forces, of the principle of territorial supremacy Thus members of the so-called Governments-in-exile [6] were granted immunity from jurisdiction [7] In 1940, in the Allied Forces Act, military tribunals of allied Governments were given jurisdiction in regard to offences committed by members of their armed forces concerning discipline and internal administration [8] The sentences rendered by these tribunals were to be enforced by British authorities who were also authorised to render assistance to allied authorities in such matters as the apprehension of deserters In 1941, in the Allied Powers (Maritime Forces) Act, provision was made for the establishment of allied maritime courts authorised to try offences committed by any persons on board an allied merchant vessel, by the crew of an allied merchant vessel in contravention of the merchant shipping

[1] Details below, §§ 348-353 and 356 The exemption of a State itself from the jurisdiction of another is not based upon a claim to exterritoriality, but upon the claim to equality, see above, § 115

[2] Details below, §§ 385-405

[3] Details below, §§ 450 451—an immunity which is extended by the law of some States to cover public ships engaged in trade (see below, § 451a) As regards the very limited exterritoriality of merchantmen which are by distress compelled to enter a foreign port see below, § 190c

[4] Details below, § 445

[5] With minor exceptions, these restrictions have now been abolished For details see below, §§ 318 and 440

[6] See Oppenheimer in *A J*, 36 (1942), pp 566 595, and in particular McNair, *Legal Effects of War* (1944), pp 355 383

[7] See below, p 739

[8] See S R & O 1940, No 1817, with regard to the forces of the Allied Governments, and S R & O 1940, No 49, concerning the Free French Forces These applied only to military and naval forces, but not to airmen whose disciplinary offences were to be tried by mixed (British and Allied) courts martial See also below, p 759

law of the country in question, and by allied seamen in contravention of the mercantile conscription laws of their country [1] However, the apprehension of the accused and the execution of the sentences was to rest with British authorities, and British courts were given the power to decide whether in any particular case an allied maritime court had not overstepped its jurisdiction Governments-in-exile were permitted to issue, though not to enforce, legislative and administrative decrees [2] Finally, in the United States of America (Visiting Forces) Act, 1942, it was provided that, as a rule,[3] no criminal proceedings shall be presented in the United Kingdom before any court in the United Kingdom against a member of the military or naval forces of the United States This Act, which was not limited to matters of internal discipline, conferred a wide and exclusive jurisdiction upon military courts of the United States in Great Britain [4] All these relaxations of territorial supremacy were adopted in order to meet an exceptional situation in time of war, but they show that there is intrinsically no such degree of rigidity in the conception of territorial supremacy as to rule out reasonable adaptations thereof to the necessities of international intercourse [5]

Territorial Supremacy and Enforcement of Foreign Public Law

§ 144*b* It follows from the principle of territorial supremacy that States must not perform acts of sovereignty within the territory of other States [6] For the same reason, while effect is as a rule given to private rights acquired

[1] See Oppenheimer, *op cit*, pp 593, 594, Chorley in *Modern Law Review*, 5 (1941), pp 118 120, de Moor in *Law Quarterly Review*, 58 (1942), pp 42 50, Jessup in *A J*, 36 (1942), pp 653 657

[2] See Drucker in *Czechoslovak Year Book of International Law*, 1942, pp 45 59, McNair, *op cit*, pp 369-377, Oppenheimer in *A J*, 36 (1942), pp 578-588, Lourie and Meyer in *University of Chicago Law Review*, 11 (1943), pp 26 48

[3] The Act makes provision for what is, in fact, a waiver of a privilege on the part of the United States

[4] See King in *A J*, 36 (1942), pp 539 567, Schwelb, *ibid*, 38 1944), pp 50 73, McNair in *Law Quarterly Review*, 60 (1944), pp 356 360 And see Fairman and King in *A J*., 38 (1944), pp 258 277, with regard to the taxation of foreign armed forces It will be noted that while the Allied Forces Act, 1940, in refraining from conceding any jurisdictional immunity for criminal acts wheresoever committed fell short, in a sense, of the rule of international law applicable in the matter—see below, p 759—the Act relating to the United States went considerably beyond it See the Exchange of Notes between Great Britain and the United States appended as a Schedule to the Act

[5] See below, p 409, on divisibility of territorial sovereignty, and p 488 on State servitudes

[6] See above, § 128

under the legislation of foreign States [1]—a subject which falls within the domain of Private International Law [2]—the courts of many countries, including British and American courts, decline to give effect to the public law, as distinguished from private law, of foreign States In particular they refuse to enforce foreign revenue laws as well as penal and confiscatory legislation of other States [3] To enforce

[1] See above, § 115*aa*

[2] See above, § 1

[3] See *Folliott* v *Ogden*, (1789) 1 H Bl 124, 135 As to revenue laws see *In re Visser The Queen of Holland* v *Drucker*, [1928] Ch 877, and *Annual Digest*, 1927 1928, Case No 18 See also Isay, *Internationales Finanzrecht* (1934) As to the various aspects of recognition of foreign currency see Neumeyer, *Internationales Verwaltungsrecht*, III (1930), and Mann, *The Legal Aspect of Money* (1938), pp 121-160, 234 277 And see generally Schwarz, *Die Anerkennung ausländischer Staatsakte* (1935) and Fedozzi in *Hague Recueil*, 27 (1929) (II), pp 145-240

As to confiscatory legislation see *Banco di Vizcaya* v *Don Alfonso de Bourbon y Austria*, [1935] 1 K B 140, *Annual Digest*, 1933 1934, Case No 56 In this case the action was dismissed on the ground that judgment in favour of the plaintiffs would, in effect, amount to the execution of a foreign penal law However, although an English court will not give effect to a foreign penal law, it will refuse to enforce, as being contrary to public policy and international comity, contracts entered into mainly for the commission of a criminal offence in a foreign country *Foster* v *Driscoll*, [1929] 1 K B 470

Notwithstanding the recognition of the Soviet Government by the United States the Courts in that country have refused to give extra territorial effect to Russian confiscatory decrees as being contrary to public policy and fundamental legal notions as understood in the various States of the Union See *Vladikavkazsky Railway Co* v *New York Trust Co* (1934), 363 N Y 369, *Annual Digest*, 1933-1934, Case No 27, *United States* v *Bank of New York and Trust Co*, 77 F (2d) 866, (1936) 296 U S 463, *Annual Digest*, 1933 1934, Case No 29, *Moscow Fire Insurance Company* v *Bank of New York and Trust Co* (1939), 280 N Y 286, *Annual Digest*, 1938-1940, Case No 53 In *United States* v *Belmont* (1937), 301 U S 324, *A J*, 31 (1937), p 537, *Annual Digest*, 1935 1937, Case No 15, the decision of the Supreme Court affirming the right of the United States, under the so called Litvinoff assignment, to the assets of a Russian company confiscated by the Soviet Government and deposited by the company in a New York bank, was largely based on the view that the assets had become vested in the Soviet Government in Russia, and not in the United States

In a series of cases—of which the leading one is *United States* v *Pink* (1942), 315 U S 203—the courts in the United States gave effect to the confiscatory decrees of Soviet Russia for the exceptional reason that they referred to property covered by certain arrangements made in connection with the recognition of the Russian Government by the United States in 1933 and that that recognition, partaking of the nature of a high act of foreign policy, overruled considerations of public policy, as understood by the individual States of the Union, prohibiting the application of foreign confiscatory decrees For a criticism of that decision, which stretches the consequences of recognition in a manner somewhat alien to its purpose as generally understood, see Borchard in *A J*, 36 (1942), p 275, and Jessup, *ibid*, p 282 On the other hand, Russian legislation, including confiscatory decrees, was given effect with regard to the operation of such legislation within Russian territory *Dougherty* v *The Equitable Life Assurance Society* (1934), 266 N Y 71, *Annual Digest*, 1933-1934, Case No

them would mean, in effect, to assist States in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy

Jurisdiction over Citizens abroad

§ 145 The Law of Nations does not prevent a State from exercising jurisdiction, within its own territory, over its subjects travelling or residing abroad, since they remain under its personal supremacy [1] As every State can also exercise jurisdiction over aliens [2] within its boundaries, such aliens are often under two concurrent jurisdictions

Jurisdiction on the Open Sea

§ 146 As the open sea is not under the sway of any State, no State can exercise its jurisdiction there But it

28 See also *Holzer* v *Deutsche Reichsbahn Gesellschaft* (1938), 277 N Y 474, *Annual Digest*, 1938 1940, Case No 71, for an example of recognition of contracts made under the law of a foreign country—public policy notwithstanding On the extra territorial effect of confiscatory decrees in respect of ships abroad see *The El Condado* (No 2), *Lloyd's List Law Reports*, 63 (1939), p 83, *Annual Digest*, 1938 1940, Case No 77, where it was held that the general principle denying extra territorial effect to confiscatory decrees was applicable to foreign ships in British waters or in foreign waters outside the territory of the confiscating State See, to the same effect, *The Jupiter* (No 3), [1927] P 122 For a suggestion of a distinction between confiscatory and requisition decrees see the learned comment in *B Y*, 21 (1944), pp 185 *et seq*, especially by reference to *Lorentzen* v *Lydden*, [1942] 2 K B 202, 58 T L R 178 On the other hand, the United States Supreme Court held in *The Navemar* (1939), 304 U S 68, *Annual Digest*, 1938-1940, Case No 68, that in view of the quasi territoriality of ships, *i e* the doctrine that they are part of national territory, there was no room for applying to them the general principles relating to foreign confiscatory decrees For a clear presentation of the British and American practice in the matter in the course of the Spanish Civil War of 1936 1939 see Preuss in *A J*, 35 (1941), pp 263-281, 36 (1942), pp 37-55 See also Jaenicke in *Z o V*, 9 (1939), pp 354 382, Riesenfeld in *Minnesota Law Review*, 25 (1940), pp 62 ff See also *Anderson* v *N V Transandine Handelmaatschappij* (1941), 31 N Y S (2d) 194, 289 N Y 9, *Annual Digest*, 1941-1942, Case No 4, *Lorentzen* v *Lydden*, [1942] 2 K B 202, *Annual Digest*, 1941 1942, Case No 34, and other cases—in particular Cases Nos 35, 36, 37, 55, 63—in the same volume relating to extra territorial decrees of the Governments in exile during the Second World War See also McNair, *Legal Effects of War* (1944), pp 358 383, and in *J C L*, 3rd ser, 27 (1945), pp 68 78 In the course of the negotiations preceding the Allied Swedish Agreement of July 18, 1946, concerning German assets in Sweden, it was contended on behalf of the Allied Powers that as they were exercising sovereignty in Germany and as it was a rule of international practice to give effect to foreign decrees regulating the property of nationals if such decrees were consistent with the public policy of the foreign State, Sweden was bound to give effect to Allied decrees concerning the seizure of German property in Sweden This argument was not accepted by Sweden See *Bulletin of State Department*, 17 (1947), p 155 See also Mann in *B Y*, 23 (1946), pp 354 358, on a similar Agreement with Switzerland of May 25, 1946 See Schindler in *Annuaire Suisse de droit international*, 3 (1946), pp 65 94, on extraterritorial effect of confiscatory decrees

1 See *Blackmer* v *The United States of America*, 284 U S 421, *A J*, 26 (1932), pp 611 618, *Skiriotes* v *Florida* (1941), 313 U S 669, *A J*, 35 (1941), p 569, Hackworth, II §§ 133 138

2 See below, § 317

is a rule of the Law of Nations that vessels, and the things and persons thereon, remain during the time they are on the open sea under the jurisdiction of the State under whose flag they sail [1] It is another rule of the Law of Nations that piracy [2] on the open sea can be punished by any State, whether or not the pirate sails under the flag of a State Further,[3] a general practice seems to admit the claim of every maritime State to exercise jurisdiction over cases of collision at sea, whether the vessels concerned are or are not sailing under its flag Again, in the interest of the safety of the open sea, every State has the right to order its men-of-war to ask any suspicious merchantmen they meet on the open sea to show the flag, to arrest foreign merchantmen sailing under its flag without an authorisation for its use, and to pursue into the open sea, and to arrest there, such foreign merchantmen as have committed a violation of its law whilst in its ports or maritime belt [4] Lastly, in time of war belligerent States have the right to order their men-of-war to visit, search, and eventually capture on the open sea all neutral vessels for carrying contraband, for breach of blockade, or for unneutral services to the enemy [5]

Criminal Jurisdiction over Foreigners in Foreign States

§ 147 Many States claim jurisdiction and threaten punishment for certain acts committed by a foreigner in foreign countries [6] States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging bank-notes, and the like, or against its citizens, such as murder and arson, libel and slander, and the like These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory But if, after the commission of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment The question is, therefore, whether States have a right to exercise jurisdiction over acts of foreigners committed in foreign countries, and

[1] See below, §§ 260, 264
[2] See below, § 278
[3] See below, § 265
[4] See below, § 266
[5] See below, vol II §§ 368 447
[6] See Hall, § 62, Westlake, I pp 261 263, Lawrence, § 104, Taylor, § 191, Moore, II §§ 200 and 201, Phillimore, I § 334, Beckett, *op cit*, *Harvard Research* (1935), pp 484 508, Preuss in *Grotius Society*, 30 (1944), pp 184 208

whether the home State of such an alien has a duty to acquiesce in the latter's punishment in case he comes into the power of these States Some answer this question in the negative [1] They argue that at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned, and that a State can only require respect for its laws from such aliens as are permanently or transiently within its territory [2] This is probably the accurate view with regard to the great majority of cases But it is not a view which, consistently with the practice of States and with common sense, can be rigidly adopted in all cases [3] It

[1] This was the view expressed by the author It was approved by Lord Finlay in his dissenting judgment in the *Lotus* case before the Permanent Court in 1927, Publications of the Court, Series A, No 10 see below, § 147*a*

[2] The Institute of International Law has studied the question at several meetings, and in 1883, at its meeting at Munich (see *Annuaire*, vii p 156), among a body of fifteen articles concerning the conflict of the Criminal Laws of different States, adopted the following (Article 8) — 'Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence, or endanger its security, and when they are not provided against by the Criminal Law of the territory where they take place' But it must be emphasised that this resolution has value *de lege ferenda* only The question was also studied by the League Codification Committee in 1926, upon a Report by Brierly and Charles de Visscher, when the Committee came to the conclusion that, in view of the diversity of practice among States, 'international regulation of these questions by way of a general question, although desirable, would encounter grave political and other obstacles' see *A J*, 20 (1926), Special Suppl, pp 252 259, and comment by Woolsey in *A J*, 20 (1926), pp 757 759 Some writers who deny the lawfulness of exterritorial criminal jurisdiction over foreigners generally nevertheless concede it when, though the perpetrator is corporeally abroad, his criminal act takes effect within the territory of the State see Judge Moore's dissenting judgment in the *Lotus* case, below, § 147*a* See also Bruns in *Z o V*, 1 (1929), pp 50-56, Drost in *Z I*, 43 (1931), pp 111-140, Cook in *West Virginia Law Quarterly*, 40 (1934), pp 303 329 Subject to minor exceptions, British courts have no jurisdiction by statute, to try criminal acts committed by aliens abroad One of these exceptions is Section 687 of the Merchant Shipping Act, 1894 See also *Joyce* v *Director of Public Prosecutions* (1946), 62 T L R 208—a case in which the accused was not an alien pure and simple but a person owing allegiance to the Crown—for an important qualification of the rule that English courts have no jurisdiction over aliens for crimes committed abroad See Lauterpacht in *Cambridge Law Journal*, 9 (1947), pp 342 348

[3] In the case of Cutting, which gave rise to a dispute between Mexico and the United States of America, an intervention took place according to this view In 1886 one A K Cutting, a citizen of the United States, was arrested in Mexico for an alleged libel against one Emigdio Medina, a subject of Mexico, which was published in the newspaper of El Paso in Texas Mexico maintained that she had a right to punish Cutting, because according to her Criminal Law offences committed by foreigners abroad against Mexican subjects are punishable in Mexico The United

cannot cover acts done abroad in preparation of and participation in common crimes committed or attempted to be committed in the country claiming jurisdiction, neither can it cover crimes injuring its subjects or serious crimes against its own safety [1] With regard to counterfeiting currency the right of such jurisdiction has now been expressly recognised [2]

The *Lotus* Case

§ 147*a* The question of criminal jurisdiction over an act causing a collision on the open sea came before the

States, however, intervened, and demanded Cutting's release Mexico refused to comply with this demand, but nevertheless Cutting was finally released, as the plaintiff withdrew his action for libel Since Mexico likewise refused to comply with the demand of the United States to alter her Criminal Law for the purpose of avoiding a similar incident in the future, diplomatic practice cannot be said to have settled the subject See Westlake, I p 252, Taylor, § 192, Calvo, VI §§ 171 173, Moore, II § 201, and his *Report on Extra territorial Crime and the Cutting Case* (1887), Rolin and Gamboa in *R I*, 20 (1888), pp 559 577, and 22 (1890), pp 234 250, Hyde, I § 243 The case is fully discussed and the American claim is disputed by Mendelssohn Bartholdy, *Das raumliche Herrschaftsgebiet des Strafgesetzes* (1908), pp 135 143 For the judgment of the Mexican Court see Scott, *Cases*, pp 387 393, and see Judge Moore's comment in his Judgment in the *Lotus* case before the Permanent Court, Series A, No 10, at p 93 The case of *Cirilo Pouble*—see Moore, II § 200, pp 227-228—concerning which the United States at first was inclined to intervene, proved to be a case of a crime committed within Spanish jurisdiction The case of *John Anderson*—see Moore, I § 174, pp 932 933—is likewise not relevant, as he claimed to be a British subject

[1] In *Harvard Research, op cit*, which contains an admirable exposition of the subject, the jurisdiction in the latter instance is limited to cases in which 'the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed' (p 543) But, it will be noted, few States make it a punishable offence to commit high treason against foreign States It would be unreasonable to deny to a foreign State the right to punish high treason provided, of course, that the act in question constitutes high treason according to generally recognised legal notions There are now very few writers who deny absolutely the right of a State to punish aliens for crimes committed abroad

[2] The Convention on Suppression of Counterfeiting Currency of May 1, 1929, provides that States which recognise the principle of the prosecution of offences committed abroad shall punish foreigners who are guilty of that offence in the same way as if the offence had been committed in their country C 153 M 59 1929 II, *L N T S*, 112, p 371, Hudson, *Legislation*, IV p 2692 And see 25 and 26 Geo 5, c 25, amending in certain respects the Forgery Act, 1913, the Coinage Offences Act, 1861, and the Extradition Act, 1870 See on that Convention Dupriez in *R I*, 3rd ser, 10 (1929), pp 511 530, Garner in *A J*, 24 (1930), pp 135 139, Pella and Donnedieu de Vabres in *Revue pénitentiaire et de droit pénal*, 1930, pp 312 325, 328 344, Fitzmaurice in *A J*, 26 (1932), pp 533 551, Mettgenberg in *Z o V*, 3 (1932), pp 76 94 See also Pella in *R G*, 24 (1927), pp 673-768, Hackworth, II § 159 For the Pan American Convention, of June 19, 1935, on the Repression of Smuggling see Hudson, *Legislation*, VII p 100 And see generally as to mutual international assistance in combating criminality, the writers referred to in § 127*a* above.

Permanent Court in 1927 in the *Lotus* case[1] A collision had occurred on the open sea between the French steamship *Lotus* and the Turkish steamship *Boz-Kourt*, resulting in the loss of the latter and the death of eight Turkish subjects When the *Lotus* arrived at Constantinople, the Turkish Government instituted joint criminal proceedings against the captain of the Turkish vessel and the French officer of the watch on board the *Lotus*, and they were both sentenced to imprisonment The French Government protested on the ground that Turkey had no jurisdiction over an act committed on the open sea by a foreigner on board a foreign vessel, whose flag State (it asserted) had exclusive jurisdiction as regards such acts The dispute was referred by agreement to the Permanent Court, which held,[2] by the President's casting vote, that Turkey had 'not acted in conflict with the principles of International Law' in instituting the criminal proceedings, because (*inter alia*) the act committed on board the *Lotus* produced its effects on board the *Boz-Kourt* under the Turkish flag, and thus, as it were, on Turkish territory, whereupon Turkey acquired jurisdiction over its foreign perpetrator The Court also expressed the opinion that there is no rule of International Law which prohibits a State from exercising jurisdiction over a foreigner in respect of an offence committed outside its territory 'The territoriality of criminal law is not an absolute principle of Inter-

[1] Series A, No 10, and (the arguments) Series C, No 13 (II), Salvioli in *Rivista*, 19 (1927), pp 521 549, Brierly in *L Q R*, 44 (1928), pp 154 163, Berge in *Michigan Law Review*, 26 (1928), pp 361 382, Noel Henry in *R I (Paris)*, 2 (1928), pp 65-134, Donnedieu de Vabres, *ibid*, pp 135-165, Lapradelle, *Causes célèbres du droit des gens, l'affaire du Lotus* (1928), Verzijl in *R I*, 3rd ser, 9 (1928), pp 1-32, Ruzé, *ibid*, pp 124-156, and note in *B Y*, 1928, pp 131-134 And see the literature cited in vol II p 69, n 2

[2] Judge Moore agreed with the judgment of the Court 'that there is no rule of International Law by virtue of which the penal cognisance of a collision at sea resulting in loss of life belongs exclusively to the country of the ship by or by means of which the wrong was done (p 65), but dissented on the ground that Article 6 of the Turkish Penal Code (under which the prosecution was brought), in asserting criminal jurisdiction over foreigners who committed offences abroad 'to the prejudice of Turkey or a Turkish subject,' was contrary to the principles of International Law There was therefore a majority of seven to five judges in favour of the precise ground of the judgment as stated above in the text

national Law, and by no means coincides with territorial sovereignty' [1]

[1] At p 20 The above is the barest summary of a judgment which, with the six dissenting judgments, forms a mine of valuable material upon the subject of Jurisdiction In January 1929 the League of Nations Advisory and Technical Committee for Communications and Transport considered a communication from the International Association of Mercantile Marine Officers expressing their concern about the decision of the Court as tending to expose masters to double prosecutions The matter was subsequently considered by the Joint Maritime Commission of the International Labour Organisation and the International Maritime Committee See *Official Bulletin of the International Labour Office*, 13, pp 67, 143, and 14, pp 43, 56, International Maritime Committee, *Reports* of the Antwerp Conference (1930) and the Oslo Conference (1933) And see Jessup in *A J*, 29 (1935), pp 495 499

CHAPTER III

RESPONSIBILITY OF STATES

I

ON STATE RESPONSIBILITY IN GENERAL

Grotius, II c 17, § 20, and c 21, § 2—Pufendorf, VIII c 6, § 12—Vattel, II §§ 63-78—Hall, § 65—Halleck, I pp 471 476—Wharton, I § 21—Moore, VI §§ 979 1039—Wheaton, § 32—Hershey, §§ 50 157—Hyde, I §§ 266-309—Bluntschli, § 380*a*—Heffter, §§ 101 104—Holtzendorff in *Holtzendorff*, II pp 70 74—Liszt, § 35—Ullmann, § 39—Strupp, *Éléments*, § 19—Hatschek, §§ 31 33—Fauchille, §§ 298 298 (20)—Despagnet, § 466—Pradier-Fodéré, I §§ 196 210—Rivier, II pp 40 44—Calvo, III §§ 1261 1298—Fiore, I §§ 659 679, and *Code*, §§ 596-615—Cavaglieri, pp 348 364—Schwarzenberger, pp 217 237—Keith's Wheaton, pp 421 437—Fenwick, pp 197 211—Balladore Pallieri, pp 518 529—Anzilotti, pp 466-505—Harvard Draft Convention (and Comment) *A J*, 23 (1929), April, Special Number, pp 133 215—Conference for the Codification of International Law *Bases of Discussion*, III (cited as *Bases of Discussion*, III), pp 10 107, 121 152—Dunn, *The Protection of Nationals* (1932), pp 113 187—Triepel, *Volkerrecht und Landesrecht* (1899), pp 324 381—Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (1902)—Wiese, *Le droit international appliqué aux guerres civiles* (1898), pp 43 65—Rougier, *Les guerres civiles et le droit des gens* (1903), pp 448 474—Baty, *International Law* (1908), pp 91-242—Borchard, §§ 73-130—Costa, *El extranjero en la guerra civil* (1913)—Marinoni, *La responsabilita degli stati per gli atti dei loro rappresentanti* (1914)—Schoen, *Die volkerrechtliche Haftung der Staaten aus unerlaubten Handlungen* (1917)—Strupp, *Das volkerrechtliche Delikt* in Stier Somlo's *Handbuch des Volkerrechts* (1920), and Strupp, *Die volkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater* (1927)—Burckhardt, *Die volkerrechtliche Verantwortlichkeit der Staaten* (1924)—Charles de Visscher in *Bibliotheca Visseriana*, II (1924), pp 89-122—Dupuis in *Hague Recueil*, 1924, I pp 350 368—Ralston, §§ 231-348, 403 474, 578-698—Report by Guerrero and Wang Chung Hui on *Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners* for League Codification Committee, in *A J*, 20 (1926), Special Suppl, pp 176 203, and comment by Borchard in *A J*, 20 (1926), pp 738-747—Lauterpacht, *Analogies*, §§ 58 66—Ruegger Burckhardt *Die volkerrechtliche Verantwortung des Staates fur die auf seinem Gebiete begangenen Verbrechen* (1924)—Decencière-Ferrandière, *La responsabilité internationale des États à raison des dommages subis par les étrangers* (1927)—Eagleton, *The Responsibility of States in International Law* (1928)—Dumas, *Responsabilité internationale des États à raison des crimes ou des délits commis sur leur territoire au préjudice d'étrangers* (1930), and in *Hague Recueil*, vol 36 (1931) (II), pp 187 259—Dunn, *The Protection of*

Nationals (1932)—Roth, *Das volkerrechtliche Delikt* (1932)—Soldati, *La responsabilité des États dans le droit international* (1934)—Arató, *Die volkerrechtliche Haftung* (1937)—Freeman, *The International Responsibility of States for Denial of Justice* (1939)—Jessup, *A Modern Law of Nations* (1948), pp 94 122—Anzilotti in *R G*, 13 (1906), pp 5 29 and 285-309—Foster in *A J*, 1 (1907), pp 4 10—Bar in *R I*, 2nd ser, 1 (1899), pp 464 481—Arias in *A J*, 7 (1913), pp 724 765—Goebel, *ibid*, 8 (1914), pp 802 852—Peaslee, *ibid*, 10 (1916), pp 328 336—Harriman in *Proceedings of the American Society of International Law*, 9 (1916), pp 69-77—Eagleton in *A J*, 19 (1925), pp 293 314—Heilborn in *Z O*, 7 (1927), pp 1-10—Charles de Visscher in *R I*, 3rd ser, 8 (1927), pp 245 272—Borchard in *Z o V*, 1 (1929), pp 222 250, and in *A J*, 24 (1930), pp 517 540—Hoijer in *R I* (*Paris*), 4 (1929), pp 577 602—Hille in *R I*, 3rd ser, 10 (1929), pp 531 571—Eagleton in *Z V*, 15 (1930), pp 337 358—Kelsen in *Z o R*, 12 (1932), pp 481 608—Salvioli in *Hague Recueil*, vol 46 (1933) (IV), pp 96 103—Strupp, *ibid*, vol 47 (1934) (I), pp 557 567—Basdevant, *ibid*, vol 58 (1936) (IV), pp 656 675—Lauterpacht, *ibid*, vol 62 (1937) (IV), pp 339 370—Starke in *B Y*, 19 (1938), pp 104 117—Friedmann, *ibid*, pp 118 150—Cohn in *Hague Recueil*, 68 (1939) (II), pp 209 324—Ago, *ibid*, pp 419 545—Biscottini in *Rivista*, 34 (1942), pp 3-43—Puente in *Tulane Law Review*, 18 (1944), pp 408 436—Freeman in *A J*, 40 (1946), pp 121 147

Nature of State Responsibility

§ 148 It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever This is only correct with reference to certain acts of a State towards its subjects [1] Since a State can abolish parts of its Municipal

[1] In English courts the defence known as 'Act of State' cannot be pleaded by the Crown or a Government official against a British subject (*Entick* v *Carrington* (1765), 19 State Trials 1030, *Walker* v *Baird*, [1892] A C 491) or against a friendly alien in the United Kingdom (*Johnstone* v *Pedlar*, [1921] 2 A C 262), but it is a valid defence against an alien resident abroad (*Buron* v *Denman* (1848) 2 Ex 167) Whether or not 'Act of State' is only a valid defence against an alien resident abroad if the injury is done abroad, is a question which cannot be regarded as definitely decided (*Johnstone* v *Pedlar*, *supra*, at p 271, *Commercial and Estates Co of Egypt* v *Board of Trade*, [1925] 1 K B, at pp 290, 297) See Harrison Moore, *Act of State in English Law* (1906) There is, however, a class of case in which even a British subject is unable to obtain a remedy against the Crown, namely, when the Act of the Crown complained of was done in exercise of the royal prerogative in the annexation of foreign territory, such Acts being 'Acts of State' and not within the jurisdiction and control of municipal courts *Secretary of State for India* v *Kamachee Boye Sahaba*, 13 Moo P C 22, *Doss* v *Secretary of State for India* (1875) 5 L R, 19 Eq 509, *Cook* v *Sprigg*, [1899] A C 572, *West Rand Central Gold Mining Co* v *Rex*, [1905] 2 K B 391, *Sobhuza II* v *Miller*, [1926] A C 518 See above, p 154, n 5, with regard to State succession As to Act of State pleaded by a foreign Government sued in its own courts see *Finck* v *Egyptian Minister of the Interior* in *B Y*, 1925, pp 219 226, and the *Egyptian Debt Case* in *L Q R*, 42 (1926), pp 3-5, and see above, p 172, n 3 As to France see Trotabas in *Revue critique de législation et de jurisprudence*, 45 (1926), pp 342 351 See also Duez, *Annuaire de l'institut international de droit public*, 2 (1931), pp 54 *et seq*, the same, *Les actes de gouvernement* (1935),

Law and can make new Municipal Law, it can always avoid legal, although not moral, responsibility by a change of Municipal Law Different from this internal supremacy is the external responsibility of a State to fulfil its international legal duties Responsibility for such duties is a quality of every State as an International Person, without which the Family of Nations could not peaceably exist [1] State responsibility concerning international duties is therefore a *legal* responsibility For a State cannot abolish or create International Law in the same way that it can abolish or create Municipal Law Every neglect of an international legal duty constitutes an international delinquency,[2] and the injured State can, subject to its obligations of pacific settlement, through reprisals or even war compel the delinquent State to fulfil its international duties State responsibility is now in a general way recognised in time of war by Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, which stipulates 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation It shall be responsible for all acts committed by persons forming part of its armed forces'

Original and Vicarious State Responsibility

§ 149 If we examine the various international duties out of which responsibility of a State may arise, we find that it is necessary to distinguish two different kinds of State responsibility They may be named 'original' in contradistinction to 'vicarious' responsibility 'Original' responsibility is borne by a State for its own—that is, for its Government's—actions, and such actions of the lower

with special reference to interpretation of treaties Dickinson in *Hague Recueil*, vol 40 (1932) (II), pp 350-371, Schlosser, *Les actes diplomatiques considérés comme actes de gouvernement* (1933), Hauriou, *Précis de droit administratif* (12th ed, 1933), pp 420 *et seq*, Audinet in Sirey, 1930, 2, p 163, Rosenmark in *Académie diplomatique*, 1931, pp 158 *et seq*, Mestre in *Hague Recueil*, vol 38 (1931) (IV), pp 264 *et seq*, Scheuner in *Z o V*, 4 (1934), pp 700 705 See also Wade in *B Y*, 15 (1934), pp 98-112, Holdsworth in *Columbia Law Review* 41 (1941), pp 1313-1331, and Lauterpacht, *The Function of Law*, pp 387-390 For a criticism of the attitude of courts in relying exclusively on the Executive, especially in questions of recognition, see Jaffe, *Judicial Aspects of Foreign Relations* (1933) and Mann in *Grotius Society*, 29 (1943), pp 143-170 See also below, § 357*a*, on the conclusiveness of the statements of the Executive

[1] See above, § 113

[2] See below, § 151

agents or private individuals as are performed at the Government's command or with its authorisation But States have to bear another responsibility besides that just mentioned For States are, according to the Law of Nations, in a sense responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their agents, of their subjects, and even of such aliens as are for the time living within their territory The responsibility of States for acts other than their own is 'vicarious' responsibility Since the Law of Nations is primarily a law between States only, it must make every State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such aliens as are temporarily resident on its territory [1]

Difference between Original and Vicarious Responsibility

§ 150 It is, however, obvious that original and vicarious State responsibility are essentially different Whereas the one is responsibility of a State for a neglect of its own duty, the other is not A neglect of international legal duties by a State constitutes an international delinquency The responsibility which a State bears for such a delinquency is especially grave Also, the State is, in general, liable to pay compensation for injurious acts of its officials which, although unauthorised, fall within the normal scope of their duties On the other hand, the vicarious responsibility which a State bears requires it chiefly, in addition to an apology, to compel those officials or other individuals who have committed internationally injurious acts to repair as far as possible the wrong done, and to punish, if necessary, the wrongdoers In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility

[1] The distinction between original and vicarious responsibility, which was first made, in 1905, in the first edition of this treatise, is approved by Borchard, § 74, but rejected by Schoen, *op cit*, pp 40 42, and by Strupp, *Das volkerrechtliche Delikt* (1920), pp 32-35, and see award of the American-Mexican Claims Commission in the *L M B Janes'* case *A J*, 21 (1927), pp 362 371, and *Annual Digest*, 1925 1926, Case No 158 See also Verdross in *Z o R*, 21 (1941), pp 283 309

II

STATE RESPONSIBILITY FOR INTERNATIONAL DELINQUENCIES

See the literature quoted above at the commencement of § 148

Concep-tion of Inter-national Delin-quencies

§ 151 An international delinquency is any injury to another State committed by the Head or Government of a State in violation of an international legal duty. Equivalent to acts of the Head and Government are acts of officials or other individuals commanded or authorised by the Head or Government The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of international law amounting to a criminal act in the generally accepted meaning of the term [1]

International delinquencies in the technical sense of the term must not be confused with so-called 'Crimes against the Law of Nations' [2] These, in the terminology of the criminal law of various States, are such acts of individuals against foreign States as are rendered criminal by these codes They include, in particular, those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations They also include crimes like piracy on the high seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent

An international delinquency must, further, not be confused with discourteous and unfriendly acts Although such acts may be met by retorsion,[3] they are not illegal and therefore not delinquent acts.

Subjects of Inter-national Delin-quencies

§ 152 An international delinquency may be committed by any member of the Family of Nations, be such member a full sovereign, half sovereign, or part sovereign State.

[1] See below, §§ 156*a* and 156*b*.

[2] See *Harvard Research* (1935), pp 573 592, Efremoff in *Revue de droit international*, 9 (1932), pp 226 *et seq*

[3] See vol II § 29

Yet half sovereign States can commit international delinquencies in so far only as they have a standing within the Family of Nations, and therefore international duties of their own And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an international duty directly to the wronged State, or whether it is the full sovereign State (suzerain,[1] federal,[2] or protectorate-exercising State), to which the delinquent State is attached, that must bear a vicarious responsibility for the delinquency On the other hand, such States as are without any place whatever within the Family of Nations, as, for example, the member-States of the American Federal States, because all their possible international relations are absorbed by the respective Federal States, cannot commit an international delinquency Thus an injurious act against France committed by the Government of the State of California in the United States of America would not be an international delinquency in the technical sense of the term, but merely an internationally injurious act for which the United States of America must bear a vicarious responsibility[3]

[1] For a discussion of the question whether, and, if so, when, a suzerain is responsible for the delinquencies of its vassal see Award in *Brown's* claim, American and British Claims Arbitration Tribunal, in *B Y*, 1924, pp 210 221, and *A J*, 19 (1925), pp 193-206

[2] See Donot, *De la responsabilité de l'état fédéral à raison des actes des états particuliers* (1912), where a number of important cases are discussed See also Stoke, *The Foreign Relations of the Federal State* (1931), pp 133-174, Gammans in *A J*, 8 (1914), pp 73-80, Cohen in *Z V*, 8 (1914), pp 134 153, Borchard, § 82, Schoen, *op cit*, pp. 100-107, and *Annuaire*, 18 (1900), p 255

[3] For a number of Awards upon the responsibility of a Federal State in regard to the contracts of its member States see Ralston, §§ 601-607, as to the responsibility of the United States for the repudiated debts of the Southern States see Randolph in *A J*, 25 (1931), pp 63-82, and see above, § 89, and Germany's acceptance of responsibility for the failure of the Bavarian Government in October and November 1922 to prevent attacks upon the members of an Inter Allied Control Commission, discussed by Strupp in *Strupp, Wort*, II p 247 See also Resolution of the Institute of International Law in *A J*, 22 (1928), Special Suppl, at pp 331, 332, which holds a Federal State, and, within limits, a protecting State, responsible for the conduct of a member State and a protected State and lays down expressly that the Federal State cannot invoke the provisions of the Federal Constitution in order to avoid liability And see *Bases of Discussion*, III p 122, where the British Government accepted as good law the rule formulated by the Institute And see *ibid*, p 124, for the Swiss reply to the effect, *inter alia*, that were a Swiss Canton to adopt a measure incompatible with International Law the Federal authorities would, under the Constitution, insist on its repeal See also Sibert in *R G*, 44 (1937), pp 544-548.

An instance of this is to be found in the conflict [1] which arose in 1906 between Japan and the United States of America, on account of the segregation of Japanese children by the Board of Education of San Francisco, and the demand of Japan that this measure should be withdrawn, The Government of the United States at once took the side of Japan, and endeavoured to induce California to comply with the Japanese demands [2]

State Organs as Subjects of International Delinquencies

§ 153 Since States are juristic persons, the question arises—Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? To which the answer must be, first, all such acts as are performed by the Heads of States or by the members of a Government acting in that capacity, so that their acts appear as State acts, and, secondly, all acts of officials or other individuals which are either commanded or authorised by Governments And, further, all acts committed by Heads of States or members of a Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies [3] The States concerned must certainly bear a vicarious responsibility for all such acts, but for that very reason these acts do not comprise international delinquencies

Individuals as Subjects of International Delinquencies

§ 153a As States are the normal subjects of International Law, they—and they only—are, as a rule, subjects of international delinquencies On the other hand, to the extent to which individuals are made subject to international duties —and, consequently, of International Law—they are also subjects of international delinquencies This is the case not only with regard to piracy and similar topics of limited compass [4] In particular, the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals, whether members

[1] See Hyde in *The Green Bag*, xix (1907) pp 38 49, Root in *A J*, 1 (1907), pp 273-286, Barthélemy in *R G*, 14 (1907), pp 636-685, Woolsey in *A J*, 15 (1921), pp 55 59

[2] For some similar acts of State legislatures and executives see Buell in *A J*, 17 (1923), pp 29-49

[3] See below, §§ 158-159

[4] See below, §§ 272-280, as to piracy And see § 340*h* as to slave trade.

of their armed forces or not [1] To that extent no innovation was implied in the Charter annexed to the Agreement of August 8, 1945, for the punishment of the Major War Criminals of the European Axis inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity For the laws of humanity,[2] which are not dependent upon positive enactment, are binding, by their very nature, upon human beings as such In this category there must be included the declaration, in the above-mentioned Charter of August 8, 1945, of individual responsibility for crimes against the peace, *i e* , for the crime of aggressive war In its Judgment of September 30, 1946, the Nuremberg International Tribunal set up in conformity with the Charter rightly pronounced its provisions relating to individual responsibility to be declaratory of an inescapable principle of International Law The Tribunal said

'It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals, and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State In the opinion of the Tribunal, both these submissions must be rejected

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced' [3]

The increasing complexities of modern international relations, in particular having regard to the unlimited potentialities of scientific weapons of destruction, may call for far-reaching extensions of individual responsibility expressly declared by International Law [4]

[1] See vol II, §§ 253, 257*a* See also Lauterpacht in *B Y*, 21 (1944), pp 63 88, and Wright in *A J*, 39 (1945), pp 257-285 And see below, § 445, and Levy in *University of Chicago Law Review*, 12 (1945), pp 313-332

[2] Article 6 of the Charter provided that there 'shall be individual responsibility' for 'crimes against peace,' 'war crimes,' and 'crimes against humanity' *A J*, 39 (1945), Suppl, p 259, Cmd 6668 (1945) See also the Indictment of October 18, 1945 Cmd 6696 (1945)

[3] *Transcript of Proceedings*, p 16,878, *A J*, 41 (1947), p 220 See also Schneeberger in *Georgetown Law Journal*, 35 (1947), pp 481 489, and Kelsen in *International Law Quarterly*, 1 (1947), pp 153-171

[4] Thus it is possible that treaties providing for the international control of atomic energy as a method of warfare may impose directly duties upon individuals and declare their violation by individuals to be an international crime

No International Delinquency without Malice or Culpable Negligence

§ 154 An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence [1] Therefore, an act of a State committed by right, or prompted by self-preservation in necessary self-defence, does not constitute an international delinquency, however injurious it may actually be to another State [2]

Objects of International Delinquencies.

§ 155 International delinquencies—a term applying both to wrongs consisting of breaches of treaties and to wrongs independent of treaty—may be committed in regard to different objects Thus a State may be injured—in regard to its independence through an unjustified intervention, in regard to its treaty rights through an act violating a treaty, or in regard to its right of protection over citizens abroad through any act that violates the person or the property of one of its citizens abroad

Non payment of Contract Debts and Damages

§ 155a An international delinquency which during recent years has received a considerable amount of attention is the non-payment by a State of money due under contract to other States, or to the nationals of other States upon the demand of their State, whether the indebtedness may have arisen from a loan or from some other contract [3] The

[1] There is an increasing tendency among modern writers to reject the theory of absolute liability and to base the responsibility of States upon fault see discussion in Lauterpacht, § 62, and also *Annuaire*, 33 (1927), pp 455 562, upon Strisower's Report, and *A J*, 21 (1927), pp 720 724, and *ibid*, 22 (1928), Special Suppl, pp 330 333 But see Borchard in *Z o V*, 1 (1929), pp 224 227 See also Starke in *B Y*, 19 (1938), pp 104-117, Ago in *Scritti giuridici in onore di Santi Romano* (1939), pp 3 32

[2] Although violations of the rights of a State prompted by self-preservation in necessary self defence are not international delinquencies because there is no *mens rea*, they nevertheless—see above, § 129—remain violations They can therefore be repelled, and indemnities may be demanded for damage done But Schoen (*op cit*, pp 115 118) denies this

[3] See Hyde, §§ 303, 304, Fauchille, § 298 (17), Ralston, §§ 90-103, Eagleton, *The Responsibility of States in International Law* (1928), pp 157 176, Domke, *Internationaler Schutz von Anleiheglaübigern* (1934), Feller, *The Mexican Claims Commissions*, 1923-1934 (1936), pp 173-200, Nussbaum in *Yale Law Journal*, 44 (1934), pp 53 89 (on the comparative and international aspects of the abrogation of the gold clause in the United States) See also the correspondence between Great Britain and France concerning the payment of French Bonds held by British subjects, Cmd 3779 (1931), Fischer Williams in *Bibliotheca Visseriana*, II (1924) pp 1 85, and the same article in *Hague Recueil*, 1923, pp 293-361, Jèze in *Hague Recueil*, 1926 (IV), pp 165 223, and *ibid*, 53 (1935) (III), pp 381-432, Thompson in *A S Proceedings*, 1934, pp 136-145, Manton, *ibid*, pp 146-155 As to changes in currency systems see Sulkowski, *Hague Recueil*, vol 29 (1929) (IV), pp 5-110 And see the cases of Serbian and

limitation placed upon the use of armed force for the recovery of contract debts by a Hague Convention of 1907 has already been discussed [1] The Governments of a number of Central and South American Republics frequently insert in contracts with the nationals of foreign States a clause (known as the 'Calvo clause') whereby the foreign national agrees that any claim or dispute arising under the contract shall be disposed of by the local tribunals and shall not be the subject of 'international reclamation,' thereby purporting to renounce any claim upon his home State for its protection 'Calvo clauses,' for the forms vary, have been discussed by a number of international tribunals and with varying results It is believed that while they may often have the legal effect of ousting the jurisdiction of an international tribunal until the remedies of the local courts have been exhausted, nevertheless the weight of authority is against the validity of so much of a 'Calvo clause' as purports to make an individual renounce the right which International Law confers, not upon him but upon his home State, of protecting him against treatment which contravenes the rules of International Law [2]

Brazilian Loans in France before the Permanent Court Series A, 20 and 21 And see above, § 137, on financial intervention On the question of the Inter Allied Debts after the First World War see *International Conciliation* (Pamphlet No 287, February 1933), and Gideonse and Brant, *ibid* (Pamphlet No 294, November 1933), Picard and Hugon, *Le problème des dettes inter alliées* (1934), Le Fur, *La Question de dettes inter-alliées* (Documentation internationale, January 1935), Donker Curtius in *Théorie du droit*, xi (1937) pp 37-50, and, in particular, Stopford in Toynbee, *Survey*, 1932, pp 97-172, Wheeler-Bennett, *The Wreck of Reparations* (1933), Holohan in *Boston University Law Review*, 14 (1934), January See also the United States Act of April 13, 1934, prohibiting financial transactions with defaulting States *Documents*, 1934, p 194 And see *ibid*, pp 194-211, for the correspondence between the United States and the debtor States

[1] See above, § 135

[2] See Hyde, § 305, and in *A J*, 21 (1927), pp 298 303, Ralston, §§ 70 89, Borchard, §§ 371 378, and in *A J*, 20 (1926), pp 538 540, Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 456 496, Bullington, *ibid*, 22 (1928), pp 66 68, Feller, *ibid*, 27 (1933), pp 461 468, Summers in *R I (Paris)*, 7 (1931), pp 567 581, and 12 (1933), pp 229 233, Ténekidès in *R G*, 43 (1936), pp 270-284, Borchard in *Annuaire*, 36 (1) (1931), pp 357-398, Lipstein in *B Y*, 22 (1945), pp 130 145, Freeman in *A J*, 40 (1946), pp 120 147 See also the *North American Dredging Co's* claim before the American-Mexican Mixed Claims Commission in *A J*, 20 (1926), pp 800 809, and *Annual Digest*, 1925 1926, and *Mexican Union Railway (Limited)* case, decided in February 1930 by the British Mexican Claims Commission *Annual Digest*, 1929 1930, Case No 129

Abuse of Rights

§ 155*aa* The responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of International Law [1] This occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage Thus international tribunals have held that a State may become responsible for an arbitrary expulsion of aliens [2] The Permanent Court of International Justice has expressed the view that, in certain circumstances, a State, while technically acting within the law, may actually incur liability by abusing its rights—although, as the Court said, such an abuse cannot be presumed [3] The conferment and deprivation of nationality is a right which International Law recognises as being within the exclusive competence of States , but it is a right the abuse of which may be a ground for an international claim [4] The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle [5] The maxim, *sic utere tuo ut alienum non laedas*, is applicable to relations of States no less than to those of individuals , it underlies a substantial part of the law of tort in English law and the corresponding branches of other systems of law [6] , it is one of those general principles

[1] See Lauterpacht, *The Function of Law*, pp 286 306 , Scerni, *L'abuso del diritto nei rapporti internazionali* (1930) , Selea, *La notion de l'abus du droit dans le droit international* (1939) , Politis in *Hague Recueil*, vol 6 (1925) (i), pp 1 109 , Leibholz in *Z o V* , 1 (1929), pp 77 125 , Schlochauer in *Z V* , 17 (1933), pp 373 394 , Salvioli in *Hague Recueil*, vol 46 (1933) (iv), pp 66 69

[2] See below, §§ 323, 324 And see Boeck in *Hague Recueil*, vol 18 (1927) (iii), pp 627 640

[3] *Free Zones of Upper Savoy and the District of Gex* Series A, No 24, p 12, and Series A/B, No 46, p 167 See also the case of *Certain German Interests in Polish Upper Silesia* Series A, No 7, p 30

[4] See the *Minutes* of the First Committee of the Hague Conference on Codification of International Law, 1930, pp 20 and 197 And see Rundstein in *Z V* , 16 (1931), pp 41 45 And see p 587, n 1

[5] See below, § 178*a* And see §§ 174 and 197 *f*

[6] On abuse of rights generally see Gutteridge in *Cambridge Law Journal*, 5 (1932), pp 22-45 For an instance of conventional regulation of a nuisance committed by private persons and affecting injuriously the territory of a neighbouring State see the Convention of April 15, 1935, between Canada and the United States for the settlement of difficulties arising out of the complaint of the United States that fumes discharged from the smelter of the Consolidated Mining and Smelting Company in British Columbia were causing damage to the State of Washington *U S Treaty Series*, No 983 , *A J* , 30 (1936), Suppl , p 163 In the *Trail*

of law recognised by civilised States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute However, the extent of the application of the still controversial [1] doctrine of the prohibition of abuse of rights is not at all certain It is of recent origin in the literature and practice of International Law, and it must be left to international tribunals to apply and develop it by reference to individual situations

National ity of Claims

§ 155*b* A State which puts forward a claim before a claims commission or other international tribunal must be in a position to show that it has *locus standi* for that purpose [2] The principal, and almost the exclusive, factor creating that *locus standi* is the nationality of the claimant, and it may be stated as a general principle [3] that from the time of the

Smelter Arbitration arising out of this Agreement it was held, in 1941, that under international law no State has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another *Annual Digest*, 1938 1940, Case No 315 And see the Report in the same matter of the International Joint Commission between Canada and the United States of February 28, 1931 *A J*, 25 (1931), p 540

[1] See *e g* Balladore Pallieri, p 287, Cavaglieri, *Nuovi studi sull' intervento* (1928), pp 42 52

[2] On the nature of the claim put forward by a State on behalf of its nationals see the Judgment of the Permanent Court of International Justice of September 13, 1928, in the *Case concerning the Factory at Chorzów* Series A, No 17, pp 25 29, *Annual Digest*, 1927 1928, Case No 170 See also Borchard in *Yale Law Journal*, 43 (1933-1934), pp 365 371, for a survey of other relevant cases

[3] See Hurst in *B Y*, 1926, pp 163 182, Hyde, §§ 275, 280, Ralston, §§ 291-348, Lambie in *A J*, 24 (1930), pp 264 278, Borchard in *Annuaire*, 36 (1) (1931), pp 277-356, Witenberg in *Hague Recueil*, vol 41 (1932) (3), pp 44 50, Borchard in *R I*, 3rd ser, 14 (1933), pp 421-467, Ch de Visscher, *ibid*, 17 (1936), pp 481 484, *Bases of Discussion*, iii pp 140 145, Sibert in *R G*, 44 (1937), pp 514 520 With regard to the nationality of corporations see below, p 585, n 2 The principle stated above has not been followed invariably, and exceptional cases exist in which a State has been allowed to support a claim on the joint basis of the claimant's domicile within its territory and of his having made a declaration of intention to acquire its nationality see Hyde, § 275, and Ralston, § 300 See also the observations of Fitzmaurice in *B Y*, 17 (1936), pp 104 110, in connection with the *I'm Alone* case in which the owners of the ship, which the Commissioners held to have been illegally sunk, were nationals of the *defendant* State See also *Annual Digest*, 1933 1934, Case No 86 (at pp 205, 206) As to the two cases —*Martin Koszta* and *August Piepenbrink*—of the successful assertion by the United States of America of a right of protection over persons who were not its nationals see Wharton, ii, § 175, Moore, iii §§ 490, 491, Martens, *Causes célèbres*, v pp 583 599, Borchard, § 250 But see Hyde, i § 396, who cites a passage in Moore, iii p 844, which makes it clear that the claim to protect was based upon Koszta's admission to American protection *ad interim* by the American Consul and Chargé d'Affaires at Constantinople by the grant of a passport or safe conduct in accordance with the recognised usage in

occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons who (*a*) have the nationality of the State by whom it is put forward, and (*b*) do not have the nationality of the State against whom it is put forward

Bar by Lapse of Time (Extinctive Prescription)

§ 155c The principle of extinctive prescription, that is, the bar of claims by lapse of time, is recognised by International Law It has been applied by arbitration tribunals in a number of cases [1] However, it is desirable that the application of the principle should remain flexible and that no attempt should be made to establish fixed time

Turkey See also the case of *Edward Hilson* v *Germany* in *A J*, 19 (1925), pp 810-815, and *Annual Digest*, 1925-1926, Case No 198 As to the *August Piepenbrink* case see *A J*, 9 (1915), Suppl, pp 353-360 For an affirmation of the rule as to the nationality of claims see the Judgment of the Permanent Court of International Justice of 1939 in the *Panevezys Saldutiskis Railway Case* Series A/B, No 76, at p 16 But see the Dissenting Opinion of Judge van Eysinga pointing to the consequences of the adoption of that rule in cases of changes of sovereignty with the result that the new State would be unable to espouse the claim of some of its nationals (at p 35) It may be regarded as established that the rule *actio personalis moritur cum persona*—now abolished in English law—is not recognised by international tribunals see the *Dujay* case, decided by the United States Mexican Claims Commission on April 8, 1929, *Annual Digest*, 1929-1930, Case No 107

[1] See Vervkios, *La prescription en droit international public* (1934), pp 129-193, Ralston, §§ 683 698, and particularly the *Gentini* case in § 687, Fauchille, §§ 856 857 (3), and the Report of Politis and Charles de Visscher in *Annuaire*, 32 (1925), pp 1 24, the *Williams* case in Moore, *Arbitrations*, iv pp 4179-4203, Lauterpacht, *Analogies*, § 129, Cavaglieri in *Rivista*, 3rd ser, 5 (1926), pp 169-204, Witenberg, *La procédure et a sentence internationales* (1937), pp 138 143, and in *Hague Recueil*, vol 41 (1932) (iii), pp 27-35, Soerensen in *Nordisk T A*, 3 (1932), pp 161-170, Borchard in *Annuaire*, 36 (i) (1931), pp 435 441, King in *B Y*, 15 (1934), pp 82 97 See also the decision of the Graeco-Bulgarian Mixed Arbitral Tribunal of February 14, 1927, *Sarropoulos* v *Bulgarian State*, in *Recueil T A M*, 7 (1927), p 47, *Annual Digest*, 1927-1928, Case No 173, and the *Cook* case, decided on June 3, 1927, by the United States and Mexican Claims Commission *ibid*, Case No 174 The apparent rejection of the principle of extinctive prescription by the Hague Court of Arbitration in the *Pious Fund* case in 1902 (Scott, *Reports of the Hague Court of Arbitration* (1916), pp 3 17) had not been generally followed see remarks in the *Gentini* case, *supra* The League Codification Committee studied Prescription in 1928 As to cases when the conduct of the injured person precludes a claim on his behalf see Witenberg in *Hague Recueil*, vol 41 (1932) (iii), pp 63 69 See also *Bases of Discussion*, ii pp 125-135 It has been held that the fact that a State denies to certain categories of its nationals the full status or privileges of citizenship (see below, § 155*d*) does not affect its rights in the matter of claims by or in respect of the individuals in question See *e g Kahane* v *Paris and the Austrian State*, *Annual Digest*, 1929-1930, Case No 131 And see Wilson in *A J*, 33 (1939), pp 146-148 On nationality and war claims see Hanna in *Columbia Law Review*, 45 (1945), pp 301-344

limits [1] Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a claim of which he only becomes aware when it is already stale [2], and a protest at the time of the occurrence of the delinquency has been held to prevent time from running against the claim for its redress [3]

The Plea of Non Discrimination

§ 155*d* It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations [4] For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals This applies in particular to the question of the treatment of the persons of aliens It has been repeatedly laid down that there exists in this matter a minimum standard of civilisation, and that a State which fails to measure up to that standard incurs international liability [5]

[1] Thus it resembles the *laches*, or acquiescence, of English Equity rather than the statutory limits governing Common Law claims

[2] Ralston, §§ 688 695

[3] *Ibid*, § 696 Although normally individual claimants are bound by the actions of their Governments who take up and put forward their claims against a foreign State, it was held in the case of the *Cayuga Indian* claims before the American-British Claims Arbitration Tribunal in 1926, upon the analogy of the exemption in English speaking countries of persons under disability from the operation of statutes of limitation, that 'dependent Indians not free to act except through the appointed agencies of a sovereignty which has a complete and exclusive protectorate over them' ought not to be prejudiced by the delay on the part of Great Britain in pressing their claim

For the Award see *A J*, 20 (1926), pp 574 594, and *Annual Digest*, 1925-1926, Case No 181 In this case the claim dated from about 1810 It is difficult to see why the principle of this decision should not apply in favour of any individual claimant who, having exhausted any private remedies, duly notifies to his own Government a claim against a foreign State and asks for help

Estoppel As to the availability of the plea of estoppel (including *res judicata*) in International Law see Lauterpacht, *Analogies*, §§ 87 89, and arbitrations there cited, McNair in *B Y*, 1924, pp 31-37, Holohan in *Boston University Law Review*, 14 (1934), pp 78 *et seq*, Friede in *Z o V*, 5 (1935), pp 517-545

[4] See above, § 24

[5] See *Robert's* claim before the American Mexican Claims Commission *Annual Digest*, 1925-1926, Case

The position is more difficult with regard to the treatment of the property of aliens as compared with that of nationals [1]

No 166 As to the effect on aliens of State legislation in the political sphere see Preuss in *Grotius Society*, 20 (1934), pp 85 105, and the same in *A J*, 29 (1935), pp 206 218 (as to Germany) As to the execution in Germany in 1934 of Van der Lubbe, a Dutchman, found guilty of taking part in the burning of the German *Reichstag* on February 27, 1933, and sentenced to death under a retro active law, see Van Hamel in *Iowa Law Review*, 19 (1933 1934), pp 237 243 See also Kuhn in *A J*, 33 (1939), pp 338 341

[1] See Borchard, §§ 21, 44, 51, 75, 393, Clunet, *Consultations par les sociétés étrangères d'assurances sur la vie établies en Italie*, etc (1912), Wehberg, *Das Volkerrecht und das italienische Staatsversicherungsgesetz* (1912), Strupp, *Das volkerrechtliche Delikt* (1920), pp 118 121, and the bibliography on p 63, Stowell, *Intervention in International Law* (1931), pp 154 162, Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 497 570, Hackworth, in § 285, Lauterpacht in *Hague Recueil*, vol 62 (1937), (iv), pp 345 348, Sibert in *R G*, 44 (1937), pp 520 544, De Boeck in *R G*, 20 (1913), pp 365-371, Audinet, *ibid*, pp 5 9, Anzilotti in *Rivista*, 14 (1921-1922), pp 177-179, Fachiri in *B Y*, 6 (1925), pp 82 90, and *ibid*, 10 (1929), pp 32 35, Verdross in *Z o R*, 4 (1925), pp 320 333, and in *Hague Recueil*, vol 37 (1931) (iii), pp 357-376, Valloton in *Ostrecht*, 1 (1927), pp 1230 1234, Kaufmann, *ibid*, pp 1256 1260, Lapradelle, *ibid*, pp 1262 1272, Bullington in *A J*, 21 (1927), pp 694-705, and in *A S Proceedings*, 1933, pp 103 109, Scelle in *R G*, 34 (1927), pp 463 467, Rolin in *R I*, 3rd ser, 8 (1927), pp 441-446, *A S Proceedings*, 1927, pp 38 48, Dunn in *Columbia Law Review*, 28 (1928), pp 161-180, Fischer Williams in *B Y*, 9 (1928), pp 1-30, Herz in *A J*, 35 (1941), pp 243-262, Freeman in *A J*, 40 (1946), pp 120-147 For extracts from municipal laws on the confiscation of private property see Anderson in *A J*, 21 (1927), pp 525-533 See also the following arbitral and judicial decisions *Norway* v *United States*, before the Hague Court of Arbitration *A J*, 17 (1923), pp 287-290, 362 399, P C I J, Series A No 7 (*Polish Upper Silesia*), at p 33, *ibid*, Series B, No 6 (*Settlers of German Origin in Poland*), at pp 23, 24, *Peter Pazmany University Case*, *ibid*, Series A/B, No 61, p 243, *Hopkins'* claim, before the American Mexican Claims Commission, *A J*, 21 (1927), p 161, and *Annual Digest*, 1925-1926, Case No 167, (*obiter*) *Refund of Canadian Duties* Case, before the British-American Claims Commission (1926), *Nielsen's Report*, p 368, and *Annual Digest*, 1925-1926, Case No 168, and the *Standard Oil Company Tankers* Case (1926), Arbitration between the United States and the Reparation Commission *B Y*, 8 (1927), p 156, *A J*, 22 (1928), p 404, and *Annual Digest*, 1925-1926, Case No 169

With special reference to Mexican legislation see Dunn, *The Diplomatic Protection of Americans in Mexico* (1933), pp 332 381, and in *Columbia Law Review*, 28 (1928), pp 166 180, Gaither, *Expropriation in Mexico* (1940), Gordon, *The Expropriation of Foreign Owned Property in Mexico* (1941), Kerr in *Illinois Law Review*, 22 (1927-1928), pp 613 634, Bullington in *A J*, 22 (1928), pp 50 69, Hyde, *ibid*, 32 (1938), pp 759 766, and 33 (1939), pp 108 112 See *ibid*, Suppl, pp 181-207, for the official correspondence, *Documents*, 1938 (i), pp 426 471 See also Friede in *Z o V*, 9 (1939), pp 31 54, Kunz in *New York University Law Quarterly Review*, 17 (1940), pp 327 384 And see Agreement of February 7, 1946, between Great Britain and Mexico regulating compensation in respect of expropriated petroleum properties and providing for the appointment of experts Cmd 6768

For the dispute between Hungary and Roumania regarding the application to Hungarian nationals of a Roumanian agrarian law see *Off J*, 1927 and 1928 (indexes), *La réforme agraire en Roumanie* (2 vols, 1927 and 1928), and *La réforme agraire roumaine*

The rule is clearly established that a State is bound to respect the property of aliens This rule is qualified, but not abolished, by two factors the first is that the law of most States permits far-reaching interference with private property in connection with taxation, measures of police, public health, and the administration of public utilities The second modification must be recognised in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property In such cases neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation

Reparation as a Consequence of International Delinquencies

§ 156 The principal legal consequences of an international delinquency are reparation of the moral and material wrong done [1] The merits and the conditions of the special cases are, however, so different, that it is impossible for the Law of Nations to prescribe once for all what legal consequences an international delinquency should have The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done What kind of acts these are depends upon the special case and the discretion of the wronged State. It is obvious that there must be a pecuniary reparation [2]

devant la justice internationale (1928) (collections of opinions of lawyers), and Deák, *The Hungarian Roumanian Land Dispute* (1928)

The Greek Government agreed in 1927 and 1928 to repurchase the expropriated landed properties held by British subjects at prices to be fixed by free negotiation between the Greek Government and the owners For the Exchange of Notes see Treaty Series, No 16 (1929), Cmd 3347

[1] See Schoen, *op cit*, pp 122-143, Strupp, *op cit*, pp 208 222, Stowell, pp. 557-599, Eagleton, *The Responsibility of States in International Law* (1928), pp 182-205, Dunn, *The Protection of Nationals* (1932), pp 172 187, Laïs, *Die Rechtsfolgen volkerrechtlicher Delikte* (1932), Reitzer, *La réparation comme consequence de l'acte illicite en droit international* (1938), Personnaz, *La réparation du prejudice en droit international public* (1938), Kelsen in *Z o R*, 12 (1932), pp 481-608, Rice in *A J*, 28 (1934), pp 246 254, *Bases of Discussion*, III. pp 146-152

[2] *Measure of Damages and Interest* Great diversity of practice at present

for a material damage [1], and at least a formal apology [2] on the part of the delinquent will in every case be necessary

prevails amongst international tribunals upon these matters, and any general rules which might be laid down at present would need to be qualified by many exceptions

(*a*) *Measure of Damages* Although pronouncements can be found both in text books and in awards to the effect that International Law does not sanction the award of 'consequential damages' such as loss of possible business profits (*lucrum cessans*), a formidable array of awards is in existence which give damages of this nature for an analysis of a large number of cases upon the measure of damages see Ralston, §§ 435 474, Lauterpacht, *Analogies*, §§ 65, 66, and, in particular, Marjorie Whiteman, *Damages in International Law*, 3 vols (1937-1943) (a comprehensive work) See also the preliminary administrative decisions of the German-American Mixed Claims Commission (see *A J*, 18 (1924), pp 175-186, and *B Y*, 1924, pp 222 225), *Janes'* claim before the American-Mexican Claims Commission in *A J*, 21 (1927), pp 362-371 An authoritative exposition of and decision on the measure of damages will be found in the Judgment of the Permanent Court of International Justice of September 13, 1928, in the *Case concerning the Factory at Chorzów* Series A, No 17, pp 31, 46 48 See also Roth, *Schadenersatz für Verletzungen Privater bei volkerrechtlichen Delikten* (1934), Wise in *A J*, 17 (1923), pp 245-261, Yntema in *Columbia Law Review*, 24 (1923 1924), pp 511 527, Hauriou in *R G*, 31 (1924), pp 203 231, Spiropoulos in *Z I*, 35 (1925-1926), pp. 59 134, Strupp, *Das volkerrechtliche Delikt* (1920), pp 211-213, Brierly in *B Y*, 1928, pp 42 49, Hyde in *A J*, 22 (1928), pp 140-142, Anzilotti, pp 517 533, Eagleton in *Yale Law Journal*, 39 (1929), pp 52 - 75, Salvioli in *Hague Recueil*, vol 28 (1929) (iii), pp 235-276, Bouvé in *R I*, 3rd ser, 11 (1930), pp 660 686, Feller, *Mexican Claims Commissions, 1923 1934* (1936), pp 290-307, Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 571 603

(*b*) *Interest* It is the general principle of international tribunals to award interest, at rates which vary according to the prevailing circumstances, from the date when a debt or other liquidated demand became due, or when the injury complained of occurred, or from the date of the judgment or award (as, for instance, in the *Wimbledon* by the Permanent Court, Series A, No 1), there may, however, have been conduct on the part of the claimant which disentitles him to an award of interest See cases discussed in Ralston, §§ 210-230, 439, 443, 467, 650, and Lauterpacht, §§ 63, 64, Eagleton, *op cit*, pp 203 205, Feller, *op cit*, pp 308 311, and, in particular, Marjorie Whiteman, *Damages in International Law*, vol iii (1943), pp 1913 2006 See also the *Russian Indemnity* case before the Hague Court of Arbitration in 1912 in Scott, the *Hague Court Reports* (1916), pp 298 323, and the discussion of the award of interest upon the debt by Strupp in *Z V*, 6 (1912), pp 353 566, Anzilotti in *Rivista*, 7 (1913), pp 53 67, and Lapradelle Politis, ii p 981

[1] Thus, according to Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, a belligerent party which violates these laws shall, if the case demands, be liable to make compensation

[2] For an example of the cumulation of these means of redress see the Japanese Note of December 14, 1937, to the United States concerning the sinking by Japanese aircraft of the United States gunboat *Panay* and three American vessels in the course of the hostilities in China. Japan expressed her profound regret at the incident, presented sincere apologies, promised indemnification for all losses, and undertook 'to deal appropriately' with those responsible for the incident and to issue instructions with a view to preventing similar incidents in the future *Documents*, 1937, pp 757 767

This apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the despatch of a special embassy bearing apologies, and the like A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, and for such as arise merely from culpable negligence

When the delinquent State refuses reparation for the wrong done, the wronged State can, consistently with any existing obligation of pacific settlement, exercise such means as are necessary to enforce an adequate reparation Among the legal questions with regard to which the Permanent Court is authorised to exercise jurisdiction, if the parties agree thereto, are included 'the nature or extent of the reparation to be made for the breach of an international obligation' [1]

Penal Damages

§ 156*a* It is often maintained that, having regard to the sovereignty of States, their responsibility for international delinquencies is limited to such reparation for wrongs committed by them as does not exceed the limits of restitution [2] This view hardly accords either with principle or with practice It is true that international tribunals have held that penal or vindictive damages cannot be awarded against States [3] However, in the majority of these decisions the tribunals were guided in this matter by the limitations of the arbitration agreement [4] On the other hand, international tribunals have in numerous cases awarded damages which must, upon analysis, be regarded as penal Such punitive damages have been awarded, in particular, for the failure of States to apprehend or effectively to punish

[1] Article 36 of the Statute

[2] See *e g* Kaufmann in *Hague Recueil*, vol 54 (1935) (IV), pp 466 471, and §§ 150, 151, and 156 of the fourth and preceding editions of this treatise

[3] See *e g* the *Lusitania* case, decided in November 1923 by the American German Mixed Claims Commission *Annual Digest*, 1923-1924, Case No 113 See also the Award in the case of *Portugal* v *Germany*, decided in June 1930, *Annual Digest*, 1929 1930, Case No 126

[4] In the case of the *Carthage*, decided on May 6, 1913, the Permanent Court of Arbitration, while refusing to award the sum of one franc for the offence against the French flag, held that the establishment of the fact that a State had failed to fulfil its obligations 'constitutes in itself a serious penalty' Scott, *Hague Court Reports* 1 p 335

persons guilty of criminal acts against aliens.[1] The practice of States and tribunals shows other instances of reparation, indistinguishable from punishment, in the form of pecuniary redress unrelated to the damage actually inflicted [2]

Criminal Responsibility of States

156b The responsibility of States is not limited to restitution and to damages of a penal character. The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt of human life place them within the category of criminal acts as generally understood in the law of civilised countries. Thus if the Government of a State were to order a wholesale massacre of aliens resident within its territory the responsibility of the State and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character The preparation and the launching of an aggressive war—now that resort to war as an instrument of national policy has been condemned and renounced in solemn international engagements [3]—must be placed within the same category [4]

[1] See *e g* the *Janes'* case in *Annual Digest*, 1925-1926, Case No 158, and comment thereon by Brierly in *B Y*, 9 (1928), pp 42 *et seq*, in particular p 49 See also Rice in *A J*, 28 (1934), pp 246 254, Briggs in *Essays in Political Science in Honor of W W Willoughby* (1937), pp 339 353, Lauterpacht in *Hague Recueil*, vol 62 (1937) (iv), pp 349 357

[2] See *e g* the decision of the Council of the League of December 14, 1925, *Off J*, 7 (1926), p 172, awarding to Bulgaria the payment of ten million levas by Greece as reparation for material and moral damage in addition to compensation for damage to movable property In the *I'm Alone* case, decided on January 5, 1935, the Commissioners recommended that the United States, in addition to formally acknowledging the illegality of its conduct and apologising to the Canadian Government therefor, should pay to Canada the sum of $25,000 'as a material amend in respect of the wrong' *A J*, 29 (1935), p 331 Hyde, *ibid*, p 300, adduces reasons why this case cannot be regarded as a precedent for awarding penal damages against a State in respect of a public claim See also the *Martini* case between Italy and Venezuela, decided on May 3, 1930, where the arbitrators held, as part of the Award, that certain obligations incurred as the result of a manifestly unjust decision of a Venezuelan Court must be expressly declared to be annulled No payment was ever made in pursuance of that decision, but the Tribunal was of the view that as an illegal act had been committed the consequences of that act must be expressly effaced *Annual Digest*, 1929 1930, Case No 93

[3] See vol II p 52 (1) as to the General Treaty for the Renunciation of War See also Article 2 (4) of the Charter of the United Nations

[4] In 1927 the Eighth Assembly of the League of Nations adopted a Resolution in which a war of aggression was described as an international crime Record of the Eighth Assembly, Plenary Meetings, p 84 A resolution of the Sixth Pan American Conference declared wars of aggression to be a 'crime against the human species' *A J*, 22 (1928), pp 356, 357 See also Lauterpacht in *B Y*, 21 (1944), p 81

There are no international judicial decisions laying down and applying the principle of criminal responsibility of States This is largely due to the absence of international tribunals endowed with the requisite jurisdiction But traditional International Law, in permitting war and reprisals as a means of redress against a State deemed guilty of a violation of international law, sanctioned coercive action not necessarily limited to mere compensation for a wrong received The sanctions of Article 16 of the Covenant of the League and of the corresponding provisions of the Charter of the United Nations [1] are, in part, of a penal character in relation to what may properly be described as the crime of war [2] The universal recognition as part of International Law of rules penalising war crimes by individuals responsible for violations of the laws of war [3] affords another instance of the recognition of criminal responsibility of States For war criminals are, as a rule, guilty of acts committed not in pursuance of private gain and lust but on behalf of and as organs of the State

Undoubtedly, the repression, by means appropriate to the seriousness of the offence, of criminal conduct of collective units raises difficulties of a legal and ethical nature inherent in the notion of collective responsibility and punishment Yet it is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation Moreover, the extreme drastic consequences of criminal responsibility of States are capable of modification in the sense that such responsibility is additional to and not exclusive of the international criminal liability of the

[1] Chapter VII of the Charter

[2] Article 6 of the Charter annexed to the Agreement of August 8, 1945, for the Punishment of the Major War Criminals provided that among the crimes coming within the jurisdiction of the Tribunal there shall be '(a) Crimes against peace Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing' *A J*, 39 (1945), Suppl, p 260, Cmd 6668

[3] Vol II § 251

individuals guilty of crimes committed in violation of International Law [1]

III

STATE RESPONSIBILITY FOR ACTS OF STATE ORGANS

See the literature quoted above at the commencement of § 148, and especially Moore, VI §§ 998 1018—Borchard, §§ 75 81 and 127 130—Schoen, *op cit*, pp 80 122—Marinoni, *La Responsabilità degli Stati per gli Atti dei loro Rappresentanti* (1914)—Strupp, *Das volkerrechtliche Delikt* (1920), pp 63 88—Eagleton, *State Responsibility in International Law* (1928), pp 44-75—Harvard Draft Convention (and Comment), *A J*, 23 (1929), April, Special Number, pp 145-188—Salvioli in *Hague Recueil*, vol 46 (1933) (IV), pp 103 114

Responsibility varies with Organs concerned

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs varies with the agents concerned It is therefore necessary to distinguish between internationally injurious acts of Heads of States, of members of a Government, of diplomatic envoys, of parliaments, of judicial functionaries, of administrative officials, and of military and naval forces

Internationally Injurious Acts of Heads of States

§ 158 Such internationally injurious acts as are committed by Heads of States in the exercise of their official functions are not our concern here, because they constitute international delinquencies, which have been discussed above (§§ 151-156) But a monarch can, just as any other individual, in his private life commit many internationally injurious acts The position of the Head of the State, who is, within and without his State, neither under the jurisdiction

[1] For it must be borne in mind that individuals are subjects of international law not merely as beneficiaries of rights They are also subject to international duties not only in the exceptional situations as blockade runners, pirates or war criminals, but also, more generally, in their capacity as organs of State The modern tendency to treat individuals as subjects of international law must not be identified with a one-sided emphasis upon enjoyment of rights arising from International Law At the same time it is clear that unless the criminal responsibility of States is to be reduced to the vanishing point of law, its enforcement must be placed in the hands of impartial international agencies operating within the orbit of a politically organised international society See also above, § 153*a* For the literature on the establishment of an international criminal court see above, § 127*a*, and in particular, vol II § 257.

of a court of justice, nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to impose a certain vicarious responsibility upon States for internationally injurious acts committed by their Heads in private life. Thus, for instance, when a monarch during a stay abroad commits an act injurious to the property of a foreign subject and refuses adequate reparation, his State may be requested to pay damages on his behalf

Internationally Injurious Acts of Members of Governments

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity, and other acts Acts of the first kind constitute international delinquencies, as stated above (§ 153) But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts Now, as members of a Government have not the exceptional position of Heads of States, and are therefore under the jurisdiction of the ordinary courts of justice, there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

Internationally Injurious Acts of Diplomatic Envoys

§ 160 The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of exterritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State, and, on the other hand, excludes the jurisdiction of the receiving State over such acts.[1] The Law of Nations therefore makes the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects on whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State Thus, for instance, a crime committed by the envoy on the territory of the receiving State must

[1] See below, §§ 386-388, 391.

be punished by his home State, and in special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologise or express its regret for his behaviour, or to pay damages Such injurious acts as an envoy performs at the command or with the authorisation of his home State, constitute international delinquencies for which the home State bears original responsibility, and for which the envoy cannot personally be blamed

Internationally Injurious Activity of Parliaments

§ 161 As regards the internationally injurious activity of parliaments, it must be kept in mind that, important as may be the part parliaments play in the political life of a nation, they do not belong to the agents which represent the State in its international relations with other States. Therefore, however injurious to a foreign State the activity of a parliament may be, it can never constitute an international delinquency [1] On the other hand the State bears full international responsibility for such legislative acts of Parliaments as are contrary to International Law and as have been finally incorporated as part of its Municipal Law [2]

Internationally Injurious Acts of Judicial Functionaries Denial of Justice

§ 162 Internationally injurious acts committed by judicial functionaries in their private life are in no way different from such acts committed by other individuals But these functionaries may in their official capacity commit such acts, and the question is how far the vicarious responsibility of a State for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are almost entirely independent of their Government [3] Undoubtedly, in case of such

[1] See details in Borchard, § 75

[2] See, for a careful study of the subject, Sibert in *R G*, 48 (1941-1945), pp 5 34 And see above, § 22

[3] Wharton, II § 230, comprises abundant and instructive material on this question For the assassination in Switzerland in May 1923 of Vorovski, the chief Russian delegate to the Lausanne Conference, and the subsequent acquittal of the person accused of the crime see Toynbee, *Survey*, 1924, pp 258, 259 And see Garner in *B Y*, 10 (1929), pp 181-189 When in July 1943 the Supreme Court of Eire gave a judgment affirming jurisdiction over certain Latvian and Estonian vessels of which Soviet Russia claimed to be the owner, the Russian Government, in a communication addressed to the High Commissioner for Eire in London, protested against the judgment as being illegal and placed the responsibility for it on the Government of Eire *Irish Law Times*, 75 (1941), p 215

denial [1] or undue delay of justice by the courts as is internationally injurious, a State must find means to exercise compulsion against such courts And the same applies to an obvious and malicious act of misapplication of the law by the courts which is injurious to another State But if a court observes its own proper forms of justice and nevertheless makes a materially unjust order or pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, unless the other party consents to bring the case before a court of arbitration [2]

[1] See Borchard, §§ 127 130, and in *Z o V*, 1 (1929), pp 242 247 The term 'denial of justice' is also applied to unjust action or inaction by the Executive see Ralston, §§ 115, 116 See also *A S Proceedings*, 1927, pp 27 38, Strupp, *Das volkerrechtliche Delikt* (1920), pp 70 85, Dunn, *The Protection of Nationals* (1932), pp 146 156, the same, *The Diplomatic Protection of Americans in Mexico* (1933), pp 199-273, Moussa, *L'étranger et la justice nationale* (1934), Feller, *The Mexican Claims Commissions, 1923-1934* (1936), pp 128-154, Eustathiadès, *La responsabilité internationale de l'état pour les actes des organes judiciaires et le problème du déni de justice en droit international* (1937), Freeman, *The International Responsibility of States for Denial of Justice* (1938) (a scholarly and exhaustive work), Eagleton in *A J*, 22 (1928), pp 538-559, Dumas in *R I*, 3rd ser, 10 (1929), pp 277 307, Hoijer in *R I* (*Paris*), 5 (1930), pp 115-146, Fitzmaurice in *B Y*, 13 (1932), pp 93-114, Ch de Visscher in *Hague Recueil*, vol 52 (1935) (II), pp 369 440, Lissitzyn in *A J*, 30 (1936), pp 632-646, Spiegel in *A J*, 32 (1938), pp 62-81, Ténékidès in *R G*, 46 (1939), pp 373-389, Puente in *Michigan Law Review*, 43 (1944), pp 383-406, Sibert in *R G*, 48 (1) (1941-1945), pp 5-34 In a number of cases international tribunals have held that the non execution or remission of a sentence on the culprit or the granting of an amnesty constitutes a denial of justice to the injured alien · see *e g* the *Putnam* case, the *West* case, and the *Mallén* case—all decided in 1927 by the United States Mexican General Claims Commission *Annual Digest*, 1927 1928, Cases Nos 141, 143, 144 See also *ibid*, 1933 1934, Case No 94, where, in the *Gust Adams* case, the United States Panama Claims Commission awarded damages to the claimant on the ground that the offender had received inadequate punishment The same Commission awarded damages on account of an amnesty granted to the offender *Denham* case, *ibid*, Case No 95 In the *Solomon* case, decided in 1933 by the United States Panama Claims Commission, damages were awarded to the claimant on the ground that his conviction by a Panamanian court had been due to the fact that the court was unduly influenced by local feeling *ibid*, 1933-1934, Case No 93 In fact, the term 'denial of justice' is at times used to cover all international injuries affecting aliens see *e g* Hyde, § 281

[2] For the interesting case of the *Costa Rica Packet*, decided in 1891, between Holland and Great Britain, see Bles in *R I*, 28 (1896), pp 452-468, Regelsperger in *R G*, 4 (1897), pp 735-745, Valery in *R G*, 5 (1898), pp 57-66, Moore, 1 § 148 See also Ullmann, *De la responsabilité de l'état en matière judiciaire* (1911), Borchard, § 81, Otken in *R I* (*Geneva*), 4 (1926), pp 33-42 The whole correspondence on the subject and the award are printed in Martens, *N R G*, 2nd ser, 23 (1898), pp 48

§ 162a It is a recognised rule that an international tribunal will not entertain a claim put forward on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available to him in the State concerned [1] So long as there has been no final pronouncement on the part of the highest competent authority within the State, it cannot be said that justice has been definitely denied and that a valid international claim has arisen The substance of this rule, usually referred to as the local remedies rule, is frequently included in conventions providing for obligatory jurisdiction of international tribunals However, the failure to exhaust the 'local remedies' will not constitute a bar to a claim if it is clearly established that, in the circumstances of the case, an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject-matter of the complaint,[2] or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation or, as a rule, when the injury to the alien is the result of an act of the government as such [3]

Exhaustion of Local Remedies.

715, and 808 See also the *Chevreau* case, decided in 1931, between Great Britain and France *A J*, 27 (1933), p 153, *Annual Digest*, 1931-1932, Hudson in *A J*, 26 (1932), pp 804-807

[1] *Bases of Discussion*, iii pp 136-139, Eagleton, *The Responsibility of States in International Law* (1928), pp 95-124, and in *R I*, 3rd ser, 11 (1930), pp 643 659, and *ibid*, 16 (1935), pp 504 526, Dunn, *The Protection of Nationals* (1932), pp 156-159, Witenberg, *La procédure et la sentence internationales* (1937), pp 153-155, and in *Hague Recueil*, vol 41 (1932) (iii), pp 50-56, Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 403 455, Borchard in *Z ö V*, 1 (1929), pp 233 242, the same in *Annuaire*, 35 (2) (1931), pp 424-435, and in *A J*, 28 (1934), pp 729-733, Fachiri in *B Y*, 12 (1931), pp 95 106, and *ibid*, 17 (1936), pp 19-36, Friedmann in *R I*, 3rd ser, 14 (1933), pp 318-327, Ténékidès, *ibid*, pp 514 535, Ago in *Archivio di diritto publico*, vol iii (2) (1938) pp 181-249 See also the dispute between Persia and Great Britain in 1932 and 1933 concerning the Anglo Persian Oil Company's Concession in Persia Toynbee, *Survey*, 1934, pp 224-247

[2] See *e g Brown's* case, decided on November 23, 1923, by the British-American Claims Arbitral Tribunal *Annual Digest*, 1923 1924, Case No 35

[3] See the Award of March 1933 given by Undén, Arbitrator, in the dispute between Greece and Bulgaria concerning the *Interpretation of Article 181 of the Treaty of Neuilly A J*, 28 (1934), p 787 See the Award of Bagge, Arbitrator, of May 9, 1934, in

Internationally Injurious Acts of Administrative Officials and Military and Naval Forces

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies, because they are not State acts But a State bears a wide, unlimited, and unrestricted [1] vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts of the State [2] Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or

the dispute between Great Britain and Finland, *Annual Digest*, 1933-1934, Case No 91 For comment thereon see Borchard in *A J*, 28 (1934), pp 729-733, Beckett in *Hague Recueil*, 50 (1934) (IV), pp 198-303, Freeman, *op cit*, pp 423-434, and Fachiri, *op cit* See also *Z ö V*, 4 (1934), pp 671-684 And see *Interocean Transportation Company of America* v *The United States of America* *Annual Digest*, 1935 1937, Case No 115 (at pp 272 274), on purely illusory remedies The interpretation given to the Calvo Clause (see above, § 155*a*) in some cases—*e g Mexican Union Railway* case *Annual Digest*, 1929 1930, Case No 129—substantially reduces the operation of that Clause to a condition of observing the local remedies rule

[1] Borchard (§ 77) objects to this statement In the *Zafiro* case (1925) the American-British Claims Arbitration Tribunal based the liability of the United States for looting by the Chinese crew of a British supply ship attached to the American fleet upon the culpable lack of control by the officers see *A J*, 20 (1926), pp 385 390, and *Annual Digest*, 1925-1926, Case No 16 See also the *Diaz* case decided by the United States Panama Claims Commission (*Annual Digest*, 1933 1934, Case No 100), where the United States was held responsible for damage caused by trespassing American sailors engaged in exercises off the coast For a criticism of the decision see Borchard in *A J*, 29 (1935), p 101 And see the decision given in December 1931 by the United States Court of Claims in *Royal Holland Lloyd* v *The United States*, *A J*, 26 (1932), pp 399 419, which, on p 410, relies on the statement in the text

[2] It is of importance to quote again here Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, which stipulates that a State is responsible for all acts committed by its armed forces The hostilities between the Chinese and Japanese forces round Shanghai in 1932 raised the question as to the responsibility for damage done to aliens by the forces of a State in the territory of another State in circumstances not amounting to war The British Government informed both parties to the dispute that it must hold each side responsible for any loss to British life and property caused by their respective armed forces (see statement by Sir John Simon on February 18, 1932, 261 H C Deb 5 s, col 1831) On principle it is not irrelevant in such cases to inquire into the legality of the action taken by a State in the territory of another State See Wright in *A J*, 26 (1932), pp 586 590 In February 1938 the United States announced that it would attribute to Japan responsibility for damage caused to United States nationals or property by Japanese armed forces in China For a criticism of that announcement see Borchard in *A J*, 32 (1938), p 534, n 4 But see Lauterpacht in *Legal Problems in the Far Eastern Conflict* (ed by Wright, 1941), pp 153 156

even apologising to the Government of the injured State, secondly, damages must be paid [1] where required, and, lastly, the offenders must be punished according to the merits of the special case

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts are internationally injurious as would constitute international delinquencies when committed by the State itself, or with its authorisation [2]

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces Individuals who enter foreign territory submit themselves to the law of the land,

[1] Grotius, II c 17, § 20, denies this 'Neque vero si quid milites, aut terrestres, aut nautici, contra imperium amicis nocuissent, reges teneri ' It has been held that a State is responsible for the injurious acts of soldiers on leave *Bellon* case, decided on June 18, 1929, by the French Mexican Claims Commission *Annual Digest*, 1929 1930, Case No 104 But see the *Gordon* case, *ibid*, Case No 103, where Mexico was held not liable for injuries caused by army doctors engaged in private target practice (United States Mexican Claims Commission, October 8, 1930)

[2] Some instructive cases may be quoted as examples

(1) On November 26, 1905, Hasmann, a member of the crew of the German gunboat *Panther* (see *R G*, 13 (1906), pp 200 206), at that time in the port of Itajahy in Brazil, failed to return on board his ship The commander of the *Panther* sent a search party, comprising three officers in plain clothes and a dozen non commissioned officers and soldiers in uniform, on shore for the purpose of finding the whereabouts of Hasmann This party, during the following night, penetrated into several houses, and compelled some of the residents to assist them in their search for the missing Hasmann, who, however, could not be found He voluntarily returned on board the following morning As the search violated Brazilian territorial supremacy, Brazil lodged a complaint with Germany, which, after an inquiry, disowned the act of the commander of the *Panther*, formally apologised for it, and punished the commander of the *Panther* by relieving him of his command

(2) Another example occurred in 1904, when the Russian Baltic fleet, on its way to the Far East during the Russo-Japanese War, fired upon the Hull fishing fleet off the Dogger Bank See below, vol II § 5

(3) In December 1915, during the First World War, and at a time when the United States was still neutral, an Austrian submarine fired upon an American merchantman, flying the American flag, in the Mediterranean The United States Government demanded an apology for this 'deliberate insult to the flag of the United States,' the punishment of the submarine commander, and reparation for damage done (*A J*, 10 (1916), Special Suppl, p 306) For some other cases see the former editions, § 163

For an instance of State responsibility for acts of soldiers in breach of duty see *Youmans'* claim before the American Mexican Claims Arbitration Tribunal in *A J*, 21 (1927), pp 571 579, *Annual Digest*, 1925-1926, Case No 162

and their home State has no right to request that they should be treated otherwise than as the law of the land authorises a State to treat its own subjects [1] Therefore, since the Law of Nations does not prevent a State from expelling aliens, the home State of an expelled alien cannot, as a rule,[2] request the expelling State to pay damages for the losses sustained by him through having to leave the country Therefore, further, a State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war,[3] insurrection,[4] riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like

IV

STATE RESPONSIBILITY FOR ACTS OF PRIVATE PERSONS

See the literature quoted above at the commencement of § 148, and especially Moore, VI §§ 1019-1031—Borchard, §§ 86 96—Schoen, *op cit*, pp 63 80 See also Arias in *A J*, 7 (1913), pp 724 765—Goebel in *A J*, 8 (1914), pp 802-852—Strupp, *Das volkerrechtliche Delikt* (1920), pp 89-108—Jess, *Politische Handlungen Privater gegen das Ausland und das Volkerrecht* (1923)—Eagleton, *State Responsibility in International Law* (1928), pp 76 94, 125 156—Harvard Draft Convention (and Com ment), *A J*, 23 (1929), April, Special Number, pp 188 196—Monaco in *Rivista*, 18 (1939), pp 3 30, 193-261—Conference for the Codification of International Law *Bases of Discussion*, III C 75, M 69 129 V pp 93-121

Vicarious in contra distinction to Original State Responsibility for Acts of Private Persons

§ 164 As regards State responsibility for acts of private persons, it is first of all necessary not to confuse the original with the vicarious responsibility of States for internationally injurious acts of private persons International Law imposes the duty upon every State as far as possible to prevent its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply

[1] Provided, however, such law does not violate essential principles of justice See below, § 320

[2] See below, § 323, for the qualification of the right to expel aliens

[3] But see above, p 328, n 2

[4] See, for instance, the *Luzon Sugar Refining Co's* claim before the British-American Claims Commission in *A J*, 20 (1926), p 391, and *Annual Digest*, 1925-1926, Case No 164 As to Responsibility for acts of Insurgents and Rioters see below, § 167

with this duty commits an international delinquency for which it has to bear original responsibility. But it is in practice impossible for a State to prevent all injurious acts which a private person might commit against a foreign State It is for that reason that a State must, according to International Law, bear vicarious responsibility for such injurious acts of private individuals as are incapable of prevention

Vicarious Responsibility for Acts of Private Persons relative only

§ 165 Whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative For their sole duty is to exercise due diligence to prevent internationally injurious acts on the part of private persons, and, in case such acts have nevertheless been committed, to procure satisfaction and reparation for the wronged State, as far as possible, by punishing the offenders and compelling them to pay damages where required Beyond this limit a State is not responsible for acts of private persons, there is in particular no duty for a State itself to pay damages for such acts if the offenders are not able to do it If, however, a State has not exercised due diligence, it can be made responsible and held liable to pay damages [1]

Municipal Law as to Offences against Aliens

§ 165a It is a consequence of the vicarious responsibility

[1] See Borchard, § 87 See the Question put to, and Answer given by, the Commission of Jurists appointed by the Council of the League after the Janina Corfu affair in 1923 *Fifth Question* In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime [*scilicet*, against foreigners] in its territory? *Reply* The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest, and bringing to justice of the criminal The recognised 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 upon his behalf' See *B Y*, 1924, pp 179 181, *A J*, 18 (1924), pp 536 544, Charles de Visscher in *R I*, 3rd ser, 5 (1924), pp 389 396 For an example of redress for the death of a consular representative at the hands of a mob see Stowell in *A J*, 18 (1924), pp 768 774 See also the Russian case *In re Dobrovolsky and Goukovitch*, *Annual Digest*, 1927-1928, Case No 255 As to the measure of damages payable by a State for neglect to punish offenders for injury to foreigners see Hyde in *A J*, 22 (1928), pp 140 142, *Janes'* claim before the American-Mexican Arbitration Claims Tribunal in *A J*, 21 (1927), pp 362-380, and Briefly in *B Y*, 1928, pp 42 49 And see above, § 156 (n)

of States for acts of private persons that their criminal offences against aliens (such offences being indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad), and especially against the Heads and diplomatic representatives of foreign States,[1] must be punished according to the ordinary law of the land, and that the civil courts of justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such country

Responsibility for Acts of Insurgents and Rioters

§ 165b The vicarious responsibility of States for acts of insurgents and rioters [2] is the same as for acts of other private individuals Therefore only in case a State by exercising due diligence could have prevented, or immediately crushed, an insurrection or riot, can it be made responsible for acts of insurgents and rioters [3] In other cases the duty of the State concerned is only to punish according to the law of the land, as soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign States against the local State for damages for losses sustained by their subjects through acts of insurgents or rioters,[4] and that some writers assert that such claims are justified by the Law of Nations The correct view is, it is believed, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters, provided due diligence was exercised by the

[1] See also below, § 386

[2] See Goebel in *A J*, 8 (1914), pp 802 852, who supplies valuable material, but differs from the view expressed in the text See also the details given by Borchard, §§ 89 96 As to the responsibility of States for the acts of general and local *de facto* Governments see Spiropoulos, *Die de facto Regierung im Volkerrecht* (1926), pp 177-188, Borchard, §§ 84, 85, and in *A J*, 20 (1926), pp 541, 542, Woolsey, *ibid*, pp 543 549, Evatt in *Australian Law Journal*, 9 (1935-1936), Suppl, pp 9 25, and Gross and Houghton quoted below, p 333, n 1 See also above, § 75*h*

[3] See, for instance, the decision of the Claims Arbitral Tribunal in the case of the *Home Missionary Society*, *A J*, 15 (1921), pp 294 297, *Annual Digest*, 1919-1922, Case No 117

[4] That is, on the basis of an absolute liability and without alleging negligence or denial of justice

State concerned [1] Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots no less than the risk of the outbreak of other calamities When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals and claim damages from the latter before the courts of justice. The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal And in States—as, for instance, France—which have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local authorities for losses of such a kind But the State itself never has by International Law a duty to pay such damages [2]

The practice of the States agrees [3] with this rule laid

[1] See Rivier, II p 43, Brusa in *Annuaire*, 17, pp 96 137, Bar in *R I*, 2nd ser, I (1899), pp 464 481, Goebel, *op cit*, Strupp, *Das volkerrechtliche Delikt* (1920), pp 89 96, Eagleton, *The Responsibility of States in International Law* (1928), pp 124-156, Houghton in *Minnesota Law Review*, 14 (1929 1930), pp 251 269, Gross in *Z o R*, 13 (1933), pp 375 407, Berlia in *R G*, 44 (1937), pp 51 66, Podestá Costa in *Revista de derecho internacional*, 34 (1938), pp 195-235, Silvanie in *A J*, 33 (1939), pp 78 103, and, the same, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (1939)

[2] See Garner in *A S Proceedings* (1927), pp 49 63, who is in substantial agreement with this section, except that he considers that, when mob violence is directed against aliens *as such*, the State should make reparation, whether or not it has shown due diligence In fact, in *Sarropoulos* v *Bulgarian State* the Graeco-Bulgarian Mixed Arbitral Tribunal held that the State is responsible if the riots were directed against foreigners as such *Annual Digest*, 1927 1928, Case No 162 See also the decision of the French Mexican Mixed Claims Commission in the *Georges Pinson* case, of October 19, 1928, qualifying the rule that a State is not responsible for damage suffered by aliens in the course of civil war *Annual Digest*, 1927-1928, Case No 159 According to the British view, clearly stated in *Bases of Discussion*, III p 109, the Government against which the insurrection is directed is not responsible unless (*a*) that Government were negligent and might have prevented the damage, (*b*) they pay compensation to their own nationals or other foreigners in similar cases, (*c*) the rebellion has been successful and the insurgent party has been installed in power

[3] Goebel (*op cit*, pp 819 831) asserts that the practice of the States has undergone a change, but it is doubtful whether this is so

down by a majority of writers Although in a number of cases several States have paid damages for losses of this kind, they have done it not through compulsion of law, but for political reasons In most cases in which damages have been claimed for such losses, the States concerned have refused to comply with the request [1] As such claims had, during the second half of the nineteenth century, frequently been made against American States which have repeatedly been the scene of insurrections, several of these States in commercial and similar treaties which they concluded with other States have expressly stipulated [2] that they are not responsible [3] for losses sustained by foreign subjects on their territory through acts of insurgents and rioters [4]

[1] See the cases in Calvo, iii §§ 1283-1290

[2] See, for instance, Martens, *N R G*, 2nd ser, 9, p 474 (Germany and Mexico), 15, p 840 (France and Mexico), 19, p 831 (Germany and Colombia), 22, p 308 (Italy and Colombia) A list of such treaties is given by Arias in *A J*, 7 (1913), pp 755, 756, 759, 760, and Borchard, p 244 (n)

[3] The question of responsibility for losses of foreign citizens during a revolution is treated with excellent judgment by Hyde in his paper on 'Mexico and the Claims of Foreigners,' in *Illinois Law Review* (January 1914), 8, No 6 See also Hyde, §§ 299B 302

[4] See also the *Règlement* proposed by the Institute of International Law, *Annuaire*, 18 (1900), pp 254-256, which would not confine liability to cases of negligence or denial of justice, and two *vœux* expressed by the Institute, *ibid*, pp 253 and 256, deprecating the practice of concluding treaties of reciprocal irresponsibility for injury to foreigners and recommending resort to international commissions of inquiry and arbitration in such cases, see below, vol ii § 14 (n), and see the Convention of December 5, 1930, between Great Britain and Mexico in which the latter agreed to compensate *ex gratia* British subjects for losses suffered in the course of Mexican revolutions from 1910 to 1920 Treaty Series, No 22 (1931), Cmd 3846 And see the Convention of November 19, 1926, between the same parties Treaty Series, No 11 (1928), Cmd 3085 The reports of the decisions of that Commission were published in 1931 and 1933 by H M Stationery Office

See also the scholarly treatise by Feller, *The Mexican Claims Commissions, 1923 1934* (1936), pp 155-172, and a series of decisions given by Verzijl as President of the French-Mexican Claims Commissions and reported in *Annual Digest*, 1927-1928 and 1929 1930

CHAPTER IV

THE LEGAL ORGANISATION OF THE INTERNATIONAL COMMUNITY

SECTION I

THE PRINCIPLES OF INTERNATIONAL ORGANISATION

As to problems of international organisation in general see Ruyssen in *Hague Recueil*, 67 (1939) (1), pp 125 224—Guggenheim, *L'Organisation de la société internationale* (1944)—Ropke, *Die Gesellschaftskrisis der Gegenwart* (1942)—the same, *Civitas humana* (1944)—the same, *Internationale Ordnung* (1945)—Bourquin, *Vers une nouvelle société internationale* (1945)—Sturzo, *Nationalism and Internationalism* (1946)—Ewing, *The Individual, the State, and World Government* (1947)—Jessup, *The International Problem of Governing Mankind* (1947)—Wright in *Yale Law Journal*, 55 (1946), pp 870 888—Laswell, *ibid*, pp 889 909—Goodrich, *ibid*, pp 950 964

General International Organisation and International Law

§ 166 The historic idea of a 'general international organisation'[1]—an idea prominent in the legal and political thought of the last three centuries—connotes an association of States of potentially universal character for the ultimate fulfilment of purposes which, in relation to individuals organised in political society, are realised by the State The achievement of these purposes, which are outlined below,[2] is as essential to the Law of Nations as it is to the internal law of the State. Failing their accomplishment, or an attempt at their accomplishment, International Law must be deemed to dwell in the realm of a twilight existence in which its very claim to be considered as a system of law is precarious and controversial. To that extent, which is fundamental in its scope and nature, the cause of International Law is identical with that of a general political organisation of mankind as distinguished from organs of international administration and co-operation for particular purposes For it is only under the shelter of and through such general organisation endowed

[1] On the origins of the term 'international organisation' see Potter in *A J*, 39 (1945), pp 803-806 And see above, p 79, n 1

[2] See § 166*a*

with overriding and coercive power for creating, ascertaining and enforcing the law that International Law can overcome its present imperfections For this reason it is proper that the constitution of international society—such as is embodied in both the Covenant of the League of Nations and in the Charter of the United Nations—should be studied by reference to its approximation to these essential objects of any political society under the rule of law

The Objects of the Political Organisation of Mankind

§ 166*a* The essential objects of a general political organisation of States cannot differ radically from those normally pursued by the State They cannot be confined to the obligation to abstain from recourse to violence or to participation in the collective effort to suppress unlawful resort to force They must cover, if they are to be effective in the long run, both the duty of States to submit their disputes with other States for determination in accordance with law and the legislative competence of the organised Society of States to modify and to supplement existing law by reference to the requirements of justice and social progress For law which is static and unalterable tends to become an instrument of oppression and, after a time, a danger to peace Finally, although International Law is primarily a law regulating the rights and duties of sovereign and independent States, the political organisation of mankind must give effect to the most fundamental of all legal and political principles, namely, that the individual human being is the ultimate unit of all law This means that it must be considered an essential purpose of the organised society of States to assist in securing—and, in the long run, to secure —the freedom of the individual, in all its aspects, by means of comprehensive and enforceable obligations binding upon the members of the Organisation

State Sovereignty and International Organisation

§ 166*b*. None of the essential objects of international organisation can be secured without the surrender of what are often regarded as vital attributes of the sovereignty of States in the international sphere These include the faculty to resort to war or, if the latter has been prohibited or renounced, the legal power to determine with finality the legitimacy of resort to war in alleged self-defence , the right

to refuse to submit disputes for binding adjudication in accordance with law, the right to decline to accept changes in the law validly decreed by appropriate organs of the international community, and the right of the State to consider the treatment—and the well-being—of the inhabitants of its territory as a matter falling exclusively within its domestic jurisdiction and not subject to effective control on the part of the organised international community. In proportion as the international organisation of States sanctions and perpetuates these rights it falls short of the fulfilment of the true purposes of its being—although such fundamental deficiency may not be inconsistent with the performance of tasks of considerable importance and usefulness It may be a matter of controversy whether those rights, the abandonment of which is essential to the fulfilment of the true function of a political organisation of States, are inherent in a rationally conceived notion of the sovereignty of the State The adoption of the view that they are inseparable from sovereignty as generally understood leads of necessity to the conviction that an adequate organisation of the Society of States must safeguard the true independence and the very survival of States by means of a curtailment of their sovereignty and that it must therefore be supranational in character That conclusion found no expression in the Covenant of the League of Nations, neither is its cogency acknowledged to any appreciable extent in the Charter of the United Nations This does not mean that it cannot serve as a rational standard of human endeavour in what is the crucial aspect of human relations

The Universality of the International Organisation of States

§ 166c It follows from the nature of the purpose of the international organisation of States conceived as the supreme organ of International Law and as an embodiment of the ultimate solidarity of interests of all States, that it must be universal in character This means not only that the international organisation must be open to all members of the international community It means also that its membership must be compulsory upon all States, and that there must be no legal possibility either of withdrawal from or of expulsion from the organisation Such compulsory member-

ship, when coupled with the comprehensive obligations enshrined in the constitution of the Organisation and with the duty to abide by any future extension of these obligations decreed by the competent organs of the Organisation, unavoidably implies a far-reaching derogation from the sovereignty of States This is the main reason why it was not adopted in the Covenant of the League of Nations [1] and why it does not form part of the Charter of the United Nations [2] It must nevertheless be considered as an imperative postulate of the universality, of the effectiveness and of the moral authority of International Law and of the transcending unity of the human race

The Rational Principles of International Organisation

§ 167. An international political organisation of States fulfilling the purposes set out above [3] and based on the principle of compulsory membership of all independent members of the international community must be regarded at present as the principal political goal, of compelling urgency, incumbent upon human society On the achievement of that aim depends not only whether the State, thus rendered secure from external danger, will be in the position to fulfil its own supreme function of enabling its members to realise their duty to obtain, through freedom, the highest degree of development of their faculties as moral beings Inasmuch as the accomplishment of that end is bound up with the elimination of war, the view is gaining ground—and the connection seems inescapable—that upon it depends the very survival of the State and probably of civilised humanity as such For with the advent of the atomic age the destruction of civilised life in consequence of war is no longer a controversial assessment of probable and indirect results of the upheavals and losses caused by hostilities [4]

[1] See below, § 167*b*

[2] See below, § 168*c*

[3] See above, § 166*a*

[4] For the Resolution of the First General Assembly of the United Nations on the establishment of a Commission to deal with the problems raised by the discovery of atomic energy see *Records of the First Assembly* (First Session), p 559 For the Declaration on Atomic Energy of November 15, 1945, by the Heads of the Governments of the United States, Canada and Great Britain see *A J*, 40 (1946), Suppl, p 48 See also Borchard in *ibid*, pp 161-165, for support of a proposal which, if accepted, would amount to 'an international government for the sole purpose of controlling the atomic bomb' (p 164) See also Turlington, *ibid*, pp 165 167, and Potter, *ibid*, 39 (1945), pp 788-790

It is, of necessity, controversial whether the effective political organisation of mankind must be a matter of gradual evolution or whether the component factors of the final structure are so interdependent that one cannot be successfully achieved without a parallel development, *pari passu*, in other fields Thus there may be substance in the view that the renunciation and prohibition of war cannot be effective without the unqualified recognition of the rule of law as expressed in the principle of obligatory jurisdiction of international tribunals For, it may be said, the renunciation and prohibition of resort to force must remain unreal if States are not assured of alternative means of obtaining effective recognition at least of their legal rights through impartial adjudication by legal tribunals endowed with compulsory jurisdiction Further, there are many who believe that the obligatory rule of law may, in the long run, prove precarious and impracticable unless organised international society can alter and supplement existing rules of law by way of international legislation overriding, if necessary, the opposition of a dissenting minority of States For, as already stated,[1] in the absence of such legislative powers the rule of law itself may become a source of injustice and oppression But, in turn, international legislation may not be practicable until States have agreed to make it feasible by renouncing the mechanical principle of equality in voting power and substituting for it a basis of representation less artificial and less repugnant to the prospects of effective legislative action [2]

It is thus probable that only simultaneous progress in all these spheres may render possible the establishment of an organisation of States capable of realising the aims which reason and experience alike proclaim as indispensable for the development of an international society under the effective rule of law Such simultaneous progress was not

[1] See above, § 166*a*

[2] So great are the difficulties inherent in the discovery and the formulation of a practicable standard of representation based on a variety of factors that there has been a tendency to abandon serious attempts in that direction Yet it must be regarded as one of the most important tasks of the science of International Law to encourage and to undertake such attempts For a helpful, though largely historical, enquiry see Sohn in *A J*, 40 (1946), pp 71-79 And see, in particular, Wellington Koo, Jr, *Voting Procedures in International Political Organisations* (1947)

attempted in the Covenant of the League of Nations Neither has it been attempted in the Charter of the United Nations. However, the intrinsic value of rational principles of international organisation is not impaired by the fact that they have not, as yet, found recognition in positive law On the contrary, it is a legitimate function of the science of International Law to attempt to assess the merits of any given general international organisation of States by reference to the abiding purposes of humanity and to the ultimate goal of a supra-national legal ordering of mankind rather than to rationalise any existing imperfections by representing them as realistic or as inescapably determined by a supposed fundamental difference between States and individuals There can be little hope of true progress in the international sphere unless the essential identity of canons of law, reason, and morality, applicable alike to States and individuals, of whom States are composed and by whom they are governed, is accepted as the fundamental standard of conduct.

At the same time it must be realised that the primary object of the science of International Law is to give an account of the law as actually adopted by States This task will be attempted in Section III of this Chapter, which is devoted to the Charter of the United Nations The Covenant of the League of Nations has now ceased to be part of the law [1] However, in a time of transition it may be of assistance for the comprehension of the new international organisation if an account is given of the law underlying the system which preceded it. For this reason Section II of this Chapter continues to be devoted to an exposition, in an abridged form, of the Covenant of the League of Nations.

Section II

THE LEAGUE OF NATIONS

i.

MEMBERSHIP AND GENERAL CHARACTER OF THE LEAGUE

Hall, chapter IIA, pp 71 80—Hershey, §§ 320*a*-320*k*—Liszt, § 50—Hatschek, pp 138-150—Verdross, § 26—Gemma, pp 97-107—Cruchaga, I §§ 697-

[1] See below, p 364, n 1.

709—Bustamante, pp 477-496—Scelle, I pp 246 287, II pp 494-512—Oppenheim, *The League of Nations and its Problems* (1919)—Pollock, *The League of Nations*, 2nd ed (1922)—Butler, *A Handbook of the League of Nations*, 2nd ed (1925), and *The Development of International Law* (1928), ch 18—Scelle, *Le pacte des nations et sa liaison avec le traité de paix* (1919), and the same, *La Société des Nations* (1922)—Bourgeois, *Le pacte de 1919 et la Société des Nations* (1919), and the same, *L'œuvre de la Société des Nations* (1923)—Breschi, *La Società delle Nazioni* (1920)—Larnaude, *La Société des Nations* (1920)—Kraus, *Vom Wesen des Volkerbundes* (1920)—Bülow, *Der Versailler Volkerbund* (1923)—Munch (editor), *Les origines et l'œuvre de la Société des Nations*, I (1923), II (1924)—Schücking und Wehberg, *Die Satzung des Volkerbundes*, 2nd ed (1924)—Laski, *A Grammar of Politics* (1925), pp 587 666—Garner, *Developments*, pp 618 651—Hoijer, *Le pacte de la Société des Nations* (1926)—Niemeyer, Rühland, Spiropoulos, *Der Volkerbund, Verfassung und Funktion* (1926)—Wehberg, *Grundprobleme des Volkerbundes* (1926) and *Die Volkerbund satzung* (1926)—Redslob, *Théorie de la Société des Nations* (1927)—Gonsiorowski, *La Société des Nations et le problème de la paix*, 2 vols (1927)—Bassett, *The League of Nations* (1928)—Schubert, *Volkerbund und Staatsouveranitat* (1929)—Ray, *Commentaire du Pacte de la Société des Nations* (1930), with Supplements (1931-1935)—Morley, *The Society of Nations* (1932)—Guggenheim, *Der Volkerbund in seiner politischen und rechtlichen Wirklichkeit* (1932)—Maim, *Volkerbund und Staat* (1932)—Webster and Herbert, *The League of Nations in Theory and Practice* (1933)—Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (1934)—Yepes and Pereira da Silva, *Commentaire théorique et pratique du Pacte de la Société des Nations*, vol I (1934), vol II (1935), vol III (1939)—Van Vollenhoven, *The Law of Peace* (translated from Dutch, 1936), pp 160 259—Zimmern, *The League of Nations and the Rule of Law* (1936)—Schwarzenberger, *The League of Nations and World Order* (1936)—Baldoni, *La Società delle Nazioni* (1936)—Goppert, *Der Volkerbund* (1938) (a comprehensive work)—Kelsen, *Legal Technique in International Law* A Textual Critique of the League Covenant (1939)—Repertoire of *Questions of General International Law before the League of Nations*, 1920 1940 (prepared by Schiffer, Geneva Research Centre, 1942)—Ranshofen-Wertheimer, *The International Secretariat* (1945)—Oppenheim in *R G*, 26 (1919), pp 234 244—Grosch in *Zeitschrift für die gesamte Staatswissenschaft*, 76 (1921), pp 217 267—Huber in *Z V*, 12 (1923), pp 1-18—Rolin in *R I*, 3rd ser, 2 (1921), pp 225-242, *ibid*, 3 (1922), pp 171-194, 336 364—Paulus in *R G*, 30 (1923), pp 525-555—Corbett in *B Y*, 1924, pp 119-148—J Nisot in 55 *Clunet* (1928), pp 329 339—*Annuaire*, 30 (1923), pp 22-96, 307 347—Fischer Williams in *International Law Association's Thirty fourth Report* (1927), pp 675 695—Del Vecchio in *Hague Recueil*, vol 38 (1931) (IV), pp 545 645—Levi in *Théorie du droit*, VII (1932-1933) pp 53 85—Campagnolo, *ibid*, X (1936) pp 125-133—Genet in *R I F*, 1 (1936), pp 29-39, 149 158—McKinnon Wood in *Minnesota Law Review*, 28 (1943), pp 43 63 See also Aufricht, *Documentary Guide to the League of Nations*, 1920-1946 (1947)

How the League arose [1]

§ 167a. The League of Nations owed its existence, in the first instance, to private initiative Soon after the First World War had broken out, a group of men in England, under the chairmanship of Viscount Bryce, combined for the purpose of working out a draft scheme of a League for the avoidance of war, and they published, in February 1915, *Proposals for the Avoidance of War*, with a prefatory note by Viscount Bryce A similar movement arose in the United States of America, where in June 1915 was founded 'The League to Enforce Peace,' under the chairmanship of ex-President William H Taft

At the Peace Conference a number of drafts were considered, and the Covenant was fully adopted by the Conference on April 28, 1919 It formed Part I. of the Treaties of Peace with Germany, Austria, Hungary, and Bulgaria This formal association of the Covenant with a particular peace settlement was subsequently subjected to criticism, and in September 1938 the Nineteenth Assembly adopted a resolution recommending the ratification of a Protocol amending various Articles of the Covenant with a view to its separation from the treaties of peace [2]

[1] See also Marburg, *World Court and League of Peace* (1915), Publication No 20 of the American Society for the Judicial Settlement of International Disputes, Marburg, *League of Nations* (1917), 2 vols, Smuts, *The League of Nations, A Practical Suggestion* (1917), Schucking, *Internationale Rechtsgarantien* (1918), Stallybrass, *A Society of States* (1918), Lawrence, *Lectures on the League of Nations* (1919), Ward, *Securities of Peace* (1919), Lammasch, *Woodrow Wilson's Friedensplan* (1919), *What Really Happened at Paris, The Story of the Peace Conference, 1918 1919* (1921), ed by House and Seymour, Lange, Scelle, and Schücking in Munch, *Les origines et l'œuvre de la Société des Nations*, 1 pp 1 160, Baker, *Woodrow Wilson and the World Settlement* (1922), 1 pp 276 339, Kunz, *Die Entstehungsgeschichte des Volkerbundpaktes* (1924), Schücking und Wehberg, pp 1 26, Rothbarth in *Strupp, Wort*, III pp 174-181, Lalouel in *R G*, 29 (1922), pp 152 222, Florence Wilson, *The Origins of the League Covenant* (1928), Miller, *The Drafting of the Covenant*, 2 vols (1928), *La Conférence de la Paix et la Société Internationale* (1929, Paris, Les Éditions Internationales), Marburg, *The Development of the League of Nations Idea* (2 vols, 1932), Noble, *Policies and Opinions at Paris, 1919* (1935), pp 99 152, Wehberg in *Friedenswerte*, 39 (1939), pp 177 202 For the original British plan of the League of Nations, the 'Phillimore Report' submitted to the British Cabinet and described as the basic document used by President Wilson in the preparation of the Covenant see Baker, *Woodrow Wilson and the World Settlement* (1922), III pp 67 78, for the final British draft, *ibid*, pp 130-143, for the Official French draft, *ibid*, pp 152 162 For earlier schemes of world peace see above, § 42

[2] *Off J*, Sp Suppl, No 182, p 29 See also von Tabouillot in *Z o V*, 7 (1937), pp. 15 37, Kelsen in *The World Crisis* (Geneva, 1938), pp 133-159, Engel, *League Reform*

The Membership of the League

§ 167*b* According to Article 1 of the Covenant, the League was to consist of original members, and of such members as were to be admitted later

Original Members —The original members of the League were, strictly speaking, those of the States [1] and Dominions enumerated in the Annex to the Covenant, either as 'Signatories of the Treaty of Peace' or as 'States invited to accede to the Covenant,' which did in fact accede without reservation to the Covenant on or before March 20, 1920

Non-Original Members —Paragraph 2 of Article 1 provided that—

> Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments

In accordance with this provision a number of States were subsequently admitted to the League Applications for admission by Armenia, Azerbaidjan, Georgia, Liechtenstein, and the Ukraine were refused in 1920 [2]

(Geneva Research Centre, August 1940), pp 89 109, Hudson in *A J*, 33 (1939), pp 138 145 For the report of the special committee on the subject see C 494 M 335 1937 VII

[1] The United States was named in the treaties as an original member of the League, but it did not ratify any of them, and she never became a member On the relation of the United States to the League of Nations see Garner, *American Foreign Policies* (1928), pp 183-213, Cooper, *American Consultation in World Affairs* (1934), Berdahl in *Michigan Law Review*, 27 (1928 1929), pp 607 636, Darling in *Canadian Historical Review*, 10 (1929), pp 196 211, Hubbard in *International Conciliation* (Pamphlet No 274, November 1931), and see the annual contributions on this subject to *Geneva Special Studies* See also Schmeckebier, *International Organisations in which the United States Participates* (1935), Fleming, *The United States and World Organisation* (1938) As to the Permanent Court of International Justice see vol II p 51, n 4

[2] An application by Monaco was withdrawn, and an application by San Marino was not proceeded with and, by implication, refused *Records of Second Assembly, Plenary Meetings*, pp 685 686 Applications for admission were first examined by a Committee of the Assembly upon the following lines (i) Is the application for admission in order? (ii) Is the Government applying for admission recognised *de jure* or *de facto*, and by which States? (iii) Is the applicant a nation with a stable government and settled frontiers? (iv) Is it fully self-governing? (v) What has been its conduct including both acts and assurances, with regard to (*a*) its international obligations, (*b*) the prescriptions of the League as to

Termination of Membership could arise (i) by voluntary withdrawal under Article 1 (3), or (ii) by expulsion [1] under Article 16 (4) for violation of the covenants of the League, or (iii) by lapse consequent upon dissent from amendments under Article 26

Article 1 (3) [2] provided that—

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

Legal Nature of the League.

§ 167c The question of the legal nature of the League was a matter of considerable controversy [3] The predominant

armaments? *Records of First Assembly, Committees*, II p 159 Much information regarding the position of a number of States who applied for admission is given by Hudson in *A J*, 18 (1924), pp 436-458, and in the *Records* of the Fifth Committee of the First and the Sixth Committee of the Second Assemblies appointed to investigate applications for admission With regard to question (v) above, the insistence of the First Assembly upon the importance of the obligations under minorities clauses in treaties (see below, § 340*b* 340*d*) should be noted *Records of First Assembly, Plenary Meetings*, pp 568, 569 See also upon the admission of States to the League Friedlander in *B Y*, 1928 pp 84-100, Hudson in *A J*, 29 (1935), pp 109-115 and with regard to Mexico, Turkey, and Iraq respectively, *ibid*, 26 (1932), pp 114, 813, and 27 (1933), p 113, Giraud in *R G*, 43 (1936), pp 197 222 For a survey of the membership of the League see Hudson in *B Y*, 16 (1935), pp 130 152 See also Strub, *Die Mitgliedschaft im Volkerbund* (1927)

[1] The right of the Council to expel a member was not limited to cases of violation of Articles 12, 13, and 15 In May 1934 the British representative expressed the view that as Liberia had failed to comply with Article 23 (*b*) of the Covenant in which the members of the League undertook to secure just treatment to the native inhabitants of the territories under their control, the League would be entitled to consider her expulsion under Article 16, paragraph 4 (*Off J*, 1934, p 511) See also Ray, *Commentaire*, pp 505-535, Strub, *Mitgliedschaft im Volkerbunde* (1927), pp 96 98, Balossini (Cajo Enrico), *Fine dell' appartenenza alla Società delle Nazioni* (1936), Jenks in *B Y*, 16 (1935), pp 155-157, Gretschaninow in *Z o V*, 5 (1935), pp 174 178 (with a bibliography on the Liberian question) As to the expulsion of Soviet Russia in 1940 see vol II § 52*e*, Balossini, *La perte de la qualité de membre de la S de N* (1945), Gross in *A J*, 39 (1945), pp 35-44 And see the Report of a Sub-Committee on Amendments to the Covenant on the liability to expulsion of members who are in arrears with their contributions (*Off J*, 1927, p 508)

[2] See Schücking Wehberg (3rd ed, 1931), I p 373, Rousseau in *R G*, 41 (1934), pp 295 322, Burns in *A J*, 29 (1935), pp 40 50 As to the interpretation of Article 1 (3) in connection with arrears of contributions see *B Y*, 19 (1938), pp 218 221 And see generally on the effect of the failure to fulfil the financial obligations to the League, Myers in *A J*, 32 (1938), pp 48 152

[3] See, *e g*, an article entitled 'What is the League of Nations?' in *B Y*, 1924, pp 119 148, by Corbett, who regards the League as a Confederation Redslob, *Théorie de la Société des Nations* (1927), and in *Problems of Peace* (6th ser, 1930), pp 1-14, Knubben, *Die Subjekte des Volkerrechts* (1928), p 387, Kunz,

opinion was that the League, while being a juristic person *sui generis*,[1] was a subject of International Law [2] and an International Person side by side with the several States In its essence the League was nothing else than the organised Family of Nations [3] Not being a State, and neither owning territory nor ruling over citizens, the League did not possess sovereignty in the sense of State sovereignty [4] However, being an International Person *sui generis*, the League was the subject of many rights which, as a rule, can only be exercised by sovereign States For instance, the League possessed the so-called right of legation [5], was able to exercise sovereign rights over such territories as were not under the sovereignty

Staatenverbindungen (1929), p 505, Verdross, *Verfassung*, p 111, and probably the majority of other writers are of the same opinion So also are Schücking und Wehberg, pp 103-111, who regard it as a Federation of States See also Kraus, *Vom Wesen des Volkerbundes* (1920) Fischer Williams in *International Law Association's* Thirty fourth Report (1927), pp 675 695, and *Some Aspects*, etc (1934), pp 38 44, likens it to a corporation, and considers it to possess corporate personality derived from International Law For a similar view see Rappard, *The Geneva Experiment* (1931), pp 10 35 See also Cavaglieri, pp 144-147, Müller, *Die Rechtsnatur des Volkerbundes* (1927), Schubert, *Volkerbund und Staatsouveranitat* (1929), Martin in *R I (Paris)*, 3 (1929), pp 403 431, Del Vecchio in *Hague Recueil*, 38 (1931) (IV), pp 545 645

[1] See Larnaude, *La Société des Nations* (1920), p 4, Huber in *Z V*, 12 (1923), pp 370, 371, Scelle in *R G*, 28 (1921), pp 125 127, Brierly, p 77

[2] Distinct from the status of the League in International Law was the status assigned to it by the Municipal Law of any State in whose jurisdiction that question became relevant For instance, Swiss Municipal Law granted to the League the status of a foreign independent State, so that it could sue in Swiss courts but could not be sued without its consent On the status of the League of Nations as a personality in private law, including the capacity of being registered as a property owner, see Schroder, *Die Grundbuchfahigkeit des Volkerbundes* (1932) See also Liermann in *Z V*, 15 (1930), pp 20 47

[3] Nor a mere international administrative union (*Zweckverband*) such as the Postal Union See Wegner, *Geschichte des Volkerrechts* (1936), p 328, and Rapisardi Mirabelli in *Z o R*, 7 (1927), pp 11 21 And see Drunkler, *Die internationale juristische Person als volkerrechtliche Korperschaft* (1933), and Zimmern, *The League of Nations and the Rule of Law* (1936), pp 277-285

[4] On the relation of the League to the question of Sovereignty see Butler in *B Y*, 1920 1921, pp 35 44, Fischer Williams in *B Y*, 1926, pp 24-42, Lindley, p 121, Schücking und Wehberg, p 80, Schubert, *Volkerbund und Staatssouveranitat* (1929), Blühdorn, *Einführung in das angewandte Volkerrecht* (1934), pp 80 *et seq*, Andrassy in *Hague Recueil*, vol 61 (1937) (III), pp 641-758, and the writers referred to above, p 120, n 1

[5] See below, §§ 358 362 And see Ray, *op cit*, p 252, and Genet in *R I*, 3rd ser, 16 (1935), pp 527-556 On the permanent delegations of various States at Geneva see Shatzky, *ibid*, pp 75 99, 736 764, Genet, *ibid*, pp 556-573, Potter in *Geneva Special Studies*, No 8 (1930), Tobin in *American Political Science Quarterly*, 48 (1933), pp 481-512 The League did not send diplomatic representatives, but maintained offices or correspondents in a number of capitals

of any State (as it did for a time in the Saar Basin)[1], was able to intervene between two disputing member-States,[2] and, exceptionally, in the internal affairs of a member-State[3], was able to exercise a protectorate over a weak State (Danzig)[4], and was, perhaps, able to declare war[5] and make peace[6]

II

THE CONSTITUTION OF THE LEAGUE

See the literature cited above, § 167*a*

The Constitution of the League

§ 167*d* The two principal political organs of the League were the Assembly and the Council, assisted by the permanent Secretariat There were, in addition, two institutions organically connected with the League, but enjoying a high degree of independence These were the International Labour Organisation and the Permanent Court of International Justice An account of them is given in other parts of this treatise The Assembly and the Council were assisted in their task by technical organisations and by permanent and temporary advisory commissions The three technical organisations were (1) the Economic and Financial Organisation[7], (2) the Organisation for Communications and Transit[8], (3) the Health Organisation[9]

There were five main Permanent Advisory Committees (1) the Permanent Advisory Commission for Military, Naval, and Air Questions, (2) the Permanent Mandates Commission, (3) the Advisory Committee on Opium and other Dangerous Drugs, (4) the Permanent Central Opium Board, (5) the Advisory Committee on Social Questions

The principal administrative organ of the League was the Secretariat (see below, § 167*g*)

Amendments to the Covenant

§ 167*dd* According to Article 26, amendments to the

[1] See below, § 171 (6)

[2] See below, vol II § 52*d*

[3] For example, in the case of certain States, to protect minorities, see below, §§ 340*b*-340*e*

[4] See above, § 93

[5] See below, vol II § 66*a* (n)

[6] On the question of making treaties see below, § 494

[7] See on this and other organisations Greaves, *The League Committees and World Order* (1931), Morley, *The Society of Nations* (1932), pp 238-260

[8] See above, p 289, n 1, and Haas in *Répertoire*, IV pp 2-13

[9] See Blayac, *L'Organisation d'Hygiène de la Société des Nations* (1932), Blankenstein, *L'Organisation d'Hygiène de la Société des Nations* (1934) See also below, p 890

Covenant of the League were to take effect when ratified by the member-States represented in the Council and by a majority of the member-States represented in the Assembly [1] No such amendment bound any member of the League which signified its dissent therefrom, but the dissenting State ceased to be a member of the League [2] The result of these provisions was to render improbable hasty amendments to the Covenant. On the other hand, the abandonment of the principle of unanimity made it impossible for a single State or for a small minority to prevent reforms generally felt to be desirable [3]

The Assembly

§ 167e The Assembly was really the Conference of the members of the League According to Article 3, each member of the League could send three representatives to the Assembly, but no member had more than one vote

[1] See Schucking und Wehberg, pp 764 781, Rolin in *R I*, 3rd ser, 3 (1922), pp 171 184, Paulus in *R G*, 30 (1923), pp 532 537, Kidd in *Geneva Special Studies*, v Nos 7 8 (1934), Meriggi in *Z o R*, 16 (1936), pp 487-521

[2] Practice has shown that it is difficult to induce States to agree to and ratify amendments of importance As to amendments already ratified or proposed see Rhoade, *Amendments of the Covenant of the League of Nations Adopted and Proposed* (1935), Rolin in *R I*, 3rd ser, 2 (1921), pp 57 66, 225-242, and *ibid*, 3 (1922), pp 171-194, 336 364, Paulus in *R G*, 30 (1923), pp 525 555, Hudson in *H L R*, 38 (1925), pp 903-953 See vol II § 52*p*, on the proposed amendments arising out of the Treaty for the Renunciation of War On the proposed revision of the Covenant in 1936 following upon the failure to apply the Covenant in the Italo-Abyssinian dispute see *New Commonwealth Quarterly*, 2 (1936), pp 111-241, *The Future of the League of Nations*—The Record of a Series of Discussions held at Chatham House (1936), Yepes and da Silva, *La Question de la Réforme du Pacte de la Société des Nations* (1937), Le Brun Keris, *Les projets de réforme de la Société des Nations* (1938), Engel, *League Reform, an Analysis of Official Proposals and Discussions*, 1936 1939 (*Geneva Research Studies*, 1940), Wolgast in *Z V*, 20 (1936), pp 436-466, Potter in *Geneva Special Studies*, VII No 7 (1936), Ray in *R I*, 3rd ser, 17 (1936), pp 225 256, Barandon in *Z o V*, 7 (1937), pp 1-14, Kelsen in *R G*, 44 (1937), pp 625 680 and 45 (1938), pp 5 43, 161 240, 521-566, Moeller in *Acta Scandinavica*, 10 (1939), pp 30-57 For the replies of Governments see *Off J*, 1936, Special Suppl No 154 See also Docs A 31 1936 VII, C 376 M 247 1936 VII, and A 83 1936 VII, and *R I* (*Paris*), 18 (1936), pp 655 695

[3] From the act of formally amending the Covenant there must be distinguished the process of defining by some means the obligations of members in accordance with the spirit of the Covenant Interpretative Resolutions were one of these means (see *e g* the Interpretative Resolution of the Assembly in 1921 concerning Article 16, and see above, § 75*c* (Non-recognition), and below, § 167*n* (as to Article 10)), the constant practice of the organs of the League was another Neither of these could be used for the purpose and with the effect of adding to or subtracting from clear obligations of the Covenant

The Assembly met at least once a year,[1] and more frequently if required

Functions—As regards the sphere of action of the Assembly, the Covenant (Article 3) laid down that 'the Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world' However, it is apparent[2] that all such matters were excluded from the sphere of action of the Assembly as were by the Covenant exclusively reserved for the sphere of action of the Council

Of the many functions performed by the Assembly and the Council, (*a*) some were exclusively reserved for the Assembly, and (*b*) others were reserved for the Council, (*c*) others, again, required the co-operation of these two organs, while (*d*) with regard to others the Assembly's competence was either concurrent with or alternative to that of the Council[3]

Methods of Voting—The Assembly could validly take a decision by means of at least four kinds of votes, the choice of which depended upon the nature of the decision[4], these four kinds were (*a*) the unanimous vote 'of all the Members of the League represented at the meeting'[5] (Article 5)—

[1] On the organisation of the work of the Assembly see Prevost, *Les Commissions de l'Assemblée de la Société des Nations* (1937) See also Burton, *The Assembly of the League of Nations* (1940) On the 'bureau' of the Assembly see Prevost in *R I*, 3rd ser, vol 20 (1939), pp 501 518 On the General Committee and other auxiliary committees of the Assembly see Calderwood in *A J*, 38 (1944), pp 74 94

[2] The question was discussed how far the Assembly and the Council were respectively bound by each other in *intra vires* decisions, see Schucking und Wehberg, pp 264-270, and Index (p 60) of *Records of the Fourth Assembly* It occasionally happened that some power or function was assigned by a treaty to 'the League' simply, without specifying which organ, for instance, Articles 1 (2), 23 (*c* and *d*), and 24 of the Covenant, and Articles 49, 102, 289 (para 4), 336, 337, 338 (para 1), 376, 377, 379, 386 of the Treaty of Peace with Germany, amongst others

[3] Upon the legal effect of the decisions of the Assembly and of the Council see Schindler, *Die Verbindlichkeit der Beschlüsse des Volkerbundes* (1927), Ray, *op cit*, pp 151 155, Briefly in *B Y*, 16 (1935), p 160

[4] See Fischer Williams in *A J*, 19 (1925), pp 475-488, Hill, *ibid*, 22 (1928), pp 319 329, Riches, *The Unanimity Rule and the League of Nations* (1933), pp 91-118

[5] There was no provision for a quorum in the Assembly See on this question Riches, *op cit*, pp 42 50 But the Rules of Procedure of the Council (Rule 6) provided that at least a majority of the members of the Council must be present at the opening of the meeting and that the meeting must be adjourned whenever a majority ceases to be present

that was *prima facie* the rule, (*b*) the vote of a simple 'majority of the Members of the League represented at the meeting,' which applied to all 'matters of procedure [1] . . including the appointment of Committees' of investigation (Article 5), (*c*) a vote of a two-thirds majority,[2] which was required in the case of certain of the items of business mentioned above in this paragraph and in certain less important matters in which it was required by the Rules of Procedure of the Assembly [3], (*d*) a majority vote (as under Article 15, paragraph 10, or Article 26), but including the votes of all the members represented on the Council But an important inroad upon the general principle of unanimity was made by the adoption by the Assembly of the rule that a decision which can be described as consisting of a *vœu*, however we may translate that word—'recommendation,' 'wish,' 'hope,' 'opinion,' or 'view'—did not require unanimity, and that a simple majority would suffice [4]

The Council

§ 167*f* *Membership*.—The Council could be described as being, for most purposes, the Executive of the League Its size depended, in the first instance, upon Article 4 It consisted eventually of the following classes of members (1) the *permanent members*, namely, those Great Powers who were members of the League, the Council could, with the approval of the majority of the Assembly, name other permanent members, (11) the *eleven non-permanent members*, of whom normally three were elected each year and for three years this group can be subdivided into (*a*) non-permanent and not re-eligible until the expiry of three years from the conclusion of their terms of office, and (*b*) non-permanent

[1] For some comment on this expression see McNair in *B Y*, 1926, at p 10

[2] It was not always clear, when the Covenant speaks of a majority of the Assembly or of the Council, either simple or two thirds, whether a majority of the members represented at the meeting in question or of all the members of the League was intended Article 5 specially mentions 'the members of the League *represented at the meeting*' See Stone in *B Y*, 14 (1933), pp 29-31

[3] Document C 356 M 158 1923 V

[4] See Fischer Williams, *op cit*, at p 479, Schindler, *Die Verbindlichkeit der Beschlüsse des Völkerbundes* (1927), Stone in *B Y*, 14 (1933), pp 35-37, Schücking und Wehberg (3rd ed, 1931), pp 511, 512 The French words *invitation*, *recommandation* were also used instead of *vœu*

but declared by a majority of two-thirds of the members of the Assembly voting to be immediately re-eligible [1] A declaration of re-eligibility implied no guarantee of re-election (iii) *Ad hoc representatives* In addition to the regular members of the Council above mentioned, paragraph 5 of Article 4 made provision for the *ad hoc* representation of a member of the League when its interests were under discussion and it did not happen at the time to have a regular representative on the Council This *ad hoc* representative sat as a member and had equal powers of voting.[2]

Functions —Like the Assembly, the Council could deal at its meetings with 'any matter within the sphere of action of the League or affecting the peace of the world' (Article 4) which was not by the Covenant expressly reserved for the sphere of action of the Assembly The functions of the Council may be classified as being (*a*) within its exclusive competence, (*b*) requiring co-operation with the Assembly, and (*c*) within the concurrent or alternative competence of the Assembly and the Council

In addition to the duties imposed upon the Council by the Covenant itself, there were very many and very important duties [3] which fell to be performed by it under other instruments connected with the settlement after the First World War—for instance, under the Statute of the Permanent Court of International Justice, or in connection with Danzig, or with the guarantee of the Minority Clauses, or inde-

[1] *Records of Seventh Ordinary Assembly, Plenary Meetings*, p 79, and *Off J*, Special Suppl No 43, p 8 On the difficulties created by the problem of the composition of the Council and on the attempts to solve them see Schücking und Wehberg, 3rd ed (1931), pp 462-479, Toynbee, *Survey*, 1928, pp 109-114, Lange, *Vers un gouvernement international La Société des Nations et la composition du Conseil* (1928), Popovitch, *La composition du Conseil de la Société des Nations* (1929), Gretschaninow in *Z o V*, 24 (1934), pp 208-225 (with a valuable bibliography) See also above, § 116*a*, on State Equality and International Organisation See also Myers in *A J*, 20 (1926), pp 689-713

[2] Circumstances could arise in which the representative of a State not a member of the League could become an *ad hoc* member of the Council—*e g* Turkey in the discussion of the Frontier of Iraq in 1924 and 1925 The reference to the Council in that case arose under the Treaty of Lausanne, but the same course would be followed under Article 17 of the Covenant For an analysis of paragraph 5 of Article 4 see Stone in *B Y*, 14 (1933), pp 19 29

[3] For an enumeration see Schücking und Wehberg, pp. 313-322

pendently of it as under the treaties of Great Britain with Iraq in 1930 and Egypt in 1936 [1]

Methods of Voting—The Council could validly take a decision by means of the following kinds of votes, the choice of which depended upon the nature of the decision [2], (*a*) the unanimous vote of 'all the Members of the League represented at the meeting' (Article 5), that was *prima facie* the rule, of which Article 26 is one of many illustrations, (*b*) the vote of a simple 'majority of the Members of the League represented at the meeting,' which applied to 'all matters of procedure, including the appointment of committees to investigate particular matters' (Article 5); (*c*) the vote of all the members of the Council, *excluding* the representatives of the parties to a dispute,[3] such a vote sufficing under paragraph 6 of Article 15 to give validity to a Report under that paragraph, with the consequence that war against a party complying with the Report was a breach of the Covenant, (*d*) the vote of a simple majority of all the members of the Council [4], this sufficed for a Report upon a dispute under paragraph 4 of Article 15 which did not have the effect mentioned under (*c*) above as regards an ensuing war, (*e*) where it was desired to expel a member from the League, the unanimous vote of the members of the Council, with the exception of the representative of that State if it happened to be a member, was required (Article 16, paragraph 4) [5]

[1] See above, § 94*d* and below, § 539 And see Powers and Duties Attributed to the League of Nations by International Treaties, Doc C 3 M 3 1944 V

[2] See Riches, *The Unanimity Rule and the League of Nations* (1933), Éles, *Le principe de l'unanimité dans la Société des Nations* (1935), Stone in *B Y*, 14 (1933), pp 18 42, Fischer Williams in *A J*, 19 (1925), pp 475-488, Hill, *ibid*, 22 (1928), pp 319-329, and, in connection with the Council's request for an advisory opinion, McNair in *B Y*, 1926, pp 1 13, and vol 11 p 63 (n 1), see also Schücking und Wehberg, pp 336 338

[3] See here Advisory Opinion No 12, Series B, pp 29 31, and Riches, *op cit*, pp 134-157

[4] Some of the treaties connected with the settlement after the First World War made provision for the modification of certain provisions with the consent of a majority of the Council, for instance, Article 12 of the Treaty of June 28, 1919, with Poland, and Article 14 of the Treaty of September 10, 1919, with Czecho-Slovakia

[5] As to the relation between the Assembly and the Council see *Report on the Relations between, and Respective Competence of, the Council and the Assembly* (*Records of the First Assembly, Plenary Meetings*, pp 318-320, adopted by the Assembly on December 7, 1920) See particularly the conclusion that 'the Council and the Assembly are each invested with par-

The Secretariat

§ 167g The Secretariat of the League consisted of the Secretary-General, appointed by the Council with the approval of the majority of the Assembly, and of such other staff as were required (Article 6), men and women being equally eligible for all positions [1]

The Secretariat was located at Geneva, the seat of the League, while representatives were maintained in a few other countries [2] The members of the Secretariat constituted an international civil service, while retaining their own nationality, they were expected to serve not their own States but the League and its members as a whole [3] An attempt was made in the case of the higher posts to preserve some degree of balance in point of nationality, but, at the same time, the ability and personal qualifications of the candidates were declared to be the principal test of selection [4] The 'officials of the League' enjoyed diplomatic privileges and immunities when engaged on the business of the League (Article 7) [5]

ticular powers and duties Neither body has jurisdiction to render a decision in a matter which by the Treaties or the Covenant has been expressly committed to the other organs of the League Either body may discuss and examine any matter which is within the competence of the League' See also Fischer Williams, *Some Aspects of the Covenant* (1934), pp 76-80. See also List of Conventions with Indication of the Relevant Articles Conferring Powers on the Organs of the League of Nations (Doc C 100 M 100 1945 V) See for an estimate of the Assembly's control of finance Fischer Williams, *Some Aspects of the Covenant* (1934), pp 76, 77 And see for an account of the composition of the Council, Morley, *The Society of Nations* (1932), pp 339-432, see also Rappard, *The Geneva Experiment* (1931), pp 46-58

[1] See Morley, *The Society of Nations* (1932), pp 261-337 For the Statute of the Administrative Tribunal which heard complaints alleging the non observance of the terms of appointment of officials of the Secretariat of the League or of the International Labour Office see *Off J*, May 1928, p 751

[2] See above, p 348

[3] By a decision of the Assembly in 1932 the Secretary General and officials of the Secretariat on taking up office were bound to make a declaration of loyalty to the League, including an undertaking not to seek or receive instructions from any Government or external authority And see generally on the Secretariat of the League the valuable work by Ranshofen Wertheimer, *The International Secretariat* (1945)

[4] See the *Report of the Committee of Thirteen* of 1930 A 16 1930, and the Resolutions of the Assembly in 1932 and the Staff Regulations as amended in that year See also Toynbee, *Survey*, 1928, pp 135-140 See also, as to the status of League officials, the Report of October 8, 1932, of a Committee of Jurists on the question whether the League Assembly was entitled to reduce the salaries of the officials of the Secretariat, of the International Labour Office and of the Permanent Court of International Justice The unanimous answer of the Committee was in the negative Fourteenth Assembly, 1933, Fourth Committee *Off J*, Special Suppl No 107, p 206 Since then, however, all new appointments were made subject to modification by the Assembly

[5] See below, § 417a

The Secretariat was divided into the following fifteen Sections. (1) Legal, including the Registration of Treaties under Article 18 of the Covenant (see below, § 518*a*); (2) Central, (3) Political, (4) Information, (5) Minorities, (6) Mandates, (7) Disarmament, (8) Financial, including the Economic Intelligence Service, (9) Economic Relations, (10) Communications and Transit, (11) Health, (12) International Bureaux and Intellectual Co-operation, (13) Opium Traffic, (14) Social Questions, (15) Treasury [1]

International Unions and Organisations under the Direction of the League.

§ 167*h* Article 24, paragraph 1, of the Covenant provided that there shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent, and that all international bureaux and all commissions for the regulation of matters of international interest constituted after the establishment of the League shall be placed under its direction The Council took a somewhat conservative view of the scope of Article 24,[2] largely on account of the requirement of the consent of non-member States The following bureaux were placed under the direction of the League (1) International Hydrographic Bureau [3], (2) Central International Office for the Control of the Liquor Traffic in Africa [4], (3) International Commission for Air Navigation [5], (4) International Bureau for Information and Inquiries regarding Relief to Foreigners (*Bureau international d'assist-*

[1] The General Budget for the year 1937, including the cost of the Permanent Court of International Justice and the International Labour Organisation, amounted to 29,184,128 Swiss francs (the figure for 1919 was 15,318,945) In 1936 the Assembly approved a new scale of contributions as proposed by a Committee on the Allocation of Expenses See Schucking-Wehberg, 3rd ed, pp 567 583, Vollmar, *Les finances de la Société des Nations* (1924), *Regulations for the Financial Administration of the League* C 3 M 3 1931, X

[2] See the Hanotaux Report adopted in 1921 by the Council *Off J*, 1921, p 759, the Resolution of the Council in 1923 concerning non conventional international bureaux *ibid*, 1923, pp 858, 948, the Resolution of the Ninth Assembly in 1928 *Plenary Meetings*, p 113, and *Off J*, 1928, p 898 On Article 24 see generally Schücking und Wehberg, pp 756-762, Spreckelsen, *Die rechtlichen Beziehungen des Volkerbundes zu internationalen Unionen* (1929), Kunz, *Staatenverbindungen* (1929), pp 382, 383, Ray, *Commentaire du Pacte* (1930), pp 667 681, Boisson, *La Société des Nations et les Bureaux internationaux* (1932), pp 55-113, Darras in *Répertoire*, x pp 716, 717, Bailey in *American Political Science Quarterly*, 25 (1931), pp 406-424

[3] *Off J*, 1921, pp 1166 *et seq* And see below, p 896

[4] *Off J*, 1922, pp 91, 128-129

[5] *Ibid*, 1921, p 1166

ance) [1]; (5) The Nansen International Office for Refugees [2], (6) International Exhibitions Bureau [3] In addition, the following institutes were set up, for purposes falling within the province of the League, by agreements between the League and particular Governments which established and maintained these institutes (1) the International Institute of Intellectual Co-operation [4], (2) the International Institute for the Unification of Private Law [5], (3) International Educational Cinematographic Institute [6], (4) International Centre for the Study of Leprosy [7]

THE FUNCTION OF THE LEAGUE

The two Purposes of the League

§ 167*i* The main purposes of the League were stated in solemn language in the Preamble of the Covenant

The High Contracting Parties, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just, and honourable relations between nations, by the firm establishment of the understandings of International Law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, agree to this Covenant of the League of Nations

It appears thus that the League was intended to serve two different purposes, namely, the maintenance of international peace and security, and the promotion of international co-operation

[1] *Ibid*, pp 761, 1166 This Organisation, composed partly of representatives of governments and partly of those of private institutions, must be distinguished from the International Relief Union which was established by the Convention of July 12, 1927 See below, p 892

[2] *Records of the Eleventh Assembly* 1930, pp 156 158, and see below, p 613, n 4

[3] *Off J*, 1931, p 1110

[4] *Ibid*, 1925, pp 284-289

[5] *Ibid*, 1926, pp 812 815, 1928, p 1773 For details see Myers in *A J*, 33 (1939), pp 322-324

[6] *Off J*, 1927, p 1450 For details see Myers, *op cit*, pp 325 328

[7] *Off J*, 1928, p 139, 1931, pp 2085 *et seq* As to the International Wine Office (see below, p 889) see *Off J*, 1930, p 516, as to the International Institute of Commerce see *ibid*, 1921, p 761, 1923, p 274, as to the International Institute of Agriculture see *ibid*, 1923, p 280, as to the *Union internationale de la Propriété Foncière Bâtie* (International Bureau for Co ordinating the Work of the National Federations of Urban Property) see *ibid*, 1926, p 545, as to the International Association for Life Saving and First Aid to Injuries see *ibid*, 1930, p 94

§ 167*k*. The avoidance of war by the peaceful settlement of international disputes was one of the most important tasks of the League. Articles 11 to 17 of the Covenant, which contained the scheme for achieving this purpose, were examined in the previous editions of Part I of the second volume of this work, entitled 'The Settlement of State Differences'.[1] Peaceful Settlement of International Disputes

§ 167*l* Article 8 embodied the principle that national armaments shall be reduced to the lowest point consistent with national safety and with the enforcement by common action of international obligations Reduction of Armaments

§ 167*m* By Article 10 of the Covenant— Guarantee against Aggression

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled

Apprehension as to the burden of the obligations entailed by Article 10 was one of the factors which prevented the United States of America from ratifying the Covenant, and Canada set on foot in the First Assembly in December 1920 a movement for its deletion.[2] The sole fruit of this attempt at deletion and later at amendment was an Interpretative Resolution which only failed to secure adoption by the Fourth Assembly in September 1923 because Persia voted against it and unanimity was required.[3] No amount of

[1] Vol II §§ 25*b* 25*g* The important limitation upon the jurisdiction of the League in the matter of disputes which is contained in paragraph 8 of Article 15—matters 'solely within the domestic jurisdiction' of either party—is dealt with below in vol II § 25*f*, to which add Tachi, *La souveraineté et l'indépendance de l'État et les questions intérieures en droit international* (1930), Le Fur in *Hague Recueil*, 54 (1935) (IV), pp 272 303

[2] *Records of the First Assembly, Plenary Meetings*, p 279, the matter was also discussed by the Second Assembly, and at the Third Assembly Canada proposed two amendments instead of deletion

[3] *Records of the Fourth Assembly, Plenary Meetings*, p 86 The main features of this Resolution were that due regard must be paid by the Council, in recommending the application of military measures, to the geographical situation and special conditions of each State, and that in the last resort each State must judge for itself 'in what degree [it] is bound to assure the execution of this obligation by employment of its military forces', and see Scott in *A J*, 18 (1924), pp 108-113 The British Government, in its memorandum despatched to the League Committee on Arbitration and Security in January 1928, accepted the interpretation of Article 10 contained in this Resolution

interpretation can alter the fact that Article 10 contained a guarantee concerning external aggression against territorial integrity [1] and existing political independence. It was a collective guarantee, so that, for instance, Great Britain, if she maintained the doctrine as to collective guarantees [2] enunciated by Lord Derby in 1867 and affirmed by Sir Edward Grey in 1914 in connection with the neutralisation of Luxemburg, was not entitled to consider that she was only under a duty to intervene if all the other members of the League would do the same, and that if the State resorting to external aggression was a member of the League no obligation to intervene would arise at all No such expression as *la garantie collective* [3] appeared in the Covenant That the Article was weakened by its second sentence may be admitted, but nevertheless it remained not only a declaration of principle [4] but also a solemn and formidable guarantee [5]

[1] Hence the importance, before admitting a new State to the League, of inquiring whether it has 'settled frontiers' see above, § 167*b*, p 344, n 2

[2] See below, § 576

[3] Which occurs in the Luxemburg treaty, Martens, *N R G*, 18, p 448 Schücking und Wehberg, at p 463, describe Article 10 as a mutual collective guarantee (*wechselseitige Kollektivgarantie*), but they explicitly reject the Derby Grey interpretation of a collective guarantee See below, § 576

[4] As suggested, *e g* by Sir John Fischer Williams, *Some Aspects of the Covenant* (1934), p 123, who bases this view on the assumption, *inter alia*, that that obligation arises now for all States in their capacity as signatories of the General Treaty for the Renunciation of War which, in his view, imposes upon them an implied obligation to prevent a State from gaining an advantage in consequence of a violation of its terms

[5] President Wilson himself seems to have regarded the expression 'territorial integrity' as meaning 'immunity not from armed invasion but from forcible annexation' (see Baker, 'The Making of the Covenant,' in Munch, *Les origines et l'œuvre de la Société des Nations*, II (1924) p 58), Baker, *ibid*, considers that 'its real meaning is that it abolishes the right of conquest It is directed against the violent transfer of territory from one sovereignty to another without the consent of the members of the League' See also Komarnicki, *La question de l'intégrité territoriale dans le Pacte de la Société des Nations* (1923), Struycken in *Bibliotheca Visseriana*, I (1926) pp 93 157, Schücking und Wehberg, pp 449-466, Scelle, 'L'élaboration du pacte,' in Munch, *op cit*, I (1923) pp 62-137, Baak, *Der Inhalt des modernen Volkerrechts und der Ursprung des Artikels 10 der Völkerbundsatzung* (1926), Redslob, *op cit*, pp 116 127, Bruce Williams, *State Security and the League of Nations* (1927), ch III, Bussmann, *Der volkerrechtliche Garantievertrag* (1927), pp 17-24, 42 53, Steinlein, *Der Begriff des nicht herausgeforderten Angriffs* (1927), Gonsiorowski, *op cit*, II pp 264-293, Yepes and da Silva, *op cit*, pp 278-300, Ray, *op cit*, pp 343 *et seq*, Spaight, *Pseudo Security* (1928), pp 35 ff, Korenitch, *L'Article 10 du Pacte de la Société des Nations* (1931), Lipartiti, *L'articolo dieci del Patto de la Società*

Like any other international obligation, that Article had to be interpreted and applied in accordance with good faith, common sense, and the spirit and scope of other Articles of the Covenant That meant that the guarantee although not collective had in some measure to be dependent upon common action on the part of the bulk of the members of the League In January 1932 China appealed to the Council under that Article [1] In September 1935 Abyssinia appealed, *inter alia*, under that Article [2] In neither case did other members of the League take any effective action under that Article to fulfil the obligation of the guarantee In the case of China the Council and the Assembly, respectively, affirmed the principle of non-recognition of changes brought about in disregard of Article 10 [3] In the case of Abyssinia practically all the members of the League actually resorted to some of the measures contemplated in Article 16 until, confronted with the success of the aggressor, they abandoned them for what they believed to be cogent reasons of policy [4]

Open Diplomacy

§ 167n At the outbreak of the First World War in 1914, and during its continuance, it became apparent that secret treaties are a danger to peace Accordingly, Article 18 [5] laid down the rule that in future every treaty or international engagement entered into by any member of the

delli Nazioni (1931), Bruck, *Les sanctions de l'Article X du Pacte* (1933), Fischer Williams, *Some Aspects of the Covenant* (1934), pp 103 125, Mirkovitch, *Des rapports entre l'Article 10 et l'Article 21 du Pacte* (1935), Report by Adatci and Charles de Visscher, and Resolutions of the Institute of International Law, in *Annuaire*, 30 (1923), pp 23 47 and 383 385, Rolin in *R I*, 3rd ser, 3 (1922), pp 336 350, Wilmanns in *Z V*, 17 (1933), pp 26-112 And see below, vol II § 52*m* on self-defence and aggression

[1] *Off J*, 1932, p 373

[2] *Ibid*, 1935, p 1139

[3] *Ibid*, Special Suppl No 101, p 87, and see above, § 75c

[4] For what will probably remain the best account of that event see Toynbee's *Survey*, 1935 (II), and *Documents*, 1935 (II)

[5] The Preamble of the Covenant spoke of 'the presumption of *open*, just, and honourable relations between nations' 'Open diplomacy' in the sense of publicity of diplomatic negotiations is an entirely different matter See Reinsch, *Secret Diplomacy* (1922), Poole, *The Conduct of Foreign Relations under Modern Democratic Conditions* (1924), Buell, *International Relations* (1925), pp 695 703, Memorandum by the Secretary General of the League in *L N T S* 1 at p 9, and *Off J* (June 1920), at p 154, and as to the publicity of meetings of the Council see Schücking und Wehberg, pp 331, 332, and *Off J*, August 1922, p 791 See also Dollot in *R G*, 36 (1929), pp 479 501, on the meaning of diplomatic secrecy, and Guggenheim in *Archives de philosophie du droit*, Nos 1 2 (1934)

League must be forthwith registered with the Secretariat of the League, and as soon as possible be published, and that no such treaty or international engagement shall be binding until so registered [1] This Article is examined in § 518*a*

Reconsideration of Treaties and International Conditions

§ 167*o* Intimately connected with the Guarantee against Aggression discussed in § 167*m* was Article 19, which provided that—

> The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world

The machinery offered by Article 19 was not free of doubt In particular, it was not certain whether the Assembly in giving 'advice' must be unanimous, whether the doctrine of the *vœu* [2] already referred to could be invoked, or whether the doctrine of *nemo judex in re sua* expounded by the Permanent Court in the Mosul Advisory Opinion [3] could be applied to this case There was no legal obligation upon the member to follow the advice [4] But otherwise the scope of that Article was very comprehensive It was suggested

[1] For an example of a secret instrument see the Secret Protocol annexed to the Balkan Pact of February 9, 1934 *Documents*, 1934, p 300

[2] See above, § 167*e*

[3] *P C I J*, Series B, No 12

[4] Bolivia requested the Second Assembly in 1921 to revise a treaty of 1904 between that State and Chile, but the request was reported by a Committee of Jurists to be out of order 'in its present form,' and it was withdrawn This Committee pointed out that the Assembly could not modify a treaty, but could merely advise its reconsideration, and that 'such advice can only be given in cases where treaties have become inapplicable—that is to say, where the state of affairs existing at the moment of their conclusion has subsequently undergone either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of international conditions whose continuance might endanger the peace of the world' Bolivia thereupon withdrew her request *Records of the Second Assembly, Plenary Meetings*, pp 466 470, and see Rappard, *International Relations as viewed from Geneva* (1925), pp 111, 112 At the same time, and with the same result, Peru requested the Assembly to revise a treaty with Chile of 1883 see *Records of the Second Assembly, Plenary Meetings*, pp 52, 56, 580, 595 In 1925 China invoked Article 19 in connection with the exterritoriality and similar treaties binding upon her (*Sixth Assembly, Plenary Meetings*, p 44) The Assembly contented itself with drawing attention to the forthcoming conference on the matter (*ibid*, p 102) In 1929 China proposed the appointment of a committee to consider how Article 19 could be rendered more effective (*Tenth Assembly, Plenary Meetings*, p 99) The Assembly did not follow that suggestion, but adopted a resolution restricting the conditions under which that Article could be invoked (*ibid*, p 177)

by some that it did not cover the revision of territorial clauses of treaties which, having been already executed, could not in any circumstances be regarded as 'inapplicable' It may be difficult to accept this literal interpretation seeing that, as the history of the Covenant shows, the possibility of territorial revision was foremost in the minds of those who drafted it In any case, such treaties were covered by the second sentence in so far as their effect was to create conditions dangerous to peace

The principle reflected in Article 19 was a modest beginning in an embryonic form of the legislative process in the society of nations [1] To some small extent that principle is susceptible of application by judicial means, namely, by the development under the control of the Permanent Court of the rule that *omnis conventio intelligitur rebus sic stantibus* [2] But that rule is not applicable in all cases in which the continued operation of a treaty becomes unjust and oppressive, neither is it applicable when the cause of friction and injustice lies in the existence and use of international rights not grounded in a treaty In all these situations the function envisaged in Article 19 was political, and not legal That political function consisted in attempting to bring about changes in the existing law not by legislation proper, but by a process of inquiry and persuasion This method probably falls short of the needs of an organised international society, but that does not mean that it was bound to remain altogether useless provided that there was a will to resort to it and to develop its machinery within the existing scheme of the Covenant [3]

[1] See above, § 37*a*

[2] See below, § 539 But it is probable that a State invoking the doctrine *rebus sic stantibus* might rely on a favourable finding under Article 19 as showing that it is justified in invoking a vital change of circumstances

[3] See Oppenheim, *The League of Nations* (1919), p 69, who suggested that the function of declaring treaties discharged by a change of circumstances should be performed by an international court, Higgins in Hall, p 407, Fauchille, §§ 858 858 (2), Hoijer, *Le pacte de la Société des Nations* (1926), pp 333 346, Goellner, *La revision des traités sous le régime de la Société des Nations* (1925), Gonsiorowski, *op cit*, pp 294-310, Lauterpacht, § 77, Brierly in *Grotius Society*, 11 (1926), pp 11 20, Fischer Williams in *A J*, 22 (1928), pp 89-104, and McNair in *Hague Recueil*, 22 (1928) (II), pp 467 481

The discussion of Article 19 was almost invariably coupled with a consideration of the doctrine *rebus sic stantibus*, and it is therefore convenient to give in this place a selection from the vast literature on the subject Vellani,

Inconsistency with the Covenant of the League.

§ 1670o The establishment of the League of Nations made a substantial change in the mutual relations of the members and added materially to their obligations undertaken for the sake of the purpose of the League as a whole. It was therefore considered necessary to provide expressly for the priority of these obligations over other treaty commitments, past or future Any treaty, be it one of neutrality, or alliance, or commerce, or concerning the freedom of communications, might easily prove inconsistent with the Covenant Accordingly Article 20 [1] provided that—

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se*

La revisione dei trattati e i principi generali del diritto (1930), Radoï kovitch, *La revision des traités et le Pacte de la Société des Nations* (1930), Werth Regendanz, *Die clausula rebus sic stantibus im Volkerrecht* (1931), Schneider, *Die volkerrechtliche clausula rebus sic stantibus und Artikel 19 der Volkerbundsatzung* (1931), Reut-Nicolussi, *Zur Problematik der Heilig keit der Vertrage* (1931), Fischer Williams, *International Change and International Peace* (1932), the same in *International Affairs*, 10 (1931), pp 326 347, Kunz, *Die Revision der Pariser Friedensvertrage* (1932), Wig niolle, *La Société des Nations et la Revision des Traités* (1932), Tobin, *The Termination of Multipartite Treaties* (1933), Hill, *The Doctrine of 'rebus sic stantibus' in Inter national Law* (1934), Cereti, *La revisione dei trattati* (1934), Bohmert, *Artikel 19 der Völkerbundsatzung* (1934), Lauterpacht, *The Function of Law*, pp 270 285, and in *Peaceful Change—An International Problem* (1937), pp 135 165, *Harvard Research*, Part III. (1935), pp 1077 1126, 1161-1173, Frangulis, *La théorie et pratique des traités internationaux* (1936), pp 121-188, Scalfati, *La clausola 'rebus sic stantibus'* (1936), Scelle, *La théorie juridique de la revision des traités* (1936), the same in *Friedenswarte*, 32 (1932), pp 193-196, and in *Hague Recueil*, vol 46 (1933) (IV), pp 469-482, Gramsch, *Grundlagen und Methoden internationaler Revision* (1937), Fischer Williams, *Aspects of Modern International Law* (1939), pp 95-114, Potter, *Article 19 of the Covenant of the League of Nations* (1941), Bullington in *University of Pennsylvania Law Review*, 1927, pp 153 177, Bouffall in *R I*, 3rd ser, 9 (1928), pp 882 905, Genet in *R G*, 37 (1930), pp 287 311, Denis in *A S Proceedings*, 1932, pp 53 59, Auer in *Grotius Society*, 18 (1932), pp 155 171, Wehberg in *Friedens-warte*, 32 (1932), pp 196 202, Burck hardt in *R I*, 3rd ser, 14 (1933), pp 5 30, McNair in *Hague Recueil*, vol 43 (1933) (I), pp 280 289, Schindler, *ibid*, vol 46 (1933) (IV), pp 271 280, Garner in *Iowa Law Review*, 19 (1933 1934), pp 312 329, Ray in *Hague Recueil*, vol 48 (1934) (II), pp 635 709, Whitton, *ibid*, vol 49 (1934) (III), pp 250 268, and in *R I (Paris)*, 18 (1936), pp 440 486, Filipucci Giustiniani in *Lo Stato*, 1934, pp 411 447, 498 541, Ténekidès in *R G*, 41 (1934), pp 273-294, Le Fur in *Hague Recueil*, vol 55 (1935) (IV), pp 214 246, Fairman in *A J*, 29 (1935), pp 818 826, Gathorne Hardy in *International Affairs*, 14 (1935), pp 818 826, Mitrany, *ibid*, pp 826 836, Kraus in *New Commonwealth Quarterly*, 1 (1935), pp 33 43, Zancla in *R I (Geneva)*, 13 (1935), pp 13 25, Wright in *A S Proceedings*, 1936, pp 55 73, Bourquin in *Hague Recueil*, vol 64 (1938) (II), pp 351 472

[1] See Fauchille, § 859, Hoijer, *Le Pacte de la Société des Nations* (1926), pp 347 350, Schücking und Wehberg, pp 664 669, Ray, *op cit*, pp 569, 570, Lauterpacht in *B Y*,

which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations

This Article was of great importance although, upon analysis, it proves to be largely declaratory of existing International Law

(*a*) *Previous Treaties*.—As regards previous treaties between members of the League, Article 20 *ipso facto* abrogated them to the extent of the inconsistency This would probably follow in any case from the general principle expressed in the maxim *lex posterior derogat priori* As regards previous treaties between members and non-members, there could be no *ipso facto* abrogation, but it was the duty of members to secure their release

(*b*) *Subsequent Treaties*.—Treaties concluded between members of the League after they became members present a different problem (a) A narrow interpretation of the Covenant might require us to say that so far as the Covenant created mutual obligations between two or more members those members could modify such obligations by a subsequent treaty, for it is open to contracting parties to modify their contract by subsequent mutual agreement But the better interpretation, which the declared far-reaching and permanent objects of the Covenant require, leads to the conclusion that every member was both morally and legally concerned in the faithful performance by every other

16 (1935), pp 54-65 Upon the bearing of this Article upon subsequent treaties of neutrality see below, § 577*b*, and vol II § 292*f* Treaties sometimes expressly provide that they shall impose no obligations upon the parties which conflict with their rights and duties as members of the League, for instance, Article 9 of the Barcelona Convention and Statute on Freedom of Transit of April 20, 1921, and the Final Protocol of the Treaty of Arbitration and Conciliation between Germany and Switzerland of December 3, 1921, *L N T S*, 12, p 293 For a detailed enumeration of these treaties see Rousseau in *R G*, 39 (1932), pp 140-142, 156 162

member of its obligations thereunder, and that therefore it was not open to two or more members (not amounting to the whole body of members) to modify the obligations of the Covenant by any subsequent agreement among themselves in a manner inconsistent with its objects. Any such agreement fell within the principle avoiding treaties inconsistent with former treaty obligations [1] This being so, the provision of Article 20 as to subsequent treaties amounted to an undertaking, declaratory in nature, not to attempt in the future illegal acts which in any case would be devoid of legal effect (b) As regards subsequent treaties concluded between a member and a non-member [2] it might appear that Article 20 could not invalidate any treaty inconsistent with the Covenant since the Covenant, like any other treaty, could not bind third States However, there is room for the view that although third States were not bound by the Covenant, they could not escape the consequences of the general principle of International Law relating to inconsistency of treaties In any case, so far as the League was concerned, the disloyal member certainly could not invoke the inconsistent treaty as a ground for release from the obligations of the Covenant

But lest Article 20 should seem to go too far, Article 21 [3] hastened to add that—

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or

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[1] See below, § 503

[2] For a striking illustration of this interpretation of Article 20 see the report of a legal sub committee set up in 1935 by the Co ordinating Committee of the Assembly in connection with the application of sanctions against Italy Doc General 1936 6 Co-ordination Committee 40, also in *Off J*, Special Suppl No 145, pp 21, 26 Thus, for instance, they held in effect that even if a treaty between two members of the League contains no express reservation regarding the provisions of the Covenant it does not operate as between them if its operation proves contrary to Article 16 In the course of the application of sanctions against Italy in 1935 Switzerland admitted that Italy would not be entitled to invoke the provisions of the Convention of 1869 relative to the Gothard Tunnel, but that the situation was affected by the circumstance that Germany was not a member of the League *Off J*, Special Suppl No 145, p 114 On the position of non members generally see Le Gal, *La Société des Nations et les États non membres* (1938)

[3] Schucking und Wehberg, pp 669-680, Hoijer, *Le pacte de la Société des Nations* (1926), pp 351 354, Ray, *op cit*, pp 571 581

regional understandings [1] like the Monroe Doctrine,[2] for securing the maintenance of peace

The effect of this Article appears to be that if two or more States members of the League had previously established or later establish a system of arbitration amongst themselves or a mutual guarantee or defensive alliance which did not conflict with their obligations under the Covenant, it was deserving of encouragement and was in no way inconsistent with the Covenant

§ 167*p* Article 22 established the system of Mandates, which has already been discussed [3] Mandates

[1] Upon the meaning of this expression see Brown in *A J*, 13 (1919), pp 738 741, and *ibid*, 15 (1921), pp 69 70, Wright, *ibid*, 14 (1920), pp 565 580, Hyde, 1 § 57, Schücking und Wehberg, pp 673, 674, and *Records of the Second Assembly, Plenary Meetings*, pp 706, 707, 830 833 (as to the views of China and Czecho Slovakia), Orue y Arregui in *Hague Recueil*, 53 (1935) (III), pp 7 90, Sereni in *Rivista*, 28 (1936), pp 172 208, see also Freytagh Loringhoven, *Die Regional vertrage* (1937), and see below, § 571*a*

[2] The desire to incorporate the Monroe Doctrine (for which see above, §§ 139 140) in the Covenant was the main reason for inserting Article 21, see Baker, *Woodrow Wilson and the World Settlement*, 1 (1922) pp 323 339, Hyde, 1 § 97, Schucking und Wehberg, pp 669-672, Fauchille, §§ 325 329, Lannoy, in *R I*, 3rd ser, 1, pp 364 384, Elliott in *International Law Association's Thirtieth Report*, 1921, pp 73 112, Madariaga in *Problems of Peace* (4th ser, 1929), pp 60 85, Spencer in *A J*, 30 (1936), pp 400-413 In accepting in 1931 the invitation to become a member of the League (see above, p 344 (n 2), Mexico expressly declared that she 'has never recognised the regional understanding mentioned in Article 21 of the Covenant' This statement was not regarded either as a reservation or as a declaration inconsistent with Article 21 In September 1928 the Council of the League, in reply to the request of Costa Rica for an official interpretation of Article 21, stated that the Article refers only to the relations of the Covenant with such engagements and that it cannot have the effect of giving them a validity which they did not previously possess *Off J*, 1928, p 1608 See Marshall Brown in *A J*, 26 (1932), pp 117-121, Stefanich, *La Sociedad de las Naciones y la doctrina de Monroe* (1928) And see generally on Latin American States in relation to the League, Edwards in *International Affairs*, 8 (1929), pp 134-153, Matos, 'L'Amérique et la Société des Nations," in *Hague Recueil*, vol 28 (1929) (III), pp 5-99, Guerrero, *Les relations des États de l'Amérique latine avec la Societé des Nations* (1936), and *Problèmes actuels de l'organisation du monde* (1937) And see in particular Yepes and da Silva, *Commentaire théorique et pratique du Pacte de la Société des Nations et des Statuts de l'Union Panaméricaine*, 1 (1934), II (1935), for a comparative account of the principles of the Covenant and of those of the Pan American Union See also below, Appendix A, p 897 As to the Pan American system in relation to the United Nations and international organisation generally see Humphrey, *The Inter-American System* (1942), Margaret Ball, *The Problem of Inter American Organisation* (1944), Sharp in *Foreign Affairs* (U S A), 23 (1945), pp 450-464, Fenwick in *American Political Science Review*, 39 (1945), pp 490-500, Kunz in *A J*, 39 (1945), pp 527-533 and 758-761

[3] See above, §§ 94*c* 94*f*

SECTION III

THE UNITED NATIONS

British Commentary on the Charter of the United Nations, Cmd 6666 (1945) (cited here as *British Commentary*)—*The Charter of the United Nations Hearings before the Committee on Foreign Relations, United States Senate*, 1945 (including a valuable commentary on the Charter contained in the Report of the Secretary of State to the President of the United States, cited here as *American Commentary*)—*Report to the Governor General in Council, by the Canadian Secretary of State for Foreign Affairs, on the United Nations Conference on International Organisation* Department of External Affairs Conference Series, 1945, No 2 (cited here as *Canadian Commentary*)—*Commentary on the Report of the Preparatory Commission of the United Nations* (with Text of the Report as presented to the General Assembly, London, January 10, 1946, Cmd 6734)—*Documents of the United Nations Conference on International Organisation* (15 vols, 1945, 1946, published by the United Nations Information Organisation in co-operation with the Library of Congress—Goodrich and Hambro, *Charter of the United Nations* (1946)—Kopelmanas, *L'Organisation des Nations Unies*, vol 1 (1947)—Kaeckenbeeck in *Hague Recueil*, 1947—Wehberg in *Friedenswarte*, 45 (1945), pp 331 392—Berenstein, *ibid*, pp 393 406—Finch in *A J*, 39 (1945), pp 541 546—Potter, *ibid*, pp 546-551—Briggs' *ibid*, pp 664 679—Commentary in *International Conciliation*, September 1945, No 413—Pollux in *B Y*, 23 (1946), pp 54 82—Eagleton in *Yale Law Journal*, 55 (1946), pp 974 996—Kelsen, *ibid*, pp 997 1015—Rappard, *ibid*, pp 1036 1048—Kirk, *ibid*, pp 1081 1096—Brierly in *B Y*, 23 (1946), pp 83 94—Goodrich in *International Organisation*, 1 (1947), pp 3 21—Gross in *A J*, 41 (1947), pp 531 554—*Yearbook of the United Nations*, vol 1, 1946 1947 (1947) On the Documents of the United Nations see Lamb in *A J*, 41 (1947), pp 140 145

THE OBJECTS AND THE LEGAL NATURE OF THE UNITED NATIONS

The Establishment of the United Nations.

§ 168 Throughout the Second World War the establishment of a general organisation of States for the purpose of safeguarding peace and promoting international co-operation and government was regarded as a major object of the war There was a divergence of opinion whether the future international organisation ought to be a continuation of the League of Nations, suitably strengthened in the light of its history,[1] whether it ought to take the form of a more

[1] See *e g* the article by Sir John Fischer Williams entitled 'A Reconstruction of the League of Nations,' in *Agenda*, vol II No 1 (1943), pp 56 66 See also Lauterpacht in *Political Quarterly*, 12 (1941), pp 121 133 The League of Nations was dissolved by a resolution of its last Assembly in

organic association on a federal basis,[1] or whether its structure ought to be determined by a combination of lessons of experience and of the requirements of the international situation at the close of the war.[2] Events caused the adoption of the last solution. In Article 4 of the Moscow Declaration of November 1, 1943, Great Britain, the United States, Russia and China recognised 'the necessity of establishing at the earliest practicable date a general international organisation, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security'.[3] In pursuance of that

April 1946 (for an account of which see McKinnon Wood in *B Y*, 23 (1946), pp 317 323) For a valuable account of the work of that Assembly see also *The League Hands Over*, published by the Secretariat of the League (*General*, 1946 1) Previously, the First General Assembly of the United Nations had adopted a Resolution declaring that the United Nations was willing to assume the exercise of certain functions and powers previously entrusted to the League of Nations, in particular those connected with the custody of instruments of treaties deposited with the Secretariat of the League, with the performance of certain functions of a technical and non political character, and with the work of the following League departments the Economic, Financial and Transit Departments, the Health Section and the Opium Section See *Records of the First General Assembly, First Session*, pp 706 709 For the Agreement of July 19, 1946, between the League of Nations and the United Nations determining the details of the transfer to the latter of the assets of the League of Nations see *General Assembly Journal* No 75, Suppl A 64, Add 1, p 899 For a List of Conventions with an indication of the relevant Articles conferring powers on the organs of the League of Nations see *League Document*, C 100, M 100 1945 V

[1] For a discussion of or support for these proposals see *e g* Streit, *Union Now* (1939), Jennings, *A Federation for Western Europe* (1940), *Federal Union* (A Symposium, edited by Chaning Pearce, 1940), Schwarzenberger, *Power Politics* (1941), Brecht in *Harvard Law Review*, 55 (1941 1942), pp 561-594, the same in *American Political Science Review*, 37 (1943), pp 862 872, Potter, *ibid*, pp 850 862, Laserson in *Journal of Legislation and Political Philosophy*, 2 (1943), pp 82 93, Dennon, *ibid*, pp 68 81, Roucek, *ibid*, pp 94 116 See also Eagleton, *The Forces that Shape Our Future* (1945), pp 89 151

[2] See *e g* Guggenheim, *L'Organisation de la Société internationale* (1944)

[3] See *A J*, 38 (1944), Suppl, p 5 See also the Report of the Crimea Conference, February 11, 1945, in which the representatives of Great Britain, the United States and the Soviet Union declared that 'the proposed international organisation will provide the greatest opportunity in all history to create in the years to come the essential conditions' of a secure and lasting peace Cmd 6598, p 7 Of the preparatory work of private organisations and bodies there must be mentioned in particular the successive reports (and accompanying papers) of the Commission to study the Organisation of Peace (a private body under the chairmanship of Professor Shotwell of Columbia University), printed in *International Conciliation* pamphlets in the years 1940-1944, and *The International Law of the Future Postulates, Principles, and Proposals*—an important private draft prepared by a number of persons in the United States and Canada: *A J*, 38 (1944), Suppl, p 41

Declaration conversations were held at Dumbarton Oaks, Washington, in August and September, 1944, between officials of Great Britain, the United States and the Soviet Union Subsequently Chinese officials joined in the meetings, the result of which was a document embodying tentative proposals for a General International Organisation [1] These proposals, together with the voting formula subsequently agreed to at the Yalta Conference,[2] formed the basis of the discussions at the Conference which took place at San Francisco from April 25 to June 26, 1945, and which was attended by representatives of the following fifty States Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czecho-Slovakia, Denmark, Dominican Republic, Egypt, El Salvador, Ecuador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxemburg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Saudi Arabia, Syria, Turkey, Ukraine, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela, White Russia, Yugoslavia [3]

The discussions at the Conference at San Francisco resulted in the unanimous adoption on June 26, 1945, without reservations, of the Charter of the United Nations [4] and of the Statute of the International Court of Justice which is annexed to the Charter and has equal validity with it [5] On

[1] Cmd 6560 (1944) and an official commentary thereon, Cmd 6571 (1944) For a comparison of the Dumbarton Oaks Proposals and the Covenant of the League see Hubert Wright in U S Senate Doc, 79th Congress, 1st Session, Doc No 33 (1945) See also Bourquin, *Vers une nouvelle Société des Nations* (1945)

[2] See below, p 396, n 2

[3] Poland, in view of her internal position, was not invited to the Conference, but she subsequently signed the Charter as an original Member In 1946 and 1947 the following six States were admitted Afghanistan, Siam, Sweden, Iceland, Yemen and Pakistan Accordingly, by the end of 1947 the membership of the United Nations was 57 And see below, p 371

[4] The title 'United Nations' was first suggested by President Roosevelt and adopted in the Declaration of January 1, 1942, in which the signatories, after pledging their resources for the achievement of common victory, subscribed to the purposes and principles embodied in the Atlantic Charter *A J*, 36 (1942), Suppl, p 191 At the time of the opening of the Conference at San Francisco forty seven States had subscribed to the Declaration

[5] For the text of the Charter (including the Statute of the Court) and the British commentary thereon see Misc No 9 (1945), Cmd 6666.

the same day an Agreement was signed establishing the Preparatory Commission of the United Nations composed of the representatives of the States taking part in the San Francisco Conference [1] The main object of the Commission was to make provisional arrangements for the first session of the General Assembly, of the Security Council, of the Social and Economic Council, and of the Trusteeship Council, and for the convening of the International Court of Justice. The General Assembly met in London on January 10, 1946, and took as the basis of its work a comprehensive report of the Preparatory Commission relating to the organisation of the United Nations and to the taking over of the functions of the League of Nations [2]

The Purposes of the United Nations

§ 168a The purposes of the United Nations are set forth exhaustively in the Preamble [3] and in the first Article of the Charter The object of the United Nations is, in the language of the latter, 'to maintain international peace and security' That object is to be achieved, negatively, by preventing and suppressing breaches of the peace and threats of such breaches, and, positively, by promoting conditions conducive to the preservation and the maintenance of peace That combination of the positive and the negative functions of the Organisation is a persistent feature of the Charter Thus Article 1 lays down that it is the purpose of the United Nations (*a*) to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression, (*b*) to bring about by peaceful means, and in conformity with the principles of justice and international law,[4] adjustment or settlement of international disputes or situations which might lead to a breach of the peace, (*c*) to develop friendly relations among States based on respect of equal rights and self-determination of peoples, and to take other appropriate measures for strengthening universal peace Further, that major purpose is to be implemented by

[1] Cmd 6669 And see in particular Kopelmanas, *L'Organisation des Nations Unies*, vol 1 (1947)

[2] For the text of the Report and a commentary thereon see Cmd. 6734

[3] See Salomon, *Le Préambule de la Charte* (1946), and Kelsen in *Journal of Politics*, 8 (1946), pp 134 159

[4] See below, p 368, n 4

achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [1] Finally, it is a purpose of the United Nations to be 'a centre for harmonising the actions of nations' in the attainment of their common ends [2]

These purposes of the United Nations are expressed in a more general form in the Preamble which has been described as forming an integral part of the Charter [3] Like the Charter itself, the Preamble not only emphasises the resolve to ensure, by 'the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest' It also expresses the positive determination 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' [4] On a wider plane the Preamble reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'

[1] See below, § 340*l*

[2] See below, § 168*r*

[3] *American Commentary*, p 51, where the opinion is expressed that 'the Conference did not doubt that the statements expressed in the Preamble constitute valid evidence on the basis of which the Charter may thereafter be interpreted' See also *Canadian Commentary*, p 16

[4] The question of the place of International Law in the scheme of preserving international peace caused some heart searching and discussion both before and during the Conference at San Francisco Unlike in Article 1 of the Charter, there was no reference in the statement of Purposes in the Dumbarton Oaks Proposals to international law and justice At the San Francisco Conference a number of States desired to go beyond the affirmation of principles of justice and International Law as a condition of maintaining peace, they proposed that the maintenance of international peace and justice be declared to be one of the Purposes of the Organisation That proposal did not prevail on the ground, apparently, that rigid insistence on legal justice may, in certain circumstances, occasion delay when expeditious action is imperative (see *Canadian Commentary*, p 17) The controversy as to the merits of the proposition that 'order comes before law' is to a large extent of a dialectical character It resolves itself substantially into the question as to whether order not based on law may not be a mere instrumentality of power inimical to justice which alone is capable of providing a true basis for the authority and, in the long run, for the effectiveness of the law For an expression of some doubt as to the adequacy of the provisions of the Charter in the matter see Corbett in the *N W Harris Foundation Lectures* (1945), pp 11-24, and Eagleton in *A J*, 39 (1945), pp 751-754 See also Kelsen, *Law and Peace in International Relations* (1942), pp 145-168 But see

Significantly, the Preamble opens with the words 'We the peoples of the United Nations'—a phrase which was not adopted without some discussion at the Conference[1]—although in the closing passage the 'respective Governments' are designated as having agreed to the Charter.

The Principles of the United Nations

§ 168b The principles on which the United Nations is based are, in substance, implicit in its purposes However, the Charter expressly enunciates, in Article 2, certain principles to be followed, by the Organisation and its Members, as a matter of legal duty These principles are as follows

(1) *The sovereign equality of all the Members of the Organisation*—a principle of some elasticity, which is commented upon below, § 168e.

(2) *The duties of peaceful settlement and of participation in the system of collective security and of enforcement of the peace* These include the obligation to settle disputes by peaceful means 'in such a manner that international peace and security, and justice,[2] are not endangered',[3] the duty to refrain from the threat or use of force against the territorial integrity and the political independence of any State, and the obligation to give the United Nations assistance in any action taken in accordance with the Charter and to refrain from assisting any State against which the United Nations is taking measures of prevention or enforcement (Article 2 (3-5))

All these obligations constitute perhaps the most fundamental of all legal duties binding upon members of the United Nations For the United Nations as conceived by its founders is primarily an organisation for maintaining and enforcing peace The binding character of these obligations is not affected by the circumstance that owing to the requirement of unanimous consent, in some cases, of all the

Briefly, *The Outlook for International Law* (1944), pp 74 *et seq*

Note also Article 2 (3) of the Charter in which the word 'justice' was added to the corresponding text of the Dumbarton Oaks Proposals

[1] See also the reference in Article 80 of the Charter to 'the rights whatsoever of any States or any peoples'

[2] See above, p 368, n 4

[3] It has been suggested—see *e g American Commentary*, p 55—that this principle does not oblige members to settle all their international disputes, and that some disputes, provided they do not endanger international peace and security, may be left in a quiescent state The suggestion seems controversial For the refusal to settle a dispute, although it may not be fraught with danger for international peace and security, may be contrary to *justice* (as to which see above, p 376, n 5)

permanent members of the Security Council, they may not always be effective. A permanent member of the Security Council may, by his vote, prevent a valid decision of the Council involving his participation in collective action, but the intrinsic legal merits of his conduct must continue to be judged by the paramount obligations expressed in the Principles

It will also be noted that, in contrast to Article X of the Covenant of the League, the Charter does not provide for a guarantee of the territorial integrity and political independence of the members of the Organisation It is probable that that object is secured, to some extent, by the negative obligation, outlined above, to refrain from the use of force or threats of force and by the acceptance of the obligation to participate in collective measures of enforcement decreed by the Security Council [1]

(3) *Mutuality of Benefits and Obligations under the Charter* Article 2 (2) lays down that ' all members, in order to ensure to all of them the rights and obligations resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter ' In a legal instrument in which, because of the incidence of voting procedure, members may often be in the position of having to pronounce upon the extent of their own obligations, the emphasis upon the requirement of good faith in the fulfilment of obligations seems proper and necessary For the same reason, although the mutuality of rights and obligations under a legal instrument follows from a general principle of law, it seemed wise, in view of the traditional tendency of States to stress their rights rather than their duties, to indicate the connection between the loyal fulfilment of the duties of the Charter and the enjoyment of benefits which it is intended to secure.

[1] The proposal of New Zealand and of a considerable number of other States that all the members of the Organisation should expressly undertake to resist by collective action any act of aggression against a member did not secure the necessary support The proposal was apparently prompted by the view that, having regard to the requirement of unanimity of the Great Powers in respect of collective action implying the use of force, such action in vindication of the territorial integrity and independence of member-States is by no means certain under the existing provisions of the Charter However, even if the principle of collective guarantee had been accepted it would still suffer from the same difficulty The remedy, it is believed, lies in making safeguards workable, not in multiplying them

(4) *Non-member States and international peace and security.* The Charter makes it mandatory upon the United Nations to ensure that non-member States shall act in accordance with the principles of the organisation 'so far as may be necessary for the maintenance of international peace and security.' In embodying this important provision the Charter follows the corresponding provisions of Article 17 of the Covenant. Without imposing legal obligations upon non-member States it asserts, in effect, the right to control their conduct with regard to an essential aspect of their foreign relations To that extent it amounts to an assertion of a right of intervention in relation to non-member States

(5) *Exclusion of matters of domestic jurisdiction from the sphere of intervention by the United Nations* (Article 2 (7)). This negative Principle, of apparently alarming comprehensiveness, may, unless put in the perspective of the Charter as a whole, obscure the meaning of most of its significant provisions, and it is therefore necessary to analyse it in some detail (see below, § 168*f*)

Membership of the United Nations

§ 168c. Although the membership of the United Nations is not irrevocably confined to any number or group of States, it cannot be said that the Charter recognises to its full extent the idea of the universality of the political organisation of mankind. To that extent the Charter must be regarded as an expression, transient in character, of the conditions and of the sentiment prevailing at the time of its adoption The Organisation is composed, in the first instance, of what may be described as original members, namely, all the States, numbering fifty,[1] which participated in the United Nations Conference on International Organisation at San Francisco or which, after having previously signed the Declaration of the United Nations of January 1, 1942,[2] sign and ratify the Charter (Article 3) Secondly, States may be admitted as members of the United Nations by a decision reached by a two-thirds majority of the Assembly on the recommendation of the Security Council (Article 4 (2))—for which recommendation there is required a majority of seven members of the Council including the

[1] For a list of these States see above, p 366 [2] See above, p 366, n. 4.

concurring votes of the permanent members (Article 27 (3)) The Charter lays down no conditions of membership other than that the new members must be 'peace-loving States' —a somewhat vague qualification—which accept the obligations of the Charter and which 'in the judgment of the Organisation, are able and willing to carry out these obligations' (Article 4 (1))[1] While it is thus clear that no State has a right to be admitted as a member, it may be assumed that the members of the Assembly and of the Council must exercise their judgment in good faith in reaching the decision whether a State is peace-loving and whether it is able and willing to carry out the obligations of the Charter It follows that the improper exercise of the power conferred by Article 4 in the matter of admission to membership may take place not only as the result of abuse of the so-called right of veto—*i e*, the right of a permanent member of the Security Council to prevent the required unanimity of its permanent members—but also of a one-sided and partisan interpretation of what constitutes a '*peace-loving*' State The early history of the United Nations produced examples of both While the competence of the General Assembly in this sphere is one of partnership exercised jointly with the Security Council, its general responsibility for the functioning of the United Nations as a whole entitles it to approach the Security Council with a view to remedying any defects in the procedure and in the actual exercise of the power of admitting new members The General Assembly has been alive to this aspect of its responsibility[2]

[1] Some States proposed even more stringent requirements of membership Thus Holland suggested that to the expression 'peace loving States' there should be added the words 'which may be expected on account of their institutions and by their international behaviour faithfully to observe and carry out international commitments' see *Canadian Commentary*, p 19 On the other hand, the Latin-American States favoured the principle of universality See also Kelsen in *Columbia Law Review*, 46 (1946), pp. 391-411 On admission to membership of other international organisations see Jenks in *B Y*, 22 (1945), pp 20 22

[2] The First General Assembly adopted a Resolution requesting the Security Council to appoint a committee to confer with a committee of the General Assembly with a view to preparing rules governing the admission of new members 'which will be acceptable both to the General Assembly and the Security Council' *Journal of the General Assembly*, No 75, p 824 For the action taken on that Resolution see *Annual Report of*

§ 168*d*. The absence of universality in the organisation of the United Nations expresses itself not only in the fact that the Charter neither makes provision for compulsory membership nor grants to all States the right to become members The Charter provides expressly for termination of membership through expulsion by the General Assembly upon the recommendation of the Security Council as a sanction for persistent violation of the Principles of the Charter (Article 6) [1] Although the Charter itself does not expressly mention the right of withdrawal, in the absence of an express prohibition to that effect the members of the United Nations must be deemed to have preserved the right to sever what is, in law, a contractual relation of indefinite duration imposing upon States far-reaching restrictions of their sovereignty Moreover, the relevant Committee of the San Francisco Conference put on record the view, eventually accepted by all participating States, that nothing in the Charter deprives members of the right to withdraw from the Organisation It is probable that any limitations upon that right are of a political and moral rather than of a legal

Termination of Membership

the Secretary General, 1947, p 15 The Second General Assembly, confronted with the fact that the Security Council had failed to recommend for membership eleven States which applied for it—Albania, Austria, Bulgaria, Finland, Hungary, Ireland, Italy, Mongolia, Portugal, Roumania and Transjordan—adopted a number of Resolutions intended to remedy the situation Thus it declared that Finland, Ireland, Italy, Portugal and Transjordan were peace loving States able and willing to carry out the obligations of the Charter, and should therefore be admitted to membership The Security Council was asked, in the light of that declaration, to reconsider the applications of these States The International Court of Justice was asked to give an Advisory Opinion on whether the consent to the admission of a new member may properly be made dependent on conditions not expressly provided in Article 4 of the Charter It may well be doubted whether a negative answer to that question would substantially assist in alleviating the unsatisfactory position resulting from the existing formulation of Article 4 It may not be able to prevent a State so minded from an improper exercise of the right to admit new members so long as the adverse vote is cloaked in the elastic garb of the general conditions laid down in Article 4 It is probable that nothing short of the acknowledgment of the right of every recognised State to membership of the United Nations can obviate the possibility of abuse of the power to admit new members See generally on the question of admission of new members Pollux in *B Y*, 24 (1947) And see above, p 366, n 3

[1] In addition, Article 5 of the Charter lays down that any member of the United Nations against which the Security Council has taken measures of prevention or enforcement may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council The latter may restore the exercise of these rights and privileges

nature [1] Both the principle of the universality and of the permanency of the political organisation of mankind and the experience of the League of Nations [2] suggested a different solution However, most States represented at the Conference of San Francisco did not see their way to acquiesce in such an impairment of national sovereignty as is undoubtedly implied in the irrevocable acceptance of membership of an international organisation with most comprehensive and expanding aims These considerations do not apply with equal cogency to States which are permanent members of the Security Council. For their concurrence is required both for the application of the existing important obligations of the Charter and for any extension of its obligations The position is different in the case of States which are not permanent members of the Council and which, in the absence of a right of withdrawal, might have to submit to amendments of the Charter from which they dissent and which enlarge their obligations in matters of significance Moreover, the fact that the Great Powers insisted successfully on their unanimous consent as a condition of the valid acceptance of amendments to the Charter (see below, § 168*s*) prompted

[1] The following extract from the report, bearing on the subject, of the *rapporteur* to Commission I of the Conference may be quoted

'The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organisation The Committee deems that the highest duty of the nations which will become members is to continue their co operation within the Organisation for the preservation of international peace and security If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other members, it is not the purpose of the Organisation to compel that member to continue its co operation in the Organisation

'It is obvious, particularly, that withdrawals or some other forms of dissolution of the Organisation would become inevitable if, deceiving the hopes of humanity, the Organisation was revealed to be unable to maintain peace or could do so only at the expense of law and justice

'Nor would a member be bound to remain in the Organisation if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect

'It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal' *American Commentary*, p 60, *Canadian Commentary*, p 22 On withdrawal from membership of international organisations see Jenks in *B Y*, 22 (1945), pp 22-25

[2] Where the right of withdrawal was used mainly either for reasons of offended prestige or as a manœuvre in the course of acts of aggression.

many States to urge the retention of the right of withdrawal from an Organisation the development and improvement of which can be prevented by the dissenting vote of a single permanent member of the Security Council

The Principle of Sovereign Equality of the Members of the United Nations

§ 168e. On the face of it the principle of the sovereign equality of all the members of the Organisation is an attempt to give formal vitality to a maxim which is in fact contradicted by many crucial provisions of the Charter For there runs throughout the Charter a clear-cut differentiation between the rights—and, it might appear at first sight, between the duties—of the five Great Powers which are permanent members of the Security Council, and other members of the United Nations The consent of the permanent members of the Security Council is required as a condition of the validity of the more important decisions not only of the Council but also of the General Assembly The consent of the Great Powers who are permanent members of the Security Council is required for amendments of the Charter, for admission of new members of the United Nations, for decisions and recommendations in connection with the settlement of disputes and safeguarding international peace and security (except in the case of parties to the dispute), for decisions embodying measures for enforcement, and in many other cases [1] It might be argued that this means, in effect, that in some cases the duties of the Great Powers are in a different—and narrower—category than those of other members, this would appear the case, for instance, with regard to measures of enforcement For if the Charter cannot be enforced against permanent members of the Security Council except with their consent, does it not mean that their duties are, in effect, less exacting? The answer is that in law the duties of all members of the United Nations are the same In the words of Article 2 (2) 'all Members shall fulfil in good faith the obligations assumed by them in accordance with the present Charter' The general obligations of the Charter are, in principle, equally binding on all members This is the first meaning of the principle of sovereign equality

[1] See below, § 168l

Secondly, the express enunciation of the principle of sovereign equality signifies that, apart from those aspects of the Charter in which the vote of the Great Powers is, in effect, given greater weight than that of other States, their equality as sovereign States remains in every other respect unimpaired The privileged position of the Great Powers does not lend itself to extensive interpretation To that extent the express enunciation of the principle of sovereign equality is not mere lip-service to a principle which has in fact been abandoned. It will also be noted that most of the derogations from the principles of equality under the Charter —although usually cloaked in the unattractive garb of the somewhat disingenuous phrase that responsibility [1] must be linked with power—are consistent, to a substantial degree, with international justice and with the progressive requirements of international organisation On the other hand, in one vital respect the absence of equality under the Charter seems to deny a basic condition of the rule of law, namely, inasmuch as measures of enforcement cannot be taken against a permanent member of the Security Council To that extent the Charter departs from the principle of equality before the law There is no such equality if the law can be enforced against some but not against other members of the community [2]

Matters of Domestic Jurisdiction

§ 168*f* Paragraph 7 of Article 2 of the Charter provides as follows :

Nothing contained in the present Charter shall authorise 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,

[1] There need be no hesitation in advancing the claim that rights, including the right to determine the assumption and the extent of responsibility in implementing collective action, ought to be commensurate with power in many respects Thus, for instance, it is proper that the power of a State—its size, its population, its wealth, its industrial capacity, and its contribution to the maintenance of international peace and security—should determine its influence, as expressed in the formal weight of its vote, upon the decisions taken by the organs of the international organisation But it does not follow that the unanimous vote of all permanent members of the Security Council constitutes a proper solution of a difficult problem

[2] For a criticism of the phrase 'sovereign equality' see Kelsen in *Yale Law Journal*, 53 (1944), pp 207-220

but this principle shall not prejudice the application of enforcement measures under Chapter VII

This important provision, incorporated as one of the Principles of the Charter, has been considered by some as having the effect of nullifying much of the purpose of the Charter and of reducing it, to a large extent, to the category of a purely political instrument There is no warrant for any such assumption if the following considerations are borne in mind

(*a*) The expression 'essentially within the domestic jurisdiction of any State' is one capable of divergent interpretations It seems that that expression was deliberately substituted for that used in Article 15 (8) of the Covenant which referred to matters which, *according to International Law*, are exclusively within the domestic jurisdiction of the State The change was apparently due to the belief that the body of International Law on the subject is 'indefinite and inadequate' and that 'to the extent that the matter is dealt with by international practice and by text writers, the conceptions are inadequate and not of a character which ought to be frozen into the new Organisation'[1] It is arguable that the language adopted by the Charter results in a limitation of the competence of the United Nations less rigid than that following from Article 15 (8) of the Covenant For subjects such as tariffs or admission of aliens—typical examples of matters of domestic jurisdiction—although according to International Law they may be incontestably within the domestic jurisdiction of the State, need not, having regard to their international repercussions, be essentially matters of domestic jurisdiction However that may be, the question whether a matter is or is not essentially within the domestic jurisdiction of a State is one which, in case of dispute, must be determined by an impartial finding either of the competent non-judicial organs of the United Nations or, if these bodies are unable to reach a decision,

[1] *American Commentary*, p 58 And see below, vol II § 25*f*, for the Advisory Opinion of the Permanent Court of International Justice in the *Tunis Nationality Decrees* case to the effect that the question whether a matter is solely within the domestic jurisdiction of the State is a relative question the answer to which depends on the development of international relations (Series B, No 4, at p 23)

because of the exigencies of the voting procedure [1] or for other reasons, by the judicial organ of the United Nations, namely, the International Court of Justice.

(*b*) The exclusion of the right of 'intervention' on the part of the United Nations must be interpreted by reference to the accepted technical meaning of that term [2] It excludes intervention conceived as dictatorial, mandatory, interference intended to exercise direct pressure upon the State concerned It does not rule out action by way of discussion, study, enquiry and recommendation [3] falling short of intervention

(*c*) In so far as a 'recommendation,' although not implying a legal obligation to accept it, is calculated to exercise direct pressure, likely to be followed by measures of enforcement, upon a State in a matter which is essentially within its domestic jurisdiction, it is probable that it would come within the terms of Article 2 (7) Other recommendations, even if addressed to individual States, are not excluded by the terms of that provision The same applies to recommendations which are general in character

(*d*) The above consideration explains the provision of Article 2 (7) according to which there is no obligation to submit disputes arising out of matters of domestic jurisdiction to settlement under the Charter For such settlement, even if not implying a decision of the Security Council, may result in a recommendation of the General Assembly or of the Security Council directly addressed to the parties to the dispute and in some ways indistinguishable from a decision [4]

[1] It is not clear whether unanimity (less the vote of the parties to the dispute) is necessary for the finding that a dispute is within the domestic jurisdiction of a State or whether such unanimity is required for the decision that a dispute is not within the domestic jurisdiction [2] See above, § 140*b*

[3] See below (*c*)

[4] The reluctance to see matters of domestic jurisdiction dealt with by way of a recommendation of the Security Council or of the General Assembly in the course of settling disputes was apparently one of the main reasons for the insistence by Australia on the extended scope of the domestic jurisdiction clause in the Charter as compared with the Dumbarton Oaks Proposals See *American Commentary*, p 57, *Canadian Commentary*, pp 18 19 So long as the determination of the question whether a matter is or is not one of domestic jurisdiction is left for the decision of the International Court of Justice or any other legal tribunal, there would appear to be no objection to excluding such matters from the purview of obligatory judicial settlement For the preliminary decision of the Court or of the tribunal to the effect that a dispute is within the domestic jurisdiction of the defendant State would, in fact, amount to a decision on the merits

(e) As, apart from the powers of the Security Council in respect of maintaining international peace and security, the functions of the two other principal organs of the United Nations, namely, of the General Assembly and of the Social and Economic Council, are limited to discussion, study and recommendation, the exclusion of 'intervention' by the United Nations in essentially domestic matters is not, in fact, relevant to the activities of these bodies [1]

(f) Finally, it must be noted that the exception of matters of domestic jurisdiction does not apply to cases in which the Security Council, in pursuance of Chapter VII of the Charter, proceeds to take measures of enforcement after having determined 'the existence of any threat to the peace, breach of the peace, or act of aggression' (Article 39). Although there is thus no obligation to submit disputes involving matters of domestic jurisdiction to the ordinary procedure of settlement, the Security Council is entitled to take cognisance of situations threatening international peace and security and, in so far as such situations eventually require for their solution measures of enforcement decreed by the Security Council, the essentially domestic character of the situation does not constitute a bar to the jurisdiction of the Council To that limited extent Article 2 (7) of the Charter meets the objection that it excludes from the competence of the United Nations those conflicts which historically have proved the most potent source of international friction.

(g) There is no substantial legal difference between the

[1] But see *American Commentary*, p. 58, for the suggestion that the clause was deemed necessary for the reason, *inter alia*, that the Charter has conferred wide powers upon the Economic and Social Council In fact, there is nothing in the competence conferred upon that Council which may render intervention, in the legal sense of the word, possible Neither is there anything in Article 2 (7) which rules out the concern, as distinguished from intervention, of the Economic and Social Council in what are regarded as 'domestic' matters

The above considerations apply especially to the question of 'fundamental human rights and freedoms' which it is the task of the United Nations to promote and encourage (see below, § 340*l*) The scope of that task is restricted not by the domestic jurisdiction clause of Article 2 (7), but by the limitations imposed upon the powers of the General Assembly and of the Economic and Social Council by the general scheme of the Charter But there is no question of Article 2 (7) nullifying the possibilities of the solemn and numerous provisions in the matter of human rights and freedoms

wording of the Charter referring to matters which are 'essentially within the domestic jurisdiction of any State' and the terms of the corresponding provision of Article 15 (8) of the Covenant of the League of Nations which excepted from the purview of the recommendations of the Council matters which the Council finds to be, according to International Law, within the exclusive domestic jurisdiction of a State For, in practice, a matter ceases to be one essentially within the domestic jurisdiction of a State if according to International Law it is no longer exclusively within the domestic jurisdiction of that State [1]

(*h*) In general, it is doubtful whether, in its present formulation, Article 2, paragraph 7, serves any legally relevant purpose With regard to the General Assembly and the Economic and Social Council the prohibition of intervention seems irrelevant for the reason that these bodies, lacking as they normally do the power to take enforceable decisions legally binding upon the members of the United Nations, cannot 'intervene' [2] The action of the Security Council can legally extend to intervention, but seeing that, as a rule, that body is competent only with regard to matters which affect or constitute a threat to international peace and security, such matters, having become the subject of direct international concern, are no longer essentially within the domestic jurisdiction of a State and as such excluded from intervention on the part of the Security Council [3] Neither the Security Council nor the General Assembly were disposed, in 1946, to treat as a matter

[1] There has been a tendency, which is probably not warranted by the terms of the Charter, to magnify the alleged disintegrating effects of Article 2, para 7 See, *e g*, Kelsen in *Yale Law Journal*, 55 (1946), pp 997-1007 See, on the other hand, the scholarly treatment of the subject by Kopelmanas, *L'Organisation des Nations Unies* (1947), pp 207-252 And see Lauterpacht in *Hague Recueil*, 70 (1947) (1), and Pollux in *Acta Scandinavica*, 17 (1946), pp 13-35

[2] See above, p 273

[3] 'Once a matter is recognised as one of legitimate international concern, no exception to the general rule is needed to bring it within the powers of the organisation The general rule itself ceases to apply as soon as a matter ceases to be one of domestic jurisdiction' This extract from the memorandum on the subject submitted by the Australian delegation to the Conference at San Francisco was referred to by Dr Evatt, the Australian representative, in support of the jurisdiction of the Security Council in the matter of the political régime in Spain (see note below) *Journal of the Security Council*, First Year, No 37, June 12, 1946, p. 728

'essentially within the domestic jurisdiction of a State' the question of the political régime in Spain [1] In the same year, in the dispute between India and South Africa concerning the treatment of Indians in the latter country, the General Assembly adopted a Resolution which, in the opinion of South Africa, but not of a two-thirds majority of the General Assembly, constituted intervention in the meaning of Article 2, para 7, of the Charter [2] It is probable that the only legally relevant—and efficacious—purpose of that provision is to prevent intervention by way of legislative action of the United Nations in such matters as regulation of tariffs and admission of aliens with regard to which some States have traditionally exhibited particular apprehension of international interference

The Legal Nature of the United Nations

§ 168g The United Nations is the legal organisation of the international community It has a legal personality distinct from that of its members That fact is to some extent brought out by Article 104 of the Charter which provides that 'The Organisation shall enjoy in the territory of each of its members such legal capacity as may be necessary for

[1] See *Journal of the Security Council*, First Year, Nos 31, 32, 38, 40 42 See also *Report of the Security Council's Sub Committee on the Spanish Question*, 1946 And see *Journal of the First General Assembly*, Second Session, 1946, No 75, p 827, for the Resolution of the General Assembly expressing the view that 'the Franco Fascist Government of Spain does not represent the Spanish people,' and recommending that it be debarred from membership in international agencies established or brought into relationship with the United Nations, and that all members of the United Nations should immediately recall from Madrid their ambassadors and ministers plenipotentiary accredited there See *Annual Report of the Secretary General* of 1947 on the Work of the Organisation, p 3, on the steps taken to implement that Resolution As 19 States had no ambassadors or ministers plenipotentiary at the time of the passing of the Resolution, and as 30 had no diplomatic relations at all with the Franco Government at that time, the Resolution was somewhat nominal

[2] In that Resolution the General Assembly noted that because of the treatment of Indians in South Africa the relations between two member States had been impaired and were likely to deteriorate unless a satisfactory settlement were reached, expressed the opinion that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements between the two Governments and the relevant provisions of the Charter, and requested the two Governments to report to the next Session of the General Assembly the measures adopted to this effect *Journal of the First General Assembly*, Second Session, No 75 p 831 In 1947 the Second Assembly, without re affirming the Resolution of the previous year, requested the two Governments to enter into negotiations with a view to reaching an agreement

the exercise of its functions and the fulfilment of its purposes.' There was apparently some apprehension—for which there was no basis in fact—lest the express conferment of 'international personality' upon the United Nations be interpreted as creating a super-State. In the Convention on the Privileges and Immunities of the United Nations, approved by the First General Assembly in 1946, Article I provided expressly that 'The United Nations shall possess juridical personality' and that it shall have the capacity to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings [1] That juridical personality is not limited to capacity for action in the sphere of private law. The Charter itself recognises the contractual capacity of the organs of the United Nations in what is in effect the wide sphere of treaties Thus Article 43 of the Charter provides for agreements between the Security Council and the members or groups of members of the Organisation concerning the armed forces and other forms of assistance to be contributed by them for the maintenance of international peace and security, it is laid down that these agreements shall be subject to ratification by the signatory States in accordance with their constitutional processes Article 62 provides for agreements to be made by the Economic and Social Council with various specialised international organisations brought into relationship with the United Nations A number of such agreements have been concluded [2] The First Assembly adopted, for the guidance of the Secretary-General, a draft Convention between the United Nations and the United States of America in connection with the establishment of the seat of the United Nations in that country [3] The United Nations as such may also exercise direct jurisdictional and legislative powers, for instance with regard to such trust areas as, according to Article 81 of the Charter, may be placed under the administrative authority of the United Nations, or with regard to its seat.

[1] *Records of the First Assembly* (1st Session), p 688

[2] See below, p. 402.

[3] *Records of the First Assembly* (1st Session), p 693.

The seat of the United Nations is in New York.[1] In December 1946, the Second General Assembly adopted a Resolution providing for a flag of the United Nations. The flag shows the official emblem of the United Nations at the centre of a background of light blue.[2]

[1] On June 26, 1947, an Agreement was concluded between the United Nations and the United States in order to carry into effect the Resolution adopted by the General Assembly in December 1946 to establish the seat of the United Nations in that city. The Agreement authorises the United Nations to establish in the headquarters district sending and receiving wireless stations (§ 4). Provision is made for supplemental agreements in case the United Nations should find it necessary to establish its own aerodrome and its own postal service (§§ 5 and 6). In general, and subject to the provisions of the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly in February 1946, the Federal, State and local laws of the United States shall apply and the jurisdiction of their courts extend to acts done and transactions taking place in the headquarters district (§ 7). However, it is provided that the United Nations shall have the power to make regulations for purposes necessary for the full execution of its functions within the headquarters district. No Federal, State or local law inconsistent with such regulations shall be applicable within the headquarters district. Machinery—which applies to all other Articles of the Agreement—is provided for settling any difference between the United Nations and the United States as to the existence of any such inconsistency (§ 8). The headquarters district shall be inviolable and American authorities shall not be entitled to enter it, or to serve legal process within it, except with the consent of and under conditions laid down by the Secretary General. But the United Nations are under a duty to prevent the headquarters district from becoming a place of refuge for persons avoiding arrest or required for extradition (§ 10). The United States authorities shall not impose any impediment to the transit to or from the headquarters district of representatives of member States, officials of the United Nations, and other persons enumerated in the Agreement, including representatives of press, film and other information agencies accredited to the United Nations after consultation with the United States. Laws and regulations in force in the United States regarding the entry and residence of aliens shall not be applied so as to interfere with the privileges as to transit granted by the Agreement. The approval of the Secretary of State of the United States shall be necessary for proceedings requiring persons thus privileged to leave the United States. Such approval shall not be given without consultation, as the case may be, with the member of the United Nations concerned or with the Secretary General (§ 13). Every person appointed by a member as the principal resident representative to the United Nations or to a specialised agency, and similar categories of persons enumerated in § 15 of the Agreement, shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities as it accords to the diplomatic envoys accredited to it. Provision is also made for similar, though somewhat restricted, immunities of representatives of governments not recognised by the United States. The latter also assume obligations with regard to the protection of the headquarters district and its amenities as well as with regard to the maintenance of public services (§§ 16–18). No form of racial or religious discrimination is to be permitted within the headquarters district. For the text of the Agreement see *Bulletin of the State Department*, 17 (1947), p. 27. See also *Weekly Bulletin of the United Nations*, III, No. 2, July 8, 1947.

[2] The First General Assembly also approved the emblem of the United

The United Nations, thus endowed with an international personality of its own in its capacity as the legal organisation of the international community, is a juristic person *sui generis* The question of the legal nature of the potentially universal association of States constituting the political organisation of mankind transcends that of any accepted classification of composite States and, in particular, that of the difference between a Confederation of States and a Federation In so far as it is helpful to use these traditional two types of a composite State as a standard of comparison, the United Nations still approximates more closely to a Confederation than to a Federal State This is so in particular in view of the right of withdrawal from the Organisation, of the practical non-existence of any true legislative powers vested in the United Nations, and of the virtual absence of any direct relation between the United Nations and the nationals of the member-States In all these respects the United Nations departs from a vital characteristic of a Federal State At the same time, with regard to the subjects just mentioned, the United Nations bears witness to the fact that the differences between a closely knit Federal State and a Confederation are, as a matter of experience, a question of degree Thus the right of secession from the United Nations must be deemed to be somewhat qualified both by the manner of the acknowledgment of the right of withdrawal and by the studied absence of an unqualified admission of a right to withdraw from the United Nations [1] The wide powers of the Security Council in coping with situations threatening international peace and security approach, in some respects, those of legislation [2] And the concern of the Charter for fundamental human rights and freedoms approximates, albeit in a rudimentary degree, to the federal guarantee of individual human rights as found in Federal States.

Nations for its official seal, and recommended that legislation should be passed by members to prevent its use for commercial purposes by means of trade marks or commercial labels as well as the use of the official seal and of the name of the United Nations, and of abbreviations of that name through the use of initial letters

[1] See above, § 168*d*

[2] See below, § 168*j*

II

THE ORGANS AND THE CONSTITUTION OF THE UNITED NATIONS

The General Character of the Organs of the United Nations

§ 168*h* Whatever may be the future possibilities of developing the United Nations into a more integrated association of States of a federal character, the present structure of its principal organs is still, from this point of view, of a rudimentary character There is in the Organisation no effective centre of authority vested with the general responsibility for the functioning of the United Nations as a whole While the competence of the General Assembly is not limited to any particular aspect of the purposes of the United Nations, it is the competence of an organ which is primarily deliberative While the Security Council is, subject to the exigencies of its voting procedure, endowed with executive powers of decision, such powers are limited mainly to the preservation of peace However, in some matters the Security Council and the General Assembly share the responsibility for the performance of functions connected with the working of the United Nations as a whole, and to that extent they constitute, jointly, the central organ of the United Nations [1] In addition to these two principal organs and the Secretariat, the Charter provides for the following three organs . (1) The Economic and Social Council (§ 168*m*), (2) The Trusteeship Council (§ 94*m*), (3) The International Court of Justice (§ 168*o*)

The General Assembly

§ 168*i* The functions of the General Assembly as laid down in Articles 9-17 of the Charter are essentially those of initiative, of discussion, of study, and of recommendation. The Assembly—which consists of the members of the United Nations [2]—may not only discuss matters within the scope of the Charter or relating to the powers and functions of any organs provided in the Charter It may also make recommendations on these matters both to members of the

[1] See below, § 168*l*

[2] Article 9 (2) lays down that each member shall have not more than five representatives in the General Assembly

United Nations and to the Security Council [1] On the other hand, it is clear that the Assembly is not invested with legislative powers However, although the recommendations of the Assembly are not legally binding, they provide an important instrument for making the weight of the public opinion of the world bear upon the members of the United Nations In particular, the right of discussion and recommendation comprises questions of co-operation in the maintenance of international peace and security, including disputes brought before the Assembly,[2] as well as principles governing disarmament and regulation of armaments The Assembly may also call the attention of the Security Council to situations likely to endanger international peace and security [3]

It is expressly provided that the Assembly shall initiate studies and make recommendations for the purpose of (*a*) promoting international co-operation in the political sphere and for encouraging the progressive development and the codification of International Law, and (*b*) furthering international co-operation in the economic, social, cultural and educational fields and in matters of health as well as in 'assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' [4] The other functions conferred upon the General Assembly include those assigned to it under the trusteeship system, in particular the approval of the trusteeship agreements for areas not designated as strategic (Article 16), [5] the consideration and approval of the budget

[1] But it is laid down in Article 12 that while a dispute or situation is before the Security Council the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so desires

[2] The proposal, made at the San Francisco Conference, that the Assembly should have the power to submit general conventions to members of the United Nations for approval did not secure the necessary majority However, it is believed that a power of that nature is nevertheless vested in the General Assembly by virtue of Chapters IV and IX of the Charter, and also as the result of Article 62 which empowers the Economic and Social Council to propose draft conventions for submission to the Assembly In fact, the First General Assembly approved at its First Session a Convention on the Privileges and Immunities of the United Nations and proposed it for accession by each member of the United Nations *Records of the First Assembly*, First Session, 1946, p 687 See above, p 383, n 1

[3] Article 11 (3) [4] Article 13

[5] See above, § 94*j*

of the United Nations (Article 17),[1] participation in the election of the Judges of the International Court of Justice (Article 4 of the Statute), election of the six non-permanent members of the Security Council (Article 23), of the members of the Economic and Social Council (Article 61), and of some members of the Trusteeship Council (Article 86 (*c*)), the appointment of the Secretary-General upon the recommendation of the Security Council (Article 97), the adoption of regulations governing the Secretariat (Article 101),[2] the admission and expulsion of members (Articles 4 and 6), and participation in the process of amending the Charter (Articles 108 and 109) Moreover, the General Assembly is empowered to establish such subsidiary organs as may be necessary for the fulfilment of the purposes of the Organisation (Article 22) In this and similar respects the position of the General Assembly approaches that of the central and co-ordinating organ of the United Nations Thus the Economic and Social Council and the Trusteeship Council

[1] The same Article provides that the expenses of the Organisation shall be borne by the members and apportioned by the General Assembly The First General Assembly adopted at its First Session detailed resolutions relating to budgetary and financial arrangements, including the appointment of an Advisory Committee on Administrative and Budgetary Questions and a Committee on Contributions charged with the apportionment of expenses *Records of the First Assembly*, 1946, pp 678 685 See also *Report of the Preparatory Commission*, Cmd 6734, pp 131-139 Article 19 of the Charter lays down that any member of the United Nations which is in arrears in the payment of its financial contributions shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years An exception is made for cases in which the Assembly is satisfied that the failure to pay contributions is due to circumstances beyond the control of the member

The following list shows the assessment of the budgetary contributions of the members of the United Nations approved by the First General Assembly in December 1946, the figures in brackets indicating the percentages to be contributed in respect of the budget for 1947 Afghanistan (0 05), Argentina (1 85), Australia (1 97), Belgium (1 35), Bolivia (0 08), Brazil (1 85), Byelorussian S S R (0 22), Canada (3 20), Chile (0 45), China (6 00), Colombia (0 37), Costa Rica (0 04), Cuba (0 29), Czechoslovakia (0 90), Denmark (0 79), Dominican Republic (0 05), Ecuador (0 05), Egypt (0 79), El Salvador (0 05), Ethiopia (0 08), France (6 00), Greece (0 17), Guatemala (0 05), Haiti (0 04), Honduras (0 04), Iceland (0 04), India (3 95), Iran (0 45), Iraq (0 17), Lebanon (0 06), Liberia (0 04), Luxemburg (0 05), Mexico (0 63), Netherlands (1 40), New Zealand (0 50), Nicaragua (0 04), Norway (0 50), Panama (0 05), Paraguay (0 04), Peru (0 20), Philippines (0 29), Poland (0 95), Saudi Arabia (0 08), South Africa (1 12), Sweden (2 35), Syria (0 12), Turkey (0 91), Ukrainian S S R (0 84), U S S R (6 34), United Kingdom (11 98), United States of America (39 89), Uruguay (0 18), Venezuela (0 27), Yugoslavia (0 33)

[2] See below, § 168*p*

are subordinate to the General Assembly and act under its authority However, unlike the Security Council, the General Assembly is not endowed with effective powers of decision in the fulfilment of the general functions entrusted to it by the Charter

The Assembly meets, as a rule, in regular annual sessions But special sessions may be convened by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations (Article 20) [1]

The Security Council

§ 168*j* The constitution of the Security Council, as shown in its composition, its competence, and its voting procedure, is more than any other aspect of the Charter expressive of the present character of the United Nations as an agency for preserving peace rather than a comprehensive instrument of the government of the world The basic political assumption—which must remain a subject of controversy [2]—of the

[1] The Charter does not lay down expressly that the Assembly shall meet at the seat of the Organisation But this will probably be the rule save in exceptional circumstances Thus the Second General Assembly decided that the Third Assembly in 1948 shall take place in Europe As to the seat of the United Nations, see above, p 383 See also Jenks, *The Headquarters of International Institutions, A Study of their Location and Status* (1945)

There is no provision in the Charter laying down that the meetings of the Assembly shall be public, but the relevant Committee of the Conference at San Francisco expressed the opinion that the rules of procedure of the Assembly should provide that, in general, the Sessions of the Assembly shall be open to the public and the press of the world *American Commentary*, p 64 The work of the General Assembly is conducted primarily through the following six main Committees (1) First Committee (Political and Security) This Committee considers, *inter alia*, the admission, suspension, and expulsion of members, political matters and those relating to security, and questions of co operation in the maintenance of international peace and security, including those relating to disarmament, (2) Second Committee (Economic and Financial), (3) Third Committee (Social, Humanitarian and Cultural), (4) Fourth Committee (Trusteeship), (5) Fifth Committee (Administrative and Budgetary), (6) Sixth Committee (Legal) The Sixth Committee is concerned with legal and constitutional questions, such as the registration of treaties, privileges and immunities of the United Nations, questions affecting the International Court of Justice, and the legal and constitutional aspects of questions referred to the other Committees The Committee also considers measures to encourage the progressive development and codification of international law There are also a general procedural committee and a committee on credentials of the members of the General Assembly Finally, there has been established an Advisory Committee for Administrative and Budgetary Questions and a Committee on Contributions The latter reports to the General Assembly on questions relating to the apportionment of the expenses of the United Nations among its members

[2] There is room for the view that one of the main objects of the Organisation is to provide means for causing the entire moral, legal and political authority of the United Nations to bear on situations in which unity

satisfactory working of the Security Council as constituted by the Charter is the continuing unity of action and purpose among the Great Powers who compose the permanent membership of the Council

(1) *The Composition of the Security Council* The Security Council is composed of five permanent and six non-permanent members The permanent members are China, France, Soviet Russia, Great Britain and the United States The non-permanent members are elected by the General Assembly for a period of two years They are not eligible for immediate re-election Each member of the Security Council has one representative The Charter lays down that in electing members of the Security Council regard shall be 'specially paid, in the first instance [1] to the contribution of the members of the United Nations to the maintenance of international peace and security and to the purposes of the Organisation, and also to equitable geographical distribution' (Article 23) It is also provided that any member of the United Nations which is not a member of the Security Council may participate, without having a right to vote,[2] in the discussion of any question brought before the Security Council provided that, in the view of the latter, the interests of that member are affected (Article 31) It is laid down that any member of the United Nations which is not a member of the Security Council or any State which is not a member of the United Nations shall be invited to participate, without vote, in any discussion before the Council concerned with a dispute to which it is a party

among the Great Powers has failed of realisation, that this is so in particular in cases in which one Great Power has finally ranged itself against the collective judgment of the United Nations, and that the necessity of directing the coercive authority of the United Nations as a whole against one State, even if it be a Great Power, would not necessarily signify a failure of the purpose of the United Nations

[1] There is, in the English text of the Charter, no comma after the words 'in the first instance' The intention of that deliberate omission—which, however, does not appear in the texts of the other languages of the Charter —was to emphasise the primary importance of the contribution to the maintenance of international peace and security as distinguished from the factor of geographical distribution This was done in order to meet, to some extent, the point of view of the so called 'middle Powers' See *Canadian Commentary*, p 29 At the First General Assembly the following non permanent members of the Security Council were elected Australia, Egypt, Poland, Holland, Mexico and Brazil

[2] The proposal that, as in the corresponding case under the Covenant of the League, the State thus invited should have a vote, was not accepted

(2) *The Powers and Functions of the Security Council* In contradistinction to the predominantly deliberative character of the functions of the Assembly, those of the Security Council are primarily of an executive nature. That executive function is confined almost exclusively to the maintenance of international peace and security But within that limited compass the powers of the Security Council are not circumscribed by any restraints other than those implied in the general obligation that ' in discharging its duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations ' Subject to that general limitation, and ' in order to ensure prompt and effective action by the United Nations,' the members confer upon the Council primary responsibility for the maintenance of international peace and security and agree that in carrying out its duties in that capacity the Council shall act on their behalf (Article 24) [1] They also ' agree to accept and to carry out the decisions of the Security Council ' reached in accordance with the Charter (Article 25) It is in that irrevocable mandate conferred upon the Security Council and in the acceptance of the legal obligation to comply with its decisions that we find the very substantial measure of renunciation of national sovereignty on the part of the members of the United Nations other than the permanent members of the Security Council [2]

In the organisation and in the procedure of the Council account is taken of the importance and urgency of its task. The Charter lays down that the Security Council shall be so organised as to be able to function continuously and that for this purpose each member of the Council shall be permanently represented at the seat of the Organisation (Article 28) The Council is to hold periodic meetings—not necessarily at the seat of the Organisation—at which its members may be represented, if they so desire, by a member

[1] The functions of the Security Council and of the United Nations generally as an agency for settling disputes and for maintaining international peace and security and the relevant provisions of the Charter will be discussed in detail in Part I of Volume II (7th edition, not yet published)

[2] See Kelsen in *H L R*, 59 (1946), pp 1087-1121

of the Government or by some specially designated representative [1]

The powers of the Security Council are not limited to its executive functions in the sphere of preservation of international peace For, together with the General Assembly, the Security Council is charged with functions relating to the working of the United Nations as a whole Thus it has a part in the admission, expulsion and suspension of members, [2] in the election of the Judges of the International Court of Justice [3], and in the appointment of the Secretary-General [4]

Voting in the Assembly and in the Council

§ 168k The Charter marks an important departure in the direction of the abandonment of the principle of unanimity The significance of that innovation has tended to be obscured —not without good reason—by the circumstance that, for most practical purposes, it does not affect the position of the Great Powers whose unanimous consent in their capacity as permanent members of the Security Council is required, as a rule, for the substantive decisions of the Security Council and for many of the decisions of the General Assembly But for that special position of the Great Powers, the abandonment of the principle of unanimity would constitute a significant innovation in the legal organisation of the international society

(1) *The General Assembly* As a rule, a simple majority

[1] The subsidiary organs of the Security Council include (1) The Military Staff Committee which advises and assists the Council on all questions relating to its military requirements for maintaining international peace and security, the employment, command and strategic direction of forces placed at the disposal of the Council, and the regulation of armaments, (2) The Atomic Energy Commission This Commission, set up by the General Assembly, consists of all members of the Security Council and of Canada when the latter is not a member of the Security Council The task of the Commission is to make proposals for extending the exchange of basic scientific information concerning atomic energy for peaceful means, control of atomic energy to the extent of limiting its use to peaceful purposes, the elimination of atomic weapons from national armaments, and the provision of safe guards for the protection of States complying with measures of international control against the danger of violations and evasions of these measures (For legal aspects of the international control of atomic energy see Bathurst in *B Y*, 24 (1947)) (3) The Commission for Conventional Armaments The object of this Commission, which is composed of representatives of the eleven members of the Security Council, is to prepare proposals for the general regulation of armaments and armed forces

[2] See above, §§ 168c, 168d

[3] Article 4 of the Statute

[4] See below, § 168p

of the members present and voting is required for the decisions of the General Assembly The Charter does not appear to distinguish, in this respect, between decisions and recommendations However, decisions of the Assembly on important questions require a two-thirds majority. These questions, according to Article 18 (2), include recommendations concerning the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council and of the Trusteeship Council, the admission to membership, suspension of rights of membership, and expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions Moreover, the Assembly may, by an ordinary majority, add to the categories of questions requiring a two-thirds majority [1] Unless a question, however important, is comprised within the above enumeration or unless it has been expressly included within a category requiring a two-thirds majority, it can be made the subject of a recommendation by a simple majority [2]

In assessing the bearing, upon the sovereignty of the members of the Assembly, of the departure from the traditional principle of unanimity, the fact must be borne in mind that, except in matters in regard to which a specific jurisdiction has been conferred upon it,[3] the Assembly has no power to adopt decisions binding upon the members of the United Nations

(2) *The Security Council* Decisions of the Council require an affirmative vote of seven members, including the concurring votes of all the permanent members [4] That general rule is qualified by the exception according to which in a decision taken under Chapter VI relating to the pacific settlement of disputes the parties to the dispute shall abstain from voting That exception is of considerable, but not of

[1] Article 18 (3)

[2] For it is clear that the question whether a matter is 'important' does not admit of an automatic answer A question may appear important to some members of the United Nations but not to others

[3] Such as election of the members of various organs of the United Nations or participation in the admission, suspension, or expulsion of members

[4] Article 27

decisive, importance, for with regard to measures of enforcement—including provisional measures calculated to prevent the aggravation of dangerous situations—undertaken under Chapter VII with respect to threats to the peace, breach of the peace, and acts of aggression, the concurring vote of all permanent members of the Security Council is required as a condition of the validity of its decisions [1] In matters of procedure the decisions of the Security Council require a majority of seven of its members

The provisions of Article 27 of the Charter in the matter of voting in the Security Council, in particular the requirement of unanimity of all its permanent members on matters other than those of procedure, are based on the assumption, which is unwarranted, that unity of view and action on the part of the Great Powers is an indispensable condition of the proper functioning of the United Nations, that no permanent member of the Security Council can properly be expected to submit to decisions of which it disapproves, and that the power to prevent decisions of an otherwise unanimous Security Council will not be abused Any abuse of that power is likely to give rise to attempts to remedy the consequences of the voting procedure of Article 27 by means of a somewhat extensive construction of other Articles of the Charter Thus it has been suggested that the failure of the Security Council, because of the use—or abuse—of the so-called right of veto, to deal effectively with situations involving a danger

[1] The above provisions in the matter of voting are the result of a special agreement reached by the United States, Great Britain and Soviet Russia at Yalta during the Crimea Conference held in February 1945 The matter had been left open in the Dumbarton Oaks Proposals As, with regard to the settlement of disputes, the unanimity of the permanent members of the Security Council—other than the parties to the dispute—is required at every stage of the proceedings, apprehension was expressed at the San Francisco Conference that any permanent member of the Council might prevent a discussion and consideration of any situation brought before the Security Council In particular, Soviet Russia advocated the view that the consideration of a dispute is a matter of substance and not of procedure Eventually the Great Powers issued an interpretative statement the result of which is that no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation brought to its attention under Chapter VIII of the Charter After such full discussion and consideration has taken place, any permanent member of the Council not a party to the dispute may prevent further action, *e g* by way of investigation or enquiry For the statement of the Great Powers on the matter see *American Commentary*, p 77, *Canadian Commentary*, p 31.

to international peace may legitimately be followed by the exercise of individual or collective self-defence on the part of the members of the United Nations in conformity with Article 51 of the Charter [1] The proposal, adopted by the Second General Assembly in 1947, to set up an Interim Committee functioning during the period between the regular Sessions of the General Assembly constitutes another effort to circumvent the effects of the 'veto' [2] While these and any similar efforts not clearly inconsistent with the letter of the Charter must be considered as justified by the overriding right and obligation to ensure the fulfilment of the major purposes of the Charter, they emphasise the necessity of the eventual amendment of the Charter with a view to removing the requirement of the absolute unanimity of all the permanent members of the Security Council [3]

The Relation of the Assembly and the Council

§ 168*l* The governing consideration in assessing the nature of the relation between the General Assembly and the Security Council is that, in principle, they are entrusted with distinct spheres of activity The Security Council is concerned primarily with preserving and maintaining international peace and security The General Assembly is largely a deliberative organ concerned with the totality of matters coming within the scope of the United Nations In a restricted sense the Council is the more important political organ of the United Nations inasmuch as its deci-

[1] See above, p 267

[2] The Interim Committee was set up, in the first instance, for the period between the Second and the Third General Assembly It is to consider and to report to the General Assembly on any dispute or situation proposed for inclusion in the agenda of the General Assembly by any member or brought before it by the Security Council in virtue of Articles 11 (2), 14 or 35 relating to the maintenance of international peace and security and the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among nations The Interim Committee is not to consider any matter of which the Security Council is seized unless the latter so desires It is authorised to conduct investigations and to appoint commissions of enquiry by a two thirds majority of its members present and voting

[3] In December 1946, the General Assembly adopted a Resolution requesting the permanent members of the Security Council to ensure that the use of their special voting privilege shall not impede the Security Council in reaching decisions promptly It also recommended to the Security Council the adoption of practices and procedures calculated to reduce the differences in the application of Article 27 with the view to ensuring the effective exercise by the Security Council of its functions See, on the question of the 'veto,' Wortley in *B Y*, 23 (1946), pp 94 111 See also Brierly, *ibid*, pp 83 84

sions, in the vital field of preservation of peace, are binding upon all members of the Organisation and inasmuch as, if it deems it desirable, it has exclusive jurisdiction with regard to any dispute or situation which is actually before it in accordance with the Charter But, in theory, the Security Council exercises these functions by virtue of delegation from the members of the United Nations The Charter lays down, in Article 15, that the General Assembly shall receive and consider annual and special reports from the Security Council, such reports to include an account of the measures taken by it to maintain international peace and security However, the Charter does not contemplate that in receiving and discussing such reports the General Assembly shall pass judgment upon the activities of the Security Council in a manner amounting to an assumption of concurrent jurisdiction in the matter of settling disputes [1] or to a subordination of the Council to the overriding authority of the Assembly Unlike in the case of the Economic and Social Council and the Trusteeship Council [2] no such authority is vested in the General Assembly in relation to the Security Council

While the main fields of activity of the two principal organs of the United Nations are thus different and, to some extent, exclusive, there is a wide sphere of subjects bearing upon the essential aspect of the United Nations in which the Charter prescribes co-operation between these two bodies This applies to such matters as the admission and expulsion of members, the appointment of the Secretary-General, and the election of the Judges of the International Court of Justice Moreover, the Charter leaves room for co-operation between the General Assembly and the Security Council with regard to the settlement of disputes and the maintenance of international peace and security [3]

[1] See, in particular, Article 12 of the Charter which lays down that while the Security Council is exercising its functions in respect of any dispute or situation assigned to it in the Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requires In general, however, the Charter leaves wide scope for action by the Assembly in the matter of preserving international peace and security See Part I of Volume II, Chapter I, VIII (7th edition, not yet published)

[2] See above, § 94*l*

[3] Thus the Security Council may call upon the General Assembly to co operate with it in the steps taken to preserve or to restore peace (Articles 11 (2), 12 (1))

The Economic and Social Council

§ 168m The realisation that the peace of the world depends in the long run not only upon the acceptance of obligations and institutions for preventing and suppressing unlawful recourse to force, but also in the provision of means for removing the economic and similar causes of war, has found expression in the setting up of an Economic and Social Council as one of the six principal organs of the United Nations Like the General Assembly, the Economic and Social Council is a body lacking in executive and legislative power However, in so far as its essential objects can be achieved by the promotion of international co-operation and co-ordination as distinguished from international government proper, the Economic and Social Council has been entrusted with tasks lying within a very comprehensive field of activity

The Economic and Social Council is the main instrument of the United Nations in the field of economic and social co-operation which, in so far as this can be done in a treaty —and the Charter is a treaty—is imposed upon the members of the Organisation as a legal duty For, in Article 56 of the Charter 'all Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement' of its economic and social objects These are the promotion (*a*) of higher standards of living, of full employment, and of conditions of social and economic progress, (*b*) of the solution of international economic and social problems, as well as those in the sphere of health and of cultural and educational co-operation, (*c*) of universal respect for, and observance of, human rights and fundamental freedoms [1]

The functions of the Economic and Social Council are described in the following terms in Article 62 of the Charter

1 The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialised agencies concerned

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[1] Article 55 See Finer, *The United Nations Economic and Social Council* (1946), and, in particular, Dehousse in *Hague Recueil*, 1947

2 It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all

3 It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence

4 It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence

In addition, the Economic and Social Council is charged with the task of co-ordinating the activities of the various international unions established by agreements between governments and, if deemed desirable, of bringing them into relationship with the United Nations It may, in connection with the latter purpose, conclude agreements with these specialised agencies, subject to the approval of the Assembly [1] It may take steps to receive regular reports from these agencies Its functions include also assistance to the Security Council, carrying out of recommendations and of special functions assigned by the Assembly and, with the approval of the latter, the performance of services at the request of members of the United Nations and of specialised agencies (Articles 63-66) It is provided that the Council shall set up commissions in economic and social fields and for the promotion of human rights [2]

[1] Article 63 And see below, § 168*r*

[2] By the end of 1947 the Council had set up the following general and regional commissions (1) Economic and Employment Commission to advise the Council on such questions as the promotion of full employment by the co ordination of national policies for full employment and by international action, prevention of wide fluctuations in economic policy, reconstruction of areas devastated by the war, and generally the promotion of economic development and progress, (2) Transport and Communications Commission, (3) Statistical Commission to assist the Council in promoting the development of national statistics and the improvement of their comparability (the Commission includes sub commissions on statistical sampling and industrial classification), (4) Commission on Human Rights (including sub commissions on freedom of information and of the press and on prevention of discrimination and protection of minorities see below, p 671), (5) Social Commission, which advises the Council on social questions of a general character, in particular on matters not covered by specialised intergovernmental agencies, (6) Commission on the Status of Women to prepare recommendations and reports to the Council on promoting the rights of women in the political, economic, social and educational fields (see below, p 671), (7) Commission on Narcotic Drugs to assist the Council in the exercise of the various powers of supervision conferred upon it with regard to the application of international conventions relating to nar

The Economic and Social Council consists of eighteen members of the United Nations elected by the General Assembly The Charter secures both continuity and change in the composition of the Council by providing that six members shall be elected each year for a term of three years A retiring member is eligible for immediate re-election (Article 61) It is laid down that the Council shall invite any member of the United Nations to participate, without vote, in its deliberations on any question which is of particular interest to that member (Article 69), and that the Council may make arrangements for representatives of international specialised agencies to participate, without vote, in the activities of the Council and in its discussions (Article 70) Moreover, provision is made for consultation between the Council and international organisations of a non-governmental character concerned with matters within the competence of the Council (Article 71) [1] Finally, and sig-

cotic drugs, (8) Fiscal Commission to advise the Council in the sphere of finance There are in addition two regional Commissions The first is the Economic Commission for Europe the object of which is to initiate and participate in measures to facilitate concerted action for the economic reconstruction of Europe The second, the Economic Commission for Asia and the Far East is charged with similar tasks

The Commissions are composed of representatives of members of the United Nations selected by the Council The members of the Commissions are nominated by the Governments of the States selected after consultation with the Secretary General—with the view to securing a balanced representation in various fields—and confirmed by the Council See Resolution of the Council of June 21, 1946 *Official Records*, First Year, Second Session, 1946, p 406 While the system of governmental representation is unobjectionable in principle, it may be open to serious criticism in some cases Thus the Human Rights Commission urged, unsuccessfully, that it should be composed of independent persons There is a distinct measure of incongruity in the purely governmental composition of a body entrusted with the function of protection of human rights against encroachments by governments

[1] For the Report of a Committee, approved by the Council in 1946, on the principles to be applied in placing organisations on the list of non governmental organisations eligible for consultation under Article 71 of the Charter, see *Official Records of the Economic and Social Council*, First Year, Second Session (1946), p 360 The Report distinguishes clearly between *participation* as provided in Articles 69 and 70 of the Charter (in the case of States not members of the Council or of specialised intergovernmental agencies) and *consultation* in accordance with Article 71 The object of consultation, as interpreted by the Report, is to secure for the Council or its organs expert information or advice from organisations having special competence on the subjects within their province and to enable organisations representing important elements of public opinion to express their views The Report classifies the organisations the consultative status of which is recognised into three groups (*a*) Organisations which have a basic interest in most of the activities of the Council and are closely linked with the economic or

nificantly, the Charter authorises such arrangements with purely national organisations, after consultation with the State concerned (*ibid*).

The Trusteeship Council

§ 168*n* The function and the composition of the Trusteeship Council are discussed elsewhere in this treatise (see above, § 94*m*)

The International Court of Justice

§ 168*o* The organisation and jurisdiction of the International Court of Justice, which has succeeded the Permanent Court of International Justice and has taken over its Statute without substantial changes, will be discussed in Volume II (seventh edition) But it must be noted that, unlike its predecessor, the International Court of Justice is an integral part of the United Nations as its 'principal judicial organ' (Article 92) In particular, the Charter provides that the organs of the United Nations Organisation and the special international agencies brought into relationship with it should be able, subject to a general authorisation of the Assembly, to avail themselves of the advisory jurisdiction of the Court

The Secretariat

§ 168*p* The provisions of the Charter relating to the Secretary-General and his staff give expression to the importance which the Charter attaches both to the office of the Secretary-General and to the maintenance of an efficient

social life of the areas which they represent Organisations in that category may designate authorised representatives to sit as observers at the public meetings of the Council They may circulate to the members of the Council written statements and communications A Standing Committee of the Council is to be set up for maintaining effective consultation with the organisations in this group The World Federation of Trade Unions, the International Co operative Alliance, and the International Chamber of Commerce are included within this group, (*b*) Organisations which are concerned specifically only with some of the fields covered by the Council, (*c*) Organisations which are primarily concerned with the development of public opinion and with the dissemination of information The facilities for consultation offered to organisations in these groups are more restricted The terms of Article 71 of the Charter are wide enough to allow a progressive extension of the machinery of consultation It is doubtful, therefore, whether the wide objects of the Council require or properly permit any rigid crystallisation of the procedure of consultation in the initial period of activity of the Council There is a distinct element of artificiality in the assumption that the conception of 'consultation' rules out the possibility of the Council, or its organs, being addressed orally by the representatives of the organisations concerned The progressive development of international co-operation in this sphere is to a large extent dependent upon the realisation that States are the principal but not the exclusive instruments of the protection of economic and social interests which require international regulation

and reliable international civil service [1] The Secretary-General is entrusted not only with the ordinary administrative functions in relation to the principal organs of the United Nations, other than the International Court of Justice, and with the preparation of annual reports to the General Assembly on the working of the United Nations (Article 98) He is also authorised to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security —a task of great responsibility (Article 99) The Secretary-General is appointed by the General Assembly upon the recommendation of the Security Council (Article 97) The Charter contains detailed provisions for securing the efficiency and the independence of the Secretariat Thus it is laid down expressly that the Secretary-General and his staff shall not seek or receive any instructions from any Government or from any other authority outside the Organisation The members of the United Nations undertake 'to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities' (Article 100) The First General Assembly adopted detailed rules on the terms of appointment of the Secretary-General and on the organisation of the Secretariat [2]

[1] As to the legal position of the Secretary-General see Kunz in *A J*, 40 (1946), pp 786-792 The Secretariat is divided into eight Departments devoted respectively to the following matters Security Council Affairs (including a Division on Enforcement Measures and an Atomic Energy Commission Group), Economic Affairs (including Divisions of Statistics, of Economic Stability and Employment, of Economic Reconstruction, of Economic Development, and on Fiscal Matters), Social Affairs (including Divisions of Human Rights, of Demography, of Social Activities, of Narcotic Drugs, of Education, Science and Culture, and of Public Health), Trusteeship and Information from Non Self Governing Territories, Public Information, Legal Matters (including Divisions of General Legal Problems, for the Development and Codification of International Law, and of Immunities and Registration of Treaties), Conferences and General Services (including the Bureau of Technical Services of the United Nations), and Administrative and Financial Services (including Bureaux concerned with questions relating to the Budget and Personnel)

[2] *Records of the First Assembly*, First Session, pp 665-672 And see *ibid*, pp 674 677, for the provisional staff regulations See also *ibid*, p 172, on the setting up of an International Civil Service Commission And see, generally, Ranshofen-Wertheimer, *The International Secretariat* (1945), and Jenks in *Public Administration Review*, 3 (1943), pp 93-104 See also Purves, *The Internal Administration of an International Secretariat*, (1945) In view of the

Centralisation and Co-ordination of International Administration.

§ 168r The Charter envisages the United Nations as an agency for the centralisation and co-ordination of international administration It lays down that the various specialised agencies of international administration in the fields of economics, culture, education, health, and related matters shall be brought into relationship with the United Nations by means of agreements concluded between them and the Economic and Social Council (Articles 57, 63) [1] Provision is made for the participation of the specialised agencies, without vote, in the deliberations of the Economic and Social Council and of its commissions, and for its representatives to take part in the deliberations of the specialised bodies (Article 70) It is provided that the United Nations shall make recommendations for the co-ordination of the policies and activities of the specialised agencies and that they shall take the initiative in setting up new agencies by means of agreements between the States concerned [2] In general, the specialised agencies are to be accorded full internal autonomy subject to the general supervision, assistance and co-ordinating action of the United Nations Thus the Charter gives the General Assembly the power to examine the administrative budgets of the specialised agencies with a view to making recommendations to them (Article 13 (3)) An early beginning was made for putting these provisions into effect through the

importance of securing adequately trained staff of high quality for the United Nations the Secretary General, in pursuance of a Resolution adopted by the First General Assembly, invited in 1947, representatives of the United Nations and of the specialised agencies to discuss the question of the establishment of an International Civil Service Commission As a result it was proposed to establish an International Personnel Advisory Board charged with the function of improving recruitment of staff by means, *inter alia*, of advice, research and interchange of information on methods of recruitment The Secretary-General has the final decision with regard to termination of appointments, but an Appeals Board has been set up to advise him with regard to appeals against termination of appointments (including termination for disciplinary reasons), disciplinary action, or with regard to complaints alleging non observance of agreed terms of appointment See also the Provisional Regulations for the United Nations Joint Staff Pension Scheme approved by the General Assembly in December 1946 *Journal* No 75, Suppl A 64, Add 1, p 909

[1] But the Charter contemplates such co ordination only with regard to agencies having 'wide international responsibilities' (Article 57), *i e* agencies set up by a considerable number of States

[2] Articles 58 and 59

conclusion of a number of Agreements between the United Nations (acting through the Economic and Social Council) and various Specialised Agencies such as the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation, the Food and Agriculture Organisation, and the International Civil Aviation Organisation [1] In 1947 the Second General Assembly approved Agreements with the World Health Organisation, the Universal Postal Union, the International Telecommunications Union, the International Bank for Reconstruction and Development, and the International Monetary Fund The object of these Agreements is to provide machinery for the co-ordination of the policies and activities of the Specialised Agencies and of the organs of the United Nations Provision is to be made for the transmission of the budgets or proposed budgets of the Specialised Agencies to the General Assembly for the purpose of information and for enabling the General Assembly to make recommendations The Agreements contemplate that eventually the budgets of the Specialised Agencies shall be included within the budget of the United Nations [2] The Agreements provide for reciprocal representation of the United Nations and the Specialised Agencies at their deliberations [3], for the right of the United Nations to make recommendations, for exchange of information, for assistance, on the part of the

[1] The first three entered into force in December 1946, the fourth in May 1947 For the texts of some of these Agreements see *Journal of the Economic and Social Council*, First Year, 1946, No 29, and *Official Records*, First Year, Second Session, 1946, pp 365 *et seq*

[2] See Resolution 81 (1) of the General Assembly of December 14, 1946, on the adoption of 'common fiscal controls and common budgetary, administrative and financial practices' The General Assembly also authorised loans to Specialised Agencies from the Working Capital Fund of the United Nations

[3] Thus, for instance, the Agreement with the Food and Agriculture Organisation provides that representatives of the latter shall be invited to the meetings of the Economic and Social Council (and its committees) and of the Trusteeship Council and to participate in their deliberations, without vote They shall also be invited to the meetings of the General Assembly for the purpose of consultation and to participate, without vote, in the discussions of its main committees Representatives of the United Nations shall be invited to the meetings of the Conference of the Food and Agriculture Organisation and to the meetings of its other organs to participate, without vote, in the deliberations of these bodies On the Specialised Agencies generally see Pollaczek in *A J*, 40 (1946), pp 592 619, Bolles in *Foreign Policy Reports*, 21 (1945), p 246, Plumer in *Temple University Law Quarterly*, 19 (1946), p 296, Blau in *R G*, 51 (1947), pp 155-171

Agencies, to the Security Council and the Trusteeship Council, and for consultation and co-operation in the matter of recruitment of personnel

Revision of and Amendments to the Charter

§ 168s. The question of the revision of and amendments to the Charter constituted one of the most difficult problems confronting the States participating in the Conference at San Francisco It was widely felt (*a*) that provision must be made for amending the Charter in the light of experience and of the expanding needs of the organised international society, and (*b*) that there should be no possibility of such amendment being frustrated by the dissent of one Great Power The latter view did not prevail Article 108 of the Charter provides that amendments to the Charter shall come into force when adopted by a vote of two-thirds of the members of the General Assembly and ratified by two-thirds of the members of the United Nations including all the permanent members of the Security Council

At the same time the Charter lays down that a Conference for reviewing the Charter may be held at any time following an affirmative vote of two-thirds of the General Assembly and any seven members of the Security Council, and that if such Conference has not been held before the tenth annual session of the General Assembly, a proposal to hold it should be put on the agenda of the Assembly and the Conference held if so decided by a majority of the General Assembly and by any seven members of the Security Council [1] However, any amendment of the Charter adopted by the required majority of two-thirds must be ratified, if it is to be effective, by two-thirds of the members of the United Nations including all the permanent members of the Security Council It is clear that the right of one Great Power to prevent a valid amendment is one of the unsatisfactory features of the Charter In the event of a persistent abuse of that right in matters of fundamental importance other members of the United Nations would be faced, in the last resort,[2] with the alternative either of acquiescing in the

[1] Article 109

[2] But only in the last resort For the generality and elasticity of some of the principal provisions of the Charter leave room for mitigating the consequences of any abusive exercise of rights See above, p 393, with regard to Article 27

frustration of changes which they deem to be essential to the United Nations or of exercising their right of withdrawal with a view to assisting in setting up a new international organisation [1]

[1] See above, § 168*d* The absence in the Charter of a satisfactory procedure of legal change expresses itself even more conspicuously in the failure of the Charter to provide direct machinery for changes in International Law generally There is absent from the Charter any express reference, such as is found in Article 19 of the Covenant of the League of Nations (see above, § 167*o*), to any competence of the United Nations and its organs to consider and recommend changes in treaties and situations which require revision on the ground that they endanger international peace or for any other reason The nearest approximation to a grant of such competence is represented by Article 14 of the Charter in which the Assembly is given the power to 'recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations' It was generally recognised when the Charter was framed that the words 'any situation, regardless of origin' include treaties, but there was a disinclination to make an explicit reference to treaties in order not to identify the United Nations too closely with the problem of the revision of the forthcoming peace settlements In the period between the two World Wars the absence in the Covenant of the League of Nations of effective provisions for peaceful change was regarded by many as a conspicuous source of political and moral weakness of the League It is believed that the defect was more fundamental than that inherent in any identification of the organised society of States with the cause of the victors and the perpetuation of the results of their victory It is probable that effective machinery for changes in the existing law is of the essence of the normal existence and of the development of a society under the rule of law For this reason there is room for the view that the provision of some effective machinery for amending International Law, including treaties, must constitute one of the main objects of the revision of the Charter as contemplated in Article 109 See above, § 167*o*, and below, p 840, for the literature on the peaceful revision of International Law

PART II

THE OBJECTS OF THE LAW OF NATIONS

CHAPTER 1

STATE TERRITORY

I

ON STATE TERRITORY IN GENERAL

Vattel, II §§ 79-83—Hall, § 30—Westlake, I pp 86 90—Lawrence, §§ 71-73 —Phillimore, I §§ 150-154—Twiss, I §§ 140 144—Halleck, I pp 156-163—Taylor, § 217—Wheaton, §§ 161-163—Moore, I § 125—Hershey, §§ 159, 160 — Bluntschli, § 277 — Hartmann, § 58 — Holtzendorff in *Holtzendorff*, II pp 225-232—Gareis, § 18—Liszt, § 15, I —Ullmann, § 86—Heffter, §§ 65 68—Hatschek, pp 150 154—Kohler, §§ 32-35—Fauchille, §§ 482 (1) 482 (5), 484 (1) 485—Despagnet, §§ 374 377—Pradier-Fodéré, II § 612—Mérignhac, II pp 356, 366—Nys, I pp 436 445—Rivier, I pp 135-142—Calvo, I §§ 260 262—Gemma, pp 180 183—Cruchaga, §§ 413 418—Fiore, I §§ 522 530—Martens, I § 88—De Louter, I pp 316-320—Bustamante, pp 277-291—Balladore Palliere, pp 391-396 —Hold Ferneck, II pp 48 55—Del Bon, *Proprietà territoriale degli Stati* (1867)—Fricker, *Vom Staatsgebiet* (1867)—Ghirardini, *La sovranità territoriale nel diritto internazionale* (1913)—Hamel, *Das Wesen des Staatsgebietes* (1933) (in particular, pp 284 *et seq*)—Schade, *Wesen und Umfang des Staatsgebietes* (1934)—Sereni, *La rappresentanza nel diritto internazionale* (1936), pp 256 *et seq* —Verdross, pp 177 179, 183 186, and in *Z I* , 37 (1927), pp 293 305—Henrich, *Theorie des Staatsgebietes* (1922), pp 1 54—Donati, *Stato e territorio* (1924)—Giese in *Z V* , 11 (1918 1920), pp 461 495 —Heinrich, *ibid* , 13 (1926), pp 28 63, 184 232, 325 352—Schoenborn in *Hague Recueil*, vol 30 (1929) (V), pp 91-134—Hostie, *ibid* , 40 (1930) (II), pp 440 449—Tachi in *R G* , 38 (1931), pp 406 419—Kelsen in *Hague Recueil*, vol 42 (1932) (IV), pp 204 220—Strupp, *ibid* , vol 47 (1934) (I), pp 540-548—Prager in *Z ö R* , 14 (1934), pp 611-633—Monaco in *Rivista*, 26 (1934), pp 289 320, 461-502—Lauterpacht in *Hague Recueil*, vol 62 (1937) (IV), pp 318-326

Conception of State Territory

§ 169 State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Vatican City, the Principality of Monaco, the Republic of San Marino, or the Principality of Liechtenstein A wandering tribe, although it has a Government

and is otherwise organised, is not a State before it has settled down on a territory of its own [1]

State territory is also named territorial property of a State Yet it must be borne in mind that territorial property is a term of Public Law, and must not be confounded with private property The territory of a State is not the property of the monarch, or of the Government, or even of the people of a State, it is the country which is subjected to the territorial supremacy or the *imperium* of a State This distinction has, however, in former centuries not been sharply drawn In spite of the *dictum* of Seneca, *Omnia rex imperio possidet, singuli dominio*, the *imperium* of the monarch and the State over the State territory has very often been identified with private property of the monarch or the State But with the disappearance of absolutism this identification has likewise disappeared It is for this reason that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory at will without the consent of Parliament [2]

It must, further, be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State The territory is the public property of the State, and not of a nation in the sense of a race The State community may consist of different nations, as, for instance, the British or the Swiss

Importance of State Territory

§ 170 The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority State territory is an object of the Law of Nations, because the latter recognises the supreme authority of every State within its territory Whatever person or thing is on, or enters into, that territory, is *ipso facto* subjected to the supreme authority of the State according to the old rules, *Quidquid est in territorio, est etiam de territorio* and *Qui in territorio meo est, etiam meus*

[1] See above, § 64

[2] In Great Britain there is a strong tendency in favour of obtaining Parliamentary approval by means of a statute, for instance, the Anglo-German Agreement Act, 1890 (as to Heligoland), the Anglo French Convention Act, 1904, and the Anglo-Italian Treaty (East African Territories) Act, 1925, and see McNair in *B Y*, 1928, pp 59 68

subditus est No foreign authority has any power within the boundaries of the home territory, although foreign sovereigns and diplomatic envoys enjoy the so-called privilege of exterritoriality, and although the Law of Nations does, and international treaties may, restrict [1] the home authority in many points in the exercise of its sovereignty

Divisibility of Territorial Sovereignty

§ 171 The supreme authority which a State exercises over its territory would seem to suggest that on one and the same territory there can exist one full sovereign State only and that two or more full sovereign States on one and the same territory are an impossibility On the other hand, it is difficult to ignore the fact that, as shown above,[2] sovereignty may in practice be divisible This explains the exceptions—some real and some apparent—to the rule of the exclusiveness of a single sovereignty over the same territory

(1) The first and perhaps only true exception to that rule is the case of the so-called *condominium* In this case a piece of territory consisting of land or water is under the *joint tenancy* of two or more States, these several States exercising sovereignty conjointly over it, and over the individuals living thereon [3] Thus Schleswig-Holstein and Lauenburg from 1864 till 1866 were under the *condominium* of Austria and Prussia,[4] since 1898 the Sudan has been under the *condominium* of Great Britain and Egypt,[5] since 1914 the New Hebrides have been under a *condominium* of Great

[1] See above, §§ 126 128

[2] See above, §§ 66 69

[3] As to Tangier see above, § 95

[4] Moresnet (Kelmis), on the frontier of Belgium and Germany, was formerly under the *condominium* of these two States because they could not come to an agreement regarding the interpretation of a boundary treaty of 1815 between the Netherlands and Prussia, but by Article 32 of the Treaty of Peace of 1919 with Germany, Germany recognised the full sovereignty of Belgium over this territory See Schröder, *Das grenzstreitige Gebiet von Moresnet* (1902)

[5] See Sarkissian, *Le Soudan égyptien* (1913) See also the agreement between Great Britain and Egypt of January 19, 1899, signed at Cairo, in Martens, *N R G*, 3rd ser, IV p 791 *British and Foreign State Papers*, vol XCI p 19 And see Card, *Situation internationale du Soudan égyptien* (1932), O'Rourke, *The Juristic Status of Egypt and the Sudan* (1935) See also the Treaty of Alliance between Great Britain and Egypt of 1936—Treaty Series, No 6 (1937), Cmd 5360—in which the question of sovereignty over the Sudan is expressly reserved According to the Annex to Article 11 of the Treaty the participation of the Sudan in international conventions is effected by joint action of Great Britain and Egypt See above, § 91

Britain and France,[1] and since 1939 the Islands of Canton and Endenbury, which are of importance for the maintenance of aviation routes over the Pacific, have been under the 'joint control' of Great Britain and the United States.[2] In some cases that arrangement is adopted as a provisional measure with regard to territories whose fate is to be decided later on.[3] Until a final settlement, the interested States do not each exercise an individual sovereignty over these territories, but they agree upon a joint administration under their conjoint sovereignty. Thus, for instance, in the Peace Treaties of 1919 the Central Powers ceded certain territories to the Allied and Associated Powers which until the final disposition of these territories held them under their joint sovereignty.[4] But in other cases, like those of the Sudan and the New Hebrides, there is in law a division of sovereignty. When on June 5, 1945, Great Britain, the United States, Russia and France, in a 'Declaration regarding the defeat

[1] By a treaty of August 6, 1914 (Martens, *N R G*, 3rd ser., xii pp 198-240) While the authority exercised over the native population is a joint sovereignty, each of the two States exercises separate jurisdiction over its own subjects. See Brunet, *Le Régime international des Nouvelles-Hébrides* (1908), Grignon Dumoulin, *Le Condominium des Nouvelles-Hébrides* (1928), Politis in *R G*, 14 (1907), pp 689-759, and Fauchille, § 187, as to the régime before 1914. The existing arrangements are contained in the following documents in the Treaty Series: No 3 of 1908, No 7 of 1922, No 2 of 1923, Nos 8 and 28 of 1927. See also the Exchange of Notes of January 31, 1935, Treaty Series, No 7 (1935), Cmd 4852. And see above, §§ 94, 95, as to Tangier, which constitutes a curious combination of a protectorate and a *condominium*. For an example of joint use as distinguished from a *condominium* proper see the Convention for the Trans-Isthmian Highway of March 2, 1936 (ratified in 1939) between the United States and Panama. Article 7 of the Convention provides that, subject to the laws relating to vehicular traffic in force in their respective jurisdictions, the two countries shall equally enjoy the use of the Trans-Isthmian Highway. *A J*, 34 (1940), Suppl., p 161. And see the Agreement of August 1945 between China and Soviet Russia providing that the 'Chinese Chungchun Railway' shall become the common property of the two States and shall be operated by them jointly. After thirty years the complete ownership of the railway is to pass to China. For the text of the Agreement see *Bulletin of the State Department*, 14 (1946), p 207.

[2] See the Agreement between the United States and Great Britain of April 6, 1939. *L N T S*, vol 196, p 344. The Agreement provides for a joint administration of the islands, for a period of fifty years, by a United States and a British official. See Reeves in *A J*, 33 (1939), pp 521-526.

[3] Existing and former examples of *condominium* are discussed by Kunz, *Staatenverbindungen* (1929), pp 278-282, and Baker Fox in *A J*, 39 (1945), pp 486-503. See also Tullio, *Il Condominium nel Diritto pubblico internazionale* (1910), and Pilotti in *R I (Geneva)*, 19 (1941), pp 284-306. And see Hunter Miller, *San Juan Archipelago Study of the Joint Occupation of San Juan Island* (1943).

[4] See *e g* Article 99 of the Treaty of Versailles with regard to Memel, Articles 53 and 74 of the Treaty of Trianon with regard to Fiume.

of Germany,' assumed supreme authority over that country, they provided an example of joint exercise of sovereignty [1] The partial responsibility of the Security Council of the United Nations for the administration of the Free Territory of Trieste, set up in 1946,[2] is in the same category

(2) In other cases one State actually exercises sovereignty which is, in law, vested elsewhere This is, for instance, the case of the administration of a piece of territory by a foreign Power, with the consent of the owner-State Thus, from 1878 to 1914 the Turkish island of Cyprus was under British administration [3], and the Turkish provinces of Bosnia and Herzegovina were from 1878 to 1908 under the administration of Austria-Hungary [4] In these cases a cession of pieces of territory had for all practical purposes taken place, although in law they still belonged to the former owner-State Such nominal sovereignty is not totally devoid of practical consequences Thus in the *Case concerning the Lighthouses in Crete and Samos* the Permanent Court of International Justice held, on October 8, 1937, that notwithstanding the very wide autonomy conceded by Turkey to the islands of Crete and Samos these territories must be regarded as having been under Turkish sovereignty in 1913, with the result that Turkey could properly grant or renew concessions with regard to these islands [5]

[1] See above, § 101 (1945) Cmd 6648 See Kelsen in *A J*, 38 (1944), pp 689 694, for a suggestion of a *condominium* proper over Germany pending the establishment of a democratic German State And see below, § 237*a*

[2] See Gervais in *R G*, 51 (1947), pp 134 154

[3] Cyprus was annexed by Great Britain on November 5, 1914 (see *R G*, 21 (1914), pp 510 512), and the annexation was recognised by Turkey in Article 20 of the Treaty of Lausanne of 1923 See Headlam-Morley, *Studies in Diplomatic History* (1929), pp 193-211, Toynbee, *Survey*, 1931, pp 354 394, Dendias in *R I* (*Paris*), 12 (1933), pp 130 159 and the same, *La question cypriote* (1934) For an analysis of the nature of the British Administration of Cyprus see the decision of the Anglo-Turkish Mixed Arbitral Tribunal of December 16, 1929, in *Parounak* v *Turkish Government* The Tribunal held that on August 29, 1914, Cyprus was a British protectorate in the sense that it fell within the designation of a country 'under the protection' of Great Britain in the meaning of Article 64 of the Treaty of Lausanne *Annual Digest*, 1929 1930, Case No 11

[4] The Turkish island of Ada-Kalé, in the river Danube, was under the administration of Austria-Hungary from 1878 to 1913 See Blociszewski in *R G*, 21 (1914), pp 379 390

[5] *P C I J*, Series A/B, No 71 In a Dissenting Opinion Judge Hudson said with regard to this point 'A juristic conception must not be stretched to the breaking point, and a ghost of hollow sovereignty cannot be permitted to obscure the realities of this situation' (at p 127) But see Lauterpacht in *Hague Recueil*, 62 (1937) (IV), pp 325-326, for an analysis of the position on the lines suggested in the Judgment of the Court

(3) The third case is that of a piece of territory leased or pledged by the owner-State to a foreign Power Thus, China in 1898 leased [1] the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang-chou Wan to France,[2] and Port Arthur to Russia [3] Thus, further, in 1803 Sweden pledged the town of Wismar [4] to the Grand Duchy of Mecklenburg-Schwerin, and the Republic of Genoa in 1768 pledged the island of Corsica to France Some of these cases comprise, for most practical purposes, cessions of pieces of territory, but in strict law they remain the property of the leasing State [5] Such property is not a mere fiction, as

[1] See below, § 216 By Article 156 of the Treaty of Peace of 1919 with Germany, Germany renounced all her rights under this lease in favour of Japan For the history and termination, in 1922, of the Kiaochow lease see Godshall, *Tsingtao under Three Flags* (1929)

[2] At the Washington Conference of 1921 1922 Japan, Great Britain, and France agreed on certain conditions to restore Kiaochow, Wei-Hai Wei, and Kuang chou Wan to China see Cmd 1627 of 1922 and Fauchille, § 557 (15) See also below, n 5

[3] Russia in 1905, by the Peace Treaty of Portsmouth, transferred her lease to Japan By an Agreement of August 14, 1945, between China and Soviet Russia the two parties agreed, for a period of thirty years, to a joint use of the port The civil administration of the port is to be appointed and dismissed by China by arrangement with the Soviet Military Command in the area The civil administration is under a duty to satisfy the suggestions of the Soviet Military Command made for the purpose of ensuring security and defence For the text of the Agreement see *Bulletin of State Department*, 14 (1946), p 206

[4] This transaction took place for the sum of 1,250,000 thaler, on condition that Sweden, after the lapse of 100 years, should be entitled to take back the town of Wismar on repayment of the money, with 5 per cent interest per annum Sweden in 1903—see Martens, *N R G*, 2nd ser, 31, pp 572 and 574—formally waived her right to retake the town, see Schmidt, *Der schwedisch mecklenburgische Pfandvertrag über Stadt und Herrschaft Wismar* (1901)

[5] Distinguish, however, (1) the somewhat peculiar leases granted in perpetuity by China to Great Britain between 1851 and 1861 in seven British Concessions in order to enable merchants in these concessions to own land and houses for the purpose of trade and residence In the case of one concession, these leases were at once transferred to the lot-holders, in the other cases the British Government became the ground landlord, and in 1927 it proposed to surrender its reversionary rights to the lot-holders (see Treasury Minute of December 7, 1927, Cmd 2994) See the Exchange of Notes of October 1929 between Great Britain and China providing for the return of the British Concession at Chinkiang, the dissolution of the British Municipal Administration there, and the substitution of Chinese deeds of perpetual lease for the lease in perpetuity under the Sino British Agreement of 1861 Treaty Series, No 3 (1930), Cmd 3469, and (2) the genuine international lease of which the following instances may be mentioned Great Britain to Italy of land at Kismayu in Kenya for the purpose of erecting a bonded warehouse and other buildings (see *Hertslet's Commercial Treaties*, 24, pp 687 690), Germany to Czecho-Slovakia by Article 363 of the Treaty of Versailles of 1919, the

some writers [1] maintain, for it is possible for the lease to come to an end by expiration of time or by rescission Thus the lease, granted in 1894 by Great Britain to the former Congo Free State, of the so-called Lado Enclave, was rescinded [2] in 1906,[3] and the British lease of Wei-Hai-Wei was rescinded in 1930 [4] On the other hand, the leases of small pieces of territory granted in 1941 by Great Britain to the United States for the use and operation of naval and

Government of India to France re garding the French Loge at Balasore on April 26, 1920 (*Hertslet's Commercial Treaties*, 30, p 227), Italy to Czecho Slovakia of an area in the port of Trieste on March 23, 1921 (*L N T S*, 32, p 251), and see Schonborn in *Z V*, 7 (1913), pp 438 445 and Váli, *Servitudes of International Law* (1933), pp 128 136 And see Villamovitch, *Zône libre Serbe à Salonique* (1926) The characteristic of the leases mentioned in this note is that they do not transfer any exercise of sovereignty As to foreign concessions in China generally, and in particular that of Shanghai, see Toynbee, *Survey*, 1927, pp 369 381, 394 399, and 1929, pp 322-344, Escarra, *La Chine et le droit international* (1931), pp 80 147, the same in *Répertoire*, iii pp 420 427, and in *Hague Recueil*, vol 27 (1929) (ii), pp 1 134, *Report of the Hon Mr Justice Richard Feetham to the Shanghai Municipal Council*, 2 vols (1931), Des Courtils, *La concession française de Chang hai* (1934), Dennis in *A S Proceedings*, 1930, pp 194 200, Pratt in *B Y*, 19 (1938), pp 1 18 As to the use of the international settlement as a base of Japanese operations against China in 1932 see Toynbee, *Survey*, 1932, pp 495 502 For the Agreement with China of February 17, 1930, relating to Chinese Courts in the International Settlement at Shanghai and providing for the establishment in the International Settlement at Shanghai of a Chinese District Court and a Branch High Court to try Chinese offenders in accordance with Chinese law see Treaty Series, No 20 (1930), Cmd 3563 It was held in *In re Ning Yi-Ching and Others* that as the British concession at Tientsin, in which Great Britain exercised certain jurisdictional rights, was part of Chinese territory the writ of habeas corpus was not available to prevent some Chinese prisoners from being handed over to the Japanese authorities (1939) 56 *T L R* 3 As to the Shanghai settlement see Fraser in *J C L*, 3rd ser, vol 21 (1939), pp 38 53 In Article 4 of the Treaty with China of January 11, 1941, for the relinquishment of extra territorial rights in China, Great Britain agreed to the cessation of the special rights accorded to her in the settlements at Shanghai and Amoy, as well as with regard to the concessions of Tientsin and Canton, and to the return of these areas to Chinese administration Cmd 6456 (1943)

[1] See, for instance, Perrinjaquet in *R G*, 16 (1909), pp 349-367 For a full discussion see Lauterpacht, *Analogies*, pp 181 190 See also Yang, *Les territoires à bail en Chine* (1929), Young, *The International Legal Status of the Kwangtung Leased Territory* (1931)

[2] By Article 1 of the Treaty of London of May 9, 1906, see Martens, *N R G*, 2nd ser, 35, p 454

[3] Similarly the leases of the German concessions at Hankow and Tientsin, and the Austro Hungarian concession at Tientsin, were abrogated by Article 132 of the Treaty of Peace with Germany and Article 116 of the Treaty of Peace with Austria, and the areas were restored to the full sovereignty of China

[4] See Convention of April 18, 1930, providing for the return of Wei-Hai-Wei and the abrogation of the Convention of 1898 Treaty Series, No 50 (1930), Cmd 3741 Wei-Hai-Wei was formally restored to China on October 1, 1930 See Toynbee, *Survey*, 1930, pp 351-354

air bases in Newfoundland, Bermuda, Jamaica, St Lucia, Antigua, Trinidad and British Guiana for a term of ninety-nine years [1] did not involve, apart from a rigidly limited concession of certain jurisdictional rights,[2] any surrender either of sovereignty or of the exercise thereof [3]

(4) The fourth case is that of a piece of territory of which the use, occupation, and control are in perpetuity granted by the owner-State to another State, to the exclusion of the exercise of any sovereign rights over the territory concerned on the part of the grantor In this way [4] the Republic of Panama transferred, in 1903, to the United States of America a ten-mile-wide strip of territory for the purpose of constructing, administering, and defending the so-called Panama Canal In this case also the grantor retains in law the property in the territory, although only the grantee exercises sovereignty there [5]

(5) The fifth case is that of the territory of a Federal State. As a Federal State is considered [6] itself a State side

[1] See Exchange of Notes of September 2, 1940, between the British Ambassador and the United States Secretary of State in connection with the transfer of fifty destroyers to Great Britain *A J*, 34 (1940), Suppl, p 184 For the Agreement of March 27, 1941, embodying the terms of the leases see *ibid*, 35 (1941), Suppl, pp 134 159

[2] These include the jurisdiction of United States courts with regard to treason, sabotage, espionage and similar offences committed within the leased area (Art 4), and the provision that no arrest shall be made and no process served within the leased area without the permission of the United States authorities (Art 6) However, in case of refusal of permission they must, except with regard to the offences referred to in Article 4 above, surrender the person whose arrest is sought to the authorities of the territory

[3] Thus, for instance, the Government of the territory in question is responsible for enacting legislation necessary to ensure the safety and security of the United States naval and air bases See also Wilson in *A J*, 34 (1940), p 703

[4] See below, § 184, and Boyd in *R G*, 17 (1910), pp 614-624

[5] See Woolsey in *A J*, 20 (1926) pp 117 124, 37 (1943), pp 482 489 And see to the same effect the judgment of the Supreme Court of Panama in *Republic of Panama* v *Schwartzfiger Annual Digest*, 1927-1928, Case No 114 In *Luckenbach Steamship Co* v *United States* the Supreme Court held, in January 1930, that the ports of the Panama Canal Zone were foreign ports within the meaning of a United States statute 280 U S 173, *Annual Digest*, 1929-1930, Case No 50 And see *ibid*, Case No 51, for a decision of the Panamanian Supreme Court of February 17, 1930, to the effect that the Canal Zone was not foreign territory in relation to Panama (*In re Bartlett*), *In re Burriel*, by the same Court, *Annual Digest*, 1931-1932, Case No 53 See also below, § 184

As to leases granted to the United States in Cuba for the lease of lands for coaling and naval stations see the Treaty of February 1903 *A J*, 4 (1910), Suppl, p 177 The Treaty of 1934, while abrogating other provisions of the Treaty of 1903, left intact the stipulations as to leases *A J*, 28 (1934), Suppl, p 97

[6] See above, § 89

by side with its single member-States, the fact is apparent that the different territories of the single member-States are at the same time collectively the territory of the Federal State This is the consequence of the fact that sovereignty is divided between a Federal State and its member-States

(6) The case of mandated areas has already been considered [1] Here we find a State exercising most of the attributes of sovereignty over territory which is not its own [2] The position is essentially the same with regard to trust territories [3] Moreover, the Charter of the United Nations provides for the possibility of joint trusteeship by several States—a case of joint exercise of divided sovereignty [4]

II

THE DIFFERENT PARTS OF STATE TERRITORY

§ 172 The territory of a State consists in the first place of the land within its boundaries To this must be added, in the case of a State with a sea coast, certain waters which are within or adjacent to its land boundaries, and these waters are of two kinds—national and territorial (1) *National Waters* These consist of the waters in its lakes, in its canals, in its rivers together with their mouths,[5] in its ports

[1] See above, §§ 94c 94*f*

[2] The German territory of the Saar constituted for a time another example of the exercise of sovereignty in foreign territory By Article 45 of the Treaty of Versailles Germany 'renounced in favour of the League of Nations, in the capacity of trustee, the government of the territory' The League exercised this trust through a Governing Commission of five persons appointed by the Council of the League The inhabitants retained their German nationality In 1934, as the result of a plebiscite held in conformity with the provisions of the Treaty, the Government of the territory was restored to Germany See Fauchille, § 431, Schücking und Wehberg, pp 120, 121, Franck in *Archiv des öffentliches Rechts*, 43 (1922), pp 1 49, Osborne, *The Saar Question* (1923), Bisschop, *The Saar Controversy* (1924), Wehberg, *Saargebiet* (1924), Redslob in *R I (Geneva)*, 3 (1925), pp 283 302, Coursier, *Le statut international de la Sarre* (1925), Russell, *The International Government of the Saar* (1926), Andres, *Grundlagen des Rechts im Saargebiet* (1927), Luttger in *Z V*, 14 (1927), pp 215 236 As to the relation of the Saar Basin to Germany in that period see a series of judgments in *Annual Digest* from 1923 to 1930, Stumm, *Das Saargebiet des Friedensvertrages von Versailles* (1928), Biesel, *Die volkerrechtliche Stellung des Saargebietes* (1929), and as to the plebiscite in 1934 see below, § 219

[3] See above, § 94*n*

[4] See above, § 94*j*

[5] See below, § 176 *Rex* v *Kizo Furazawa* (1930), 42, *British Columbia Reports*, 548 As to the line of demarcation between national waters and territorial waters see Codification Conference, *Bases of Discussion*, II pp 61-63

and harbours, and in some of its gulfs and bays. These different kinds of national, or, as they are sometimes called, internal or inland, waters will be examined in due course, but they must be distinguished at once from territorial waters [1] National waters are, in fact, legally though not physically, equivalent to national land (ii) *Territorial Waters* These consist of the waters contained in a certain zone or belt, called the maritime or marginal belt, which surrounds a State and thus includes a part of the waters in some of its bays, gulfs, and straits

The distinction between national and territorial waters is important from the point of view of International Law, (1) because in territorial waters foreign States can claim for their ships a certain right of passage which is discussed below, whereas in national waters no such right exists [2], (2) because in the case of gulfs and bays which are admitted to be national, the base line for the measurement of territorial waters is the line where the waters of the gulf or

[1] This distinction is made *eo nomine* in the case of bays by Hurst in *B Y*, 1922 1923, at p 46, and (also in the case of bays) in the final draft convention contained in the League Codification Committee's report, cited below, § 185 The distinction is widely recognised, indirectly and by implication, in practice, and deserves general recognition as a matter of theory As to ports and bays, contrast Hyde, 1 §§ 221 and 226, as to ports see Fauchille, § 517 (1), more generally see the valuable article of Charteris in *B Y*, 1920-1921, at pp 47, 62 65, Rivier, 1 p 153, as to 'golfes et baies, rades, havres et ports, embouchures des fleuves', Lapradelle in *R G*, 5 (1898), at p 265, Article 2 of the Resolutions of the Institute of International Law concerning the Legal Status of Ships and their Crews in Foreign Ports in *Annuaire*, 17 (1898), p 273 (cited by Charteris, *op cit*), Sir Robert Phillimore in *Reg* v *Keyn* (1876), 2 Ex D at p 82 (cited by Charteris, *op cit*), and particularly at foot of p 81 and top of p 82, Twiss, § 180, suggests the use of the terms 'maritime territory' for national waters and 'jurisdictional waters' for the maritime belt That the distinction is recognised by the English common law is, it is believed, clear from a comparison of *Reg* v *Cunningham* (1859), 3 Bell's Crown Cases 86, where the whole of the Bristol Channel was stated to be within the bodies of the counties of Glamorgan and Somerset, and *Reg* v *Keyn* (1876), 2 Ex D 65 (see above, § 25), where, if the place of the collision (about two and a half miles from Dover beach) could have been said to be within the body of the county of Kent, no difficulty would have arisen in finding a court (not necessarily the Central Criminal Court) with jurisdiction to try the offender *The Fagernes*, [1927] P 311, while reversing *Reg* v *Cunningham* as to the status of the Bristol Channel, does not affect the principle for which the latter decision is cited above see below § 191

[2] See Hurst in *B Y*, 1922 1923, at p 54, Sir Robert Phillimore in *Reg* v *Keyn* (1876), 2 Ex D at foot of p 81 and top of p 82 See also Hyde, 1 § 187 (access to ports), and Hall, § 42 (n 3) And see Gidel, i pp 44 62, for a general discussion

bay cease to be national [1]; and (3) it is also possible that the Municipal Law of certain States draws a distinction in the matter of jurisdiction [2]

Fictional Parts of Territory

§ 172*a* In contradistinction to these real parts of State territory there are some things that are either in every respect or for some purposes treated as though they were territorial parts of a State They are fictional and in a sense only parts of the territory Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point treated as though they were floating parts of their home State [3] And the houses in which foreign diplomatic envoys have their official residence are in many points treated as though they were parts of the home States of the respective envoys [4] Again, merchantmen on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail [5]

Territorial Subsoil

§ 173 The subsoil beneath the territorial land and water [6] is of importance on account of telegraph and telephone wires and the like, and also on account of the working of mines and of the building of tunnels The territorial subsoil is not a special part of territory, although this is frequently asserted But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface

Territorial Atmosphere

§ 174 The space of the territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of the greatest importance on account of wires for telegraphs, telephones, electric traction, and the like, on account of wireless telegraphy, and, above all, on account of aerial navigation.

(1) Nothing need be said concerning wires for telegraphs

[1] See Hurst, *op cit*, and Article 2 of the North Sea Fisheries Convention of 1882 as an instance of the application of this principle, and literature, cited below, § 191, p 458, n 1

[2] See p 416 (n 1) above as to *Reg* v *Keyn*

[3] See below, § 450

[4] See below, § 390

[5] See below, § 264, and, for the *Lotus* case before the Permanent Court in 1927, above, § 147*a*

[6] See Schoenborn in *Hague Recueil*, vol 30 (1929) (5), pp 145-151 As regards the subsoil of the open sea, see below, §§ 287*c* and 287*d*

and the like, except that obviously the territorial State can prevent neighbouring States from making use of its territorial atmosphere for such wires

(2) As regards wireless telegraphy,[1] the International Radiographic Conventions signed at London on July 5, 1912, and at Washington on November 25, 1927,[2] and the International Telecommunication Convention signed at Cairo on December 9, 1932,[3] contain no stipulation respecting the general question whether the territorial State is compelled to allow the passage over its territory of waves emanating from a foreign wireless telegraphy station No such compulsion exists according to customary International Law Accordingly, subject, possibly, to the principle prohibiting the abuse of rights,[4] the territorial State can prevent the passage of such waves [5] over its territory

(3) But with regard to aerial navigation the space of the territorial atmosphere is of particular importance, and will be considered in §§ 197*a*-197*e*

Inalienability of Parts of Territory

§ 175 It should be mentioned that not every part of territory is alienable by the owner-State For it is evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere Only pieces of land together with the appurtenant territorial waters are alienable parts of territory [6] There is, however, one exception to this, since boundary waters [7] may wholly belong to one of the riparian States, and may therefore be transferred through cession from one riparian

[1] For literature see below, Appendix A

[2] See below, §§ 287*a*, 287*b*, and Appendix A

[3] See below, § 197*f*

[4] See above, § 155*aa* And see below, § 178*a*

[5] See *Annuaire*, 21 (1906), pp 327 329 However, the Institute of International Law in August and September 1927 discussed Radiotelegraphic Communication at its meeting at Lausanne (see Scott in *A J*, 21 (1927), pp 716 736), and adopted a resolution to the effect that a State 'does not have the right to prevent the simple passage of wave lengths over its territory' See also Saudemont, *Radiophonie et le droit* (1927), Mance, *International Telecommunications* (1943), Cereti in *Rivista*, 3rd ser, 5 (1926), pp 1-20, Cavaglieri in *R I* (*Paris*), 2 (1928), pp 860 872, and Report of Committee in *International Law Association's Thirty fourth Report* (1927), pp 469-480 See also writers referred to below, § 197*f*

[6] See below, § 185 But by treaty obligation a part of territory may be made inalienable, or only alienable *sub modo*, see below, § 213 (n)

[7] See below, § 199

State to the other without the bank itself But it is obvious that this is only an apparent, not a real, exception to the rule that territorial waters are inseparable appurtenances of the land For boundary waters that are ceded to the other riparian State remain an appurtenance of land, although they are now an appurtenance of the one bank only

III

RIVERS

Grotius, II c 2, §§ 11-15—Pufendorf, III c 3, § 8—Vattel, II §§ 117, 128, 129, 134—Hall, § 39—Westlake, I pp 144 163—Lawrence, § 92—Phillimore, I §§ 155 171—Twiss, I §§ 145 156—Halleck, I pp 182 191—Taylor, §§ 233 241—Walker, § 16—Hershey, §§ 199, 200—Wharton, I § 30—Moore, I §§ 128-132—Wheaton, §§ 192 205—Hyde, I §§ 159 184—Bluntschli, §§ 314, 315—Hackworth, I §§ 84 89—Hartmann, § 58—Heffter, § 77—Caratheodory in *Holtzendorff*, II pp 279 377—Gareis, § 20—Liszt, § 17, II 38—Ullmann, §§ 87, 105—Strupp, *Éléments*, § 10A—Hatschek, pp 180-190—De Louter, I pp 414 456—Fauchille, §§ 520 531 (1)—Despagnet, §§ 419 421—Mérignhac, II pp 605 632—Pradier Fodéré, II §§ 688 755—Nys, I pp 457-471, and II pp 129 163—Rivier, I p 142 and § 14—Calvo, I §§ 302 340—Cruchaga, §§ 454 465—Suarez, §§ 125 130—Fiore, II §§ 755 797, and *Code*, §§ 288 290, and 981 987—Martens, I § 102, II § 57—Keith's Wheaton, pp 385-403—Baty, pp 81-85—Smith, II pp 273 368—Higgins and Colombos, §§ 179 212—Delavaud, *Navigation sur les fleuves internationaux* (1885)—Engelhardt, *Du régime conventionnel des fleuves internationaux* (1879), and *Histoire du droit fluvial conventionnel* (1889)—Vernesco, *Des fleuves en droit international* (1888)—Orban, *Étude sur le droit fluvial international* (1896)—Bergès, *Du régime de navigation des fleuves internationaux* (1902)—Lopez, *Régimen internacional de los Ríos navegables* (1905)—Carlomagno, *El Derecho fluvial internacional* (Buenos Ayres, 1913)—Schulthess, *Das internationale Wasserrecht* (1915)—Kaeckenbeeck, *International Rivers* (1918), and, same title, British Foreign Office Peace Handbook (1920)—Ogilvie, *International Waterways* (1920)—Van Eysinga, *Évolution du droit fluvial international, 1815 1919* (1920), and in *Bibliotheca Visseriana*, II (1924) pp 123 157—Lederle, *Das Recht der internationalen Gewasser* (1920), pp 71 125, 132 233—Dupuis in *Hague Recueil*, 1924, I pp 219-262—Charles de Visscher, *Le droit international des communications* (1924)—Kasama, *La navigation fluviale en droit international* (1928)—Quint, *International Rivierenrecht* (1930), and in *R I*, 3rd ser, 12 (1931), pp 325 340—Triepel, *Internationale Wasserlaufe* (1931)—Vošta, *Mezinarodní reky* (1938)—Mance, *International River and Canal Transport* (1944)—Huber in *Z V*, 1 (1907), pp 29, 159—Hyde in *A J*, 4 (1910), pp 145 155—Vallotton in *R I*, 2nd ser, 15 (1913), pp 271 306—Bousek in *Z V*, 7 (1913), pp 39-55—Wittmaak in *Jahrbuch für Volkerrecht*, I (1913) pp 481 495—Hostie in *R I*, 3rd ser, 2 (1921), pp 532 567, and *ibid*, 4 (1923), pp

246 271—Lederle in *Z V*, 13 (1926), pp 64-76—Hennig in *Z I*, 36 (1926), pp 100 116—League Publication, *Barcelona Conference, Verbatim Records and Texts relating to the Régime of Navigable Waterways of International Concern* (1921)—Corthésy in *Répertoire*, IV pp 55 67—Lederle in *Strupp, Wort*, III pp 869 873—Vallotton d'Erlach in *Annuaire*, 35 (I) (1929), pp 228 401, 37 (1932), pp 67 103, and 38 (1934), pp 167-175—Winiarski in *Hague Recueil*, vol 45 (1933) (III), pp 79 215—Leener *ibid*, vol 55 (1936) (I), pp 34-46—Wehle in *A J*, 40 (1946), pp 100 120

Rivers State Property of Riparian States

§ 176 Theory and practice agree upon the rule that rivers are part of the territory of the riparian State Consequently, (*a*) if a river lies wholly, that is, from its source to its mouth, within the boundaries of one and the same State, such State owns it exclusively [1] As such rivers are under the sway of one State only and exclusively, they are named *national rivers* Thus, all English, Scottish, and Irish rivers are national, and so are, to give some Continental examples, the Seine, Loire, and Garonne, which are French; and the Tiber, which is Italian But many rivers do not run through the land of one and the same State only (*b*) Secondly, there are so-called *boundary rivers*, that is, rivers which separate two different States from each other (*c*) Thirdly, there are rivers which run through several States and are therefore named *not-national rivers* [2] Such rivers are owned by more than one State Boundary rivers belong to the territory of the States they separate, the boundary line,[3] as a rule, running either through the middle of the river or through the middle of the so-called mid-channel of the river And rivers which run through several States belong to the territories of the States concerned, each State owns that part of the river which runs through its territory

(*d*) There is, however, another group of rivers to be mentioned, which comprises all such rivers as are navigable from the open sea, and at the same time either separate or

[1] Including the mouth of the river, the waters in the river and its mouth being national or internal waters (see above, § 142)

[2] The alternative term 'plurinational' (or 'multi-national') has certain merits

[3] See below, § 199, Huber in *Z V*, 1 (1907), pp 29, 159, and Schulthess, *op cit*, pp 8 15 The Treaties of Peace of 1919 with Germany (Article 30), Austria (Article 30), Hungary (Article 30), and Bulgaria (Article 30) provide that in case of boundaries therein defined by a waterway, the terms 'course' and 'channel' signify (*a*) in the case of non navigable rivers, the median line of the waterway or of its principal arm, (*b*) in the case of navigable rivers, the median line of the principal channel

pass through several States between their sources and their mouths These rivers, too, belong to the territories of the different States concerned, but they are nevertheless named *international rivers*, because freedom of navigation in time of peace on all such rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by conventional International Law [1]

Navigation on National, Boundary and not-National Rivers

§ 177 There is no rule of the Law of Nations in existence which grants foreign States the right of admission for their public or private vessels to navigation on national rivers In the absence of commercial or other treaties granting such a right, every State can exclude foreign vessels from its national rivers, or admit them under certain conditions only, such as the payment of dues and the like [2] The teaching of Grotius (II c 2, §§ 10, 12, and 13) that innocent passage through rivers must be granted has not been recognised by the practice of the States, and Bluntschli's assertion (§ 314) that such rivers as are navigable from the open sea must in time of peace be open to vessels of all nations, is at best an anticipation of a future rule of International Law , such a rule does not as yet exist

As regards boundary rivers and not-national rivers running through several States, the riparian States can regulate navigation on such parts of these rivers as they own, and they can certainly exclude vessels of non-riparian States altogether, unless prevented therefrom by virtue of special treaties

Navigation on International Rivers

§ 178 *Historical*—Whereas there is certainly no recognised principle of free navigation on national, boundary, and not-national rivers, a movement for the recognition of free navigation on international rivers set in at the beginning of the nineteenth century [3] Until the French

[1] The distinction made in the text between 'national,' 'boundary,' 'not national,' and 'international' rivers is not made by other writers They class as 'international' all such rivers as are not national Hennig, *op cit*, at p 101, states that the first treaty in which rivers have been described as 'international' is the Treaty of Peace with Germany of 1919, Part XII

[2] As to the jurisdiction over passing ships see Gidel in *Revue critique de droit international*, 29 (1934), pp 16 *et seq* For an interpretation of a conventional provision as to levying dues see *Pigeon River Improvement, Slide and Boom Co* v *Charles W Cox* (1934), S Ct 361, *Z o V*, 4 (1934), pp 690, 691

[3] For a historical sketch see the Advisory Opinion of the Permanent Court on the *European Danube Commission*, Series B, No 14, at pp 38 41

Revolution towards the end of the eighteenth century, the riparian States of such rivers as are now called international rivers could, in the absence of special treaties, exclude foreign vessels altogther from those parts which ran through their territory, or admit them under discretionary conditions Thus, the river Scheldt [1] was wholly shut up in favour of the Netherlands according to Article 14 of the Peace Treaty of Munster of 1648 between the Netherlands and Spain The development of things in the contrary direction begins with a decree of the French Convention, dated November 16, 1792, which opens the rivers Scheldt and Meuse to the vessels of all riparian States But it was not until the Vienna Congress [2] in 1815 that the principle of free navigation on the international rivers of Europe by merchantmen of not only the riparian but of all States was proclaimed [3] The Congress itself gave *theoretical* recog-

[1] There remain outstanding certain difficult questions between Belgium and Holland concerning the Scheldt see Maeterlinck and Bisschop in *Grotius Society*, 4 (1919), pp 253 295, and Omond, *ibid*, 6 (1921), pp 80 88, Bourquin in *R G*, 27 (1920), pp 5 28, *Grotius Annuaire*, 1926, pp 84-122, *Solicitors' Journal*, vol 71 (1927), pp 509-511, 536, 537, Fauchille, § 527 A Belgo Dutch treaty dealing with the disputed points and creating a new régime, after being ratified by Belgium, was rejected by the First Chamber of the Dutch States General on March 24, 1927 See Smith, *The Economic Uses of International Rivers* (1931), pp 24 39, Blondeau, *L'Escaut, fleuve international, et le conflit hollando belge* (1932), Siotto Pintór in *Hague Recueil*, vol 21 (1928) (1), pp 286 367, Rolin Jaequemyns in *R I*, 3rd ser, 9 (1928), pp 377-399, Van Eysinga, *ibid*, pp 732-752, Bastid in *R G*, 35 (1928), pp 689-712, Lederle in *Z I*, 44 (1931), pp 71 93 See also the Judgment of the Permanent Court of International Justice of June 28, 1937, in the dispute between Belgium and Holland concerning the *Diversion of Water from the Meuse* Series A/B, No 70, and see Dehousse in *R I (Paris)*, 19 (1937), pp 177-263 And as to the passage of Wielingen see below, § 194

[2] Articles 108-117 of the Final Act of the Vienna Congress, see Martens, *N R*, 2, p 427 As to British and American policy with regard to rivers of international concern see Bacon in *B Y*, 9 (1930), pp 158 170, and *ibid*, 13 (1932), pp 76 91 As to Finland see *Das Wassergebiet Finlands in volkerrechtlicher Hinsicht* (1926) As to Latin-America see Sosa Rodriguez, *Le droit fluvial international et les fleuves de l'Amérique latine* (1935) As to the Brazilian rivers see Hill, *Diplomatic Relations between the United States and Brazil* (1932), pp 214 238

[3] But note that Article 109 of the principal Act of the Vienna Congress contains the words 'sous le rapport du commerce,' and that according to the views held in certain quarters the 'freedom of navigation' is subject to considerable qualifications For a clear exposition of the historical basis and the rationale of the principle of the freedom of navigation on so called international rivers see the Judgment of the Permanent Court of International Justice of September 10, 1929, in the case of the *Territorial Jurisdiction of the International Commission of the River Oder* Series A, No 23, pp 27, 28

nition to that principle in making arrangements [1] for free navigation on the rivers Scheldt, Meuse, Rhine, and on the navigable tributaries of the latter—namely, the rivers Neckar, Maine, and Moselle—although more than fifty years elapsed before it became realised *in practice*, in 1868, [2] and even then in a somewhat restricted way [3]

The Danube.—The next step was taken by the Peace Treaty of Paris of 1856, which by its Article 15 [4] stipulated for free navigation on 'the Danube and its Mouths,' and expressly declared the principle of the Vienna Congress regarding free navigation on international rivers for merchantmen of all nations to be part of 'European Public Law'. A special international organ for the regulation of navigation on the Danube below Isatscha was created, the so-called European Danube Commission

[1] 'Règlements pour la libre navigation des rivières', see Martens, *N R*, 2, p 434

[2] See the Convention of Mannheim of October 17, 1868

[3] *The Congo and the Niger*.—The General Act (see Martens, *N R G*, 2nd ser, 10, p 417) of the Congo Conference at Berlin in 1884 1885 provided for free navigation on the rivers Congo and Niger and their tributaries, and the creation of an 'International Congo Commission' as a special international organ for the regulation of the navigation of that river, but this Commission was never appointed The Peace Conference of 1919 dealt with these two rivers The General Act above mentioned was abrogated by a Convention signed at St Germain on September 10, 1919 (Treaty Series, No 18 (1919), Cmd 477), but the old Article 1, which defined the area within which the trade of all nations should enjoy complete freedom, has been re enacted and new rules have been laid down, so that the original or acceding parties to the new convention should enjoy the full benefit in practice of that freedom of navigation on the Congo, Niger, and their tributaries which was declared by the General Act For an interpretation of these provisions see the decision of the Permanent Court of International Justice of December 12, 1934, in the *Oscar Chinn* case between Great Britain and Belgium Series A/B, No 63, and below, pp 628, n 1, and 806, n 3 There are also a number of treaties stipulating for freedom of navigation for the merchantmen of all States on certain South American rivers (see Taylor, § 238, Moore, 1 § 131, pp 639 651, and Hackworth, 1 § 88) An arbitration tribunal in Paris, in the case of the boundary dispute between Great Britain and Venezuela, decided in 1899 in favour of freedom of navigation for the merchantmen of all States upon the rivers Amakourou and Barima (Martens, *N R G*, 2nd ser, 29, p 587)

[4] See Martens, *N R G*, 15, p 776 The documents concerning navigation on the Danube are collected by Sturdza, *Recueil de documents relatifs a la liberté de navigation du Danube* (Berlin, 1904), see also Demorgny, *La question du Danube* (1911), Dungern in *Z I*, 26 (1916), pp 510 562, Fauchille, §§ 528 528 (12), Hajnal, *The Danube* (1920), Ruhland in *Z I*, 30 (1922 1923), pp 243 248, Chamberlain, *The Régime of the International Rivers Danube and Rhine* (1923), pp 13 134, Radovanovitch, *Le Danube et l application du principe de la liberté de la navigation fluviale* (1925), Sherman in *A J*, 17 (1923), pp 438 459, Hostie in *R I*, 3rd ser, 4 (1923), pp 246 271, Lederle in *Z V*, 13 (1926), pp 70 73, Blociszewski in *Hague Recueil*, 1926 (1), pp 257 336

The Treaties of Peace of 1919 and 1920 with Germany, Austria, Bulgaria, and Hungary (i) confirmed the European Commission in the powers it possessed before the First World War [1] (the exercise of which had gradually been extended as far upwards as Braila), (ii) extended the internationalised stretch of the river upwards as far as Ulm in Germany (including the Rhine-Danube waterway then under construction), and (iii) foreshadowed the creation of a new International Commission for the purpose of administering the newly internationalised portion of the Danube In due course a Definitive Statute of the Danube was established by a Convention [2] of July 23, 1921 By this Statute the powers of the European Commission are confirmed, and navigation on the Danube is declared to be 'unrestricted and open to all flags on a footing of complete equality [3] over the whole navigable course of the river, that is to say, between Ulm and the Black Sea' [4] The jurisdiction of the International Commission extends from Ulm to Braila, that is, 'the fluvial Danube,' and of the European Commission from Braila to the Black Sea, that is, 'the maritime Danube' [5] The Treaties of Peace of 1946 with

[1] See p 55 of Advisory Opinion referred to above, p 421, n 3

[2] Treaty Series, No 16 of 1922, Cmd 1754, *L N T S*, 26, p 174, *A J*, 17 (1923), Suppl, pp 13 27 By Article 38 appeals from the decisions of the International Commission lie 'to the special jurisdiction set up for the purpose by the League of Nations,' which probably means the Permanent Court of International Justice, Hajnal, *Le droit du Danube international* (1929), and in *R I*, 3rd ser, 9 (1928), pp 588 645, *Commission Européenne du Danube et son œuvre de 1856 à 1931* (1931), Radovanovitch in *R I*, 3rd ser, 13 (1932), pp 564 631, Marcantonato in *R I* (*Paris*), 17 (1936), pp 469 533 For the agreement of June 28, 1932, between Yugoslavia, Roumania and the International Commission of the Danube for the setting up of special services at the Iron Gates see Hudson, *Legislation*, vi p 47

For the *modus vivendi* and declaration of June 25, 1933, concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braila see *P C I J*, Series E, No 9, p 115, and No 10, p 91 And see Hudson, *Legislation*, v p 806, for the declaration of December 5, 1930, which, however, is now only of historical importance See also the Arrangement and Final Protocol of August 18, 1938, Misc No 1 (1939), Cmd 5946 And see Sofronie in *R G*, 48 (1941 1945), pp 53 77

[3] Subject to a limited reservation of *cabotage* (see below, § 187) to riparian States by Article 22

[4] See Bacon in *A J*, 31 (1937), pp 414 430, Auburtin in *Z o V*, 9 (1939), pp 338 354

[5] In 1927 the Permanent Court gave an Advisory Opinion upon the powers of the European Commission and of Roumania respectively in regard to the section of the maritime Danube between Braila and Galatz, and to other matters, Series B, No 14 For the literature thereon see below, vol ii p 74 The International Commission publishes a monthly periodical entitled *Le Danube International*

Bulgaria,[1] Roumania and Hungary lay down that navigation on the Danube shall be free and open for the nationals, commercial vessels and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping.[2] No agreement could be reached on the question of the organs of the régime of internationalisation. However, in a separate Declaration issued in December 1946, Great Britain, the United States, Soviet Russia and France agreed to convene, within six months of the coming into force of the Treaties, a Conference to lay down a new régime for the Danube to give practical effect to the principles laid down in these Treaties. The Conference was to be attended by the representatives of the riparian States and those of the signatories of the Declaration.

Other European Rivers after the First World War

§ 178a. The Peace Treaties at the end of the First World War declared a number of European rivers international, and foreshadowed a 'General Convention' which would provide a general régime applicable to them. Germany, Austria, Bulgaria, and Hungary agreed to accede to this convention.[3] The following parts of rivers were declared international: parts of the Elbe (*Labe*), of the Ultava (*Moldau*), of the Oder, of the Niemen, of the Morava (*March*), of the Theiss (*Thaya*), of the Vistula,[4] and of the Pruth,[5] and the Danube up to Ulm, including the then projected Rhine-Danube waterway.[6] On these waterways the

[1] Article 36 of the Treaty.

[2] The principle of equality does not apply to traffic between ports of the same State (so called '*petit cabotage*'). See also Wehle in *A J*, 40 (1946), pp. 100–120.

[3] Treaty of Peace with Germany, Article 338, with Austria, Article 299, with Bulgaria, Article 227, with Hungary, Article 276, Wehberg, *Die Fortbildung des Flussschiffahrtsrechts im Versailler Friedensvertrag* (1919), Jacomini in *Rivista*, 3rd ser., 1 (1921), pp. 542–546.

[4] Article 18 of the Treaty of June 28, 1919, between the Allied and Associated Powers and Poland, by applying to the Vistula (together with the Bug and the Narev) the régime contained in Articles 332 to 337 of the Treaty of Peace with Germany pending the conclusion of a general convention, by implication declares it international, see Fauchille, § 527 (2), Libera, *Le régime juridique de la Vistule et du Niémen* (1929).

[5] Fauchille, § 528 (13).

[6] 'And all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without transhipment from one vessel to another, together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river.' See Treaty of Peace (1919) with Germany, Article 331, with Austria, Article 291, Treaty with Poland, Article 18, Treaty with Roumania, Article 16.

nationals, property, and flags of all States must be treated on a footing of perfect equality with the nationals, property, and flags of the riparian States [1]

Of these rivers and parts of rivers, the Elbe was made the subject of a special régime by a Statute of Navigation [2] signed on February 22, 1922, which in the main adopts the principles of the Barcelona Convention of 1921 (about to be discussed) as to freedom of navigation and equality of treatment The Oder [3] was placed under an International Commission The Rhine and Moselle were not made subject to the general provisional régime The Convention of Mannheim of 1868 was to continue for the time being to govern the navigation of the Rhine and Moselle, but subject to important modifications introduced by the Treaty of Peace with Germany [4] In May 1936 [5] a Convention regulating the navigation of the Rhine was signed by all the States concerned, with the exception of Holland But before it entered into force Germany declared on November 14, 1936, that she no longer considered herself bound by the provisions of Part XII of the Treaty of Versailles concerning the Commissions of the Danube, the Rhine, the Elbe, and the Oder [6] She announced the cessation of German co-operation

[1] See, for example, Treaty of Peace with Germany, Article 332

[2] Treaty Series, No 3 (1923), Cmd 1833, *A J*, 17 (1923), Suppl, pp 227 242, and see Fauchille, § 527 (1)

[3] Fauchille, § 527 (2) See Libera, *op cit*, and, as to the Oder, *P C I J*, Series A, No 23

[4] See Articles 354 362, Fauchille, §§ 526 (2) 526 (4), Charles de Visscher in *R I* 3rd ser, 1 (1920), pp 80 85, Hennig, *Rheinschiffahrt und Versailler Frieden* (1921), and in *Z I*, 29 (1921), pp 20-26, Borel in *B Y*, 1921 1922, pp 75-89, Chamberlain, *The Régime of the International Rivers Danube and Rhine* (1923), pp 137 283, Niboyet in *R G*, 30 (1923), pp 5 33, Lederle in *Z V*, 13 (1926), pp 73 76, and for the adhesion of Holland to the modification made by the Treaty of Peace with Germany see two protocols of January 21, 1921, and March 29, 1923, *L N T S*, 20, p 112 See also Vomhoff, *Zur Revision der Mannheimer Rheinschiffahrtsakte* (1927), Strauss, *Les Juridictions en droit fluvial rhénan* (1930), Sause, *Die volkerrechtliche Stellung des Rheins* (1931), Krause, *Die internationalen Stromschiffahrtskommissionen* (1931), Telders, *Der Kampf um die Rheinschiffahrtsakte* (1934), Van Eysinga, *La Commission centrale pour la Navigation du Rhin* (1935), Hostie in *Hague Recueil*, vol 28 (1929) (III), pp 109 225, Corthesy in *R G*, 37 (1930), pp 62 95 (with a bibliography), Lederle in *Z V*, 20 (1936), pp 65 80

[5] Hudson, *Legislation*, VII p 290

[6] For the text of the Note see *Z V*, 21 (1937), pp 111 113 For the British attitude see Mr Eden's statement in the House of Commons on November 16, 1936 317 H C Deb, cols 1334 5 See also *Documents*, 1936, pp 282 286

For a German view see Totzek, *Das Wesen und die innere Berechtigung der Strominternationalisierung* (1933), Otto, the same title (1933)

in the International River Commissions, but declared that, subject to reciprocal treatment of German ships, navigation on German waterways shall be open to ships of all States on a footing of equality with vessels of German nationals

The Barcelona Convention of 1921

§ 178*b* In 1921 a conference was summoned under the auspices of the League of Nations to draw up the general convention foreshadowed in the Peace Treaties, and there met at Barcelona the representatives of forty States, European, American, and Asian (the United States of America, the Argentine Republic, Russia, and Turkey [1] being notable absentees), together with delegates from Germany and Hungary in a consultative capacity This conference produced a 'Convention and Statute on the Régime of Navigable Waterways of International Concern' [2] which has received many ratifications (including that of Great Britain) and accessions, and is now in force With certain reservations as to *cabotage* [3] and as to the navigation of warships and other vessels engaged upon public services,[4] each of the contracting parties 'accords free exercise of navigation to the vessels flying the flag of one of the other contracting States on those parts of navigable waterways' (as defined by the Statute) 'which may be situated under its sovereignty or authority' (Article 2) In the exercise of this navigation 'the nationals, property, and flags of all contracting States shall be treated in all respects on a footing of perfect equality' (Article 4) No dues of any kind may be levied other than equitable dues in the nature of payment for services rendered in maintaining and improving the navig-

[1] Who, however, by Article 101 of the Treaty of Lausanne of 1923 agreed to accede to the Barcelona Convention on Navigable Waterways

[2] *L N T S*, 7, pp 36 63, Treaty Series, No 28 of 1923, *A J*, 18 (1924), Suppl, pp 151-165, League of Nations Publication, *Barcelona Conference, Verbatim Records and Texts relating to the Convention on the Régime of Navigable Waterways of International Concern* (1921), Alvarez, *La Conférence de Barcelone sur le transit et le nouveau droit international*, in *Travaux de l'Académie des Sciences morales et politiques*, 81 (1921), Toulmin in *B Y*, 1922-1923, pp 167 178, Fauchille, § 525 (14), Hostie in *R I*, 3rd ser, 2 (1921), pp 532 567, Dupuis in *Hague Recueil*, 1924 (1), pp 248 262, Lederle in *Z V*, 13 (1926), pp 64-76, Hajnal in *Strupp, Wörl*, in pp 31-34, and see generally on inland navigation, Niboyet in *Annuaire*, 34 (1928), pp 145 172, as to other conventions emanating from the Barcelona Conference of 1921 see below, § 258, and Appendix A, p 884

[3] See Article 5 of the Statute, and below, § 187

[4] See Article 17 of the Statute

ability of the waterway (Article 7) Each riparian State is bound to refrain from measures likely to reduce the facilities for navigation, and undertakes to remove any obstacles and dangers to navigation which may occur (Article 10) In the absence of special conventions making other arrangements, navigable waterways are administered by each of the riparian States under whose sovereignty or authority they may be situated (Article 12) The Statute does not entail the withdrawal or prevent the future grant of any greater facilities for freedom of navigation under conditions consistent with the principle of equality (Article 20) The Statute does not attempt to regulate the rights and duties of belligerents and neutrals in time of war, but nevertheless 'continues in force in time of war so far as such rights and duties permit' (Article 15) Disputes, failing settlement by the mediation of the Advisory and Technical Committee of the League Organisation for Communications and Transit or by some other means, are referred to the Permanent Court (Article 22)

The relation of the above-mentioned Barcelona Convention to the Peace Treaties is that it is 'the General Convention (to be) drawn up by the Allied and Associated Powers and approved by the League of Nations,' which is referred to in the Peace Treaties, but it does not modify any existing greater facilities for free navigation which those treaties may create upon conditions consistent with the principle of equality

As some of the States wished to go even further than the opening of 'navigable waterways of international concern' and to open purely national waterways, an Additional Protocol of the same date was signed and ratified by certain States,[1] whereby they grant to one another, 'on condition of reciprocity' and in time of peace, either (*a*) 'on *all* navigable waterways' (that is, presumably, rivers, canals, and lakes) or[2] (*b*) 'on all *naturally* navigable waterways' (that is, presumably, rivers and lakes) under their sovereignty or authority and accessible to ordinary com-

[1] Including Great Britain as to '*all* navigable waterways'

[2] States must declare on signing whether they accept alternative (*a*), or the more limited alternative (*b*)

mercial navigation to and from the sea, perfect equality of treatment for the flags of any signatory State 'as regards the transport of imports and exports without transhipment'

General—After the First World War there took place important applications of the principle of free navigation upon rivers, the essence of which is the admission of the flags of all States upon terms of equality and subject to the payment of such dues only as are equitably required for maintaining and improving the conditions of navigation The principle cannot be described as a recognised rule of customary International Law, but the machinery now exists in the Barcelona Convention of 1921 whereby it is capable of becoming a world-wide principle of conventional International Law The League created an Organisation for Communications and Transit, an international body to safeguard and foster the principle [1] It was under the auspices of the League and due largely to its Consultative Committee on Communications and Transit that a series of conventions relating to the unification of river laws was concluded in 1930 [2]

§ 178c Apart from navigation on rivers, the question of the utilisation of the flow of rivers is of importance [3] With regard to national rivers, the question cannot indeed be

Utilisation of the Flow of Rivers

[1] See Schucking und Wehberg, pp 733 743

[2] The Conference in question was held at Geneva in November and December 1930 It adopted, on December 9, the following Conventions (1) Convention on the Registration of Inland Navigation Vessels, Rights *in rem* over Such Vessels, and other Cognate Questions Doc Conf U D F 58 (1), Hudson, *Legislation*, v p 822, Paunesco, *L'unification internationale des privilèges et hypothèques en droit maritime et en droit fluvial* (1933), (2) Convention on Administrative Measures for Attesting the Rights of Inland Navigation Vessels to a Flag Doc Conf U D F 59 (1), Hudson, *Legislation*, v p 848, (3) Convention for the Unification of Certain Rules Concerning Collisions in Inland Navigation Doc Conf U D F 57 (1), Hudson, *Legislation*, v p 8151, Charguérau-Hauptmann in *Navigation du Rhin*, viii (1930), pp 42 72, Niboyet in *R I*, 3rd ser, 12 (1931), pp 303 324, 547 577, Kuhn in *A J*, 26 (1932), pp 121 124 And see Convention on the Measurement of Vessels Employed in Inland Navigation of November 27, 1925, which provides that measurement certificates issued by the competent authorities of one of the contracting parties in accordance with the provisions of the Convention shall be accepted, to the exclusion of others, by the authorities of the other contracting parties *L N T S*, 67, p 63, Hudson, *Legislation*, iii p 1808 In June 1947 an International Congress of River Transportation, convened by the International Committee on Inland Navigation, was held in Paris

[3] The work of Schulthess, *Das internationale Wasserrecht* (1915), is most valuable on this question See also Lederle's book, cited above, pp 187 209, and the authors and cases referred to below, p 430, n 3

raised, since the local State is absolutely unhindered in the utilisation of the flow But the flow of not-national,[1] boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it is a rule of International Law [2] that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State For this reason a State is not only forbidden to stop or to divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use [3] of the flow of the river on its part [4]

[1] Or pluri national

[2] See above, § 127

[3] For an exhaustive and careful treatment of the whole subject see Smith, *The Economic Use of International Rivers* (1931), whose conclusions are fully in accordance with the view propounded in the text See also Hackworth, 1 § 86, Hyde, 1 pp. 316 *et seq*, and Neumeyer, *Ein Beitrag zum internationalen Wasserrecht* in *Festschrift für G Cohn* (1915) And see the Exchange of Notes of May 7, 1929, between Great Britain and Egypt concerning the use of the waters of the Nile for irrigation purposes, Treaty Series, No 17 (1929), and, for the preceding discussion, Egypt No 1 (1928), Cmd 3050 As to the Gash river in Eritrea and the Sudan see the answer in the House of Commons, London *Times* newspaper, May 8, 1924 As to the Rio Grande see an opinion of the Law Officers of the United States, which appears to be of more general application and to conflict with the views as to use rexpressed above in § 178c, in *U S Opinions of Attorney General*, 21 (1893-1897), p 274 See also *A J*, 6 (1912), pp 478-485, Hawkins in *Temple Law Quarterly*, 5 (1930-1931), pp 193-207 And see a decision of the German *Staatsgerichtshof* of June 18, 1927, in a litigation between Baden and Württemberg regarding the use of the Danube, which supports the view as to user expressed in the text *Entscheidungen des Reichsgerichts in Zivilsachen*, vol cxvi, Appendix, p 18, *Annual Digest*, 1927-1928, Case No 86 As to the *Chicago Sanitary District* case and the diversion of waters from the Great Lakes see Garner in *A J*, 22 (1928), pp 837-840, Dealey, *ibid*, 23 (1929), pp 307 328, Williams in *Michigan Law Review*, 28 (1929 1930), pp 1 25, Smith in *B Y*, 9 (1930), pp 144 157, and in *Canadian Bar Review*, 8 (1930), pp 330 343, Eagleton in *R I*, 3rd ser, 13 (1932), pp 398 409, Lynde in *Illinois Law Review*, 25 (1930 1931), pp 243 260, Simsarian in *A J*, 32 (1938), pp 488-518 See also *Arizona* v *California* (1931), 283 U S 423, as to which see Niles in *New York University Law Quarterly Review*, 10 (1932-1933), pp 188 212, *Wisconsin* v *Illinois*, 281 U S 200 See also *Connecticut* v *Massachusetts* (1931), 282 U S 660, *A J*, 26 (1932), p 163, *B Y*, 13 (1932), p 189 Connecticut attempted to obtain an injunction against Massachusetts to prevent her from diverting the waters of two small non navigable streams, running in their entire course within Massachusetts but tributary to the river Connecticut which flows through both States The object was to provide a water supply for Boston and its neighbouring cities It was held that the alleged prospective damage would be negligible in comparison with the benefit to Massachusetts As to the diversion of water from the Meuse see above, § 178

[4] The Institute of International Law, at its meeting at Madrid in 1911, adopted a 'Réglementation

A 'Convention [1] Relative to the Development of Hydraulic Power affecting more than one State' was signed at Geneva on December 9, 1923, by sixteen States and one Dominion, and is now in force While not affecting the right of each State 'within the limits of International Law' discussed above to carry out upon its own territory operations for the development of hydraulic power, and without imposing upon any State the duty to take part in joint operations partly on its own territory and partly on the territory of another State or to submit to operations on the territory of another State which might cause serious prejudice to its neighbours, it provides that the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed and will regulate the situation created by them [2]

IV

LAKES AND LAND-LOCKED SEAS

Vattel, 1 § 294—Hall, § 38—Phillimore, 1 §§ 205 205*a*—Twiss, 1 § 181—Hallek, 1 pp 181 182—Moore, 1 §§ 135 143—Hershey, §§ 197 198—Hyde, 1 § 186—Bluntschli, § 316—Hartmann, § 58—Hackworth, 1 § 91—Heffter, § 76—Caratheodory in *Holtzendorff*, II pp 378 385—Gareis, §§ 20 21—Liszt, § 15 II—Ullmann, §§ 88 and 106—Fauchille, §§ 495 505, 519—Despagnet, No 407—Merignhac, II 587 595—Pradier Fodere, II §§ 640 649—Nys, 1 pp 488 491—Calvo, 1 §§ 301, 373, 374, 383—Fiore, II §§ 811 813, and *Code*, §§ 284 and 1005—Martens, 1 § 100—Rivier, 1 pp 143 145, 230—Baty, pp 80, 81—Higgins and Colombos, §§ 156 158—Mischeff, *La Mer Noire et les détroits de Constantinople* (1901)—Schulthess, *Das internationale Wasserrecht* (1915)—Lederle, *Das Recht der internationalen Gewasser* (1920), pp 125 129—Hunt in *A J*, 4 (1910), pp 285 313

internationale des cours d'eau internationaux au point de vue de leurs forces motrices et de leur utilisation industrielle et agricole,' for the consideration of the several States and any such action as they might think fit See *Annuaire*, 24 (1911), p 365 See also Bar in *R G*, 17 (1910), pp 281-288

[1] *L N T S*, 36, p 76, Treaty Series, No 26 of 1925, *A J*, 20 (1926), Suppl, pp 145-152 See also the resolution of the Seventh Pan-American Conference of December 1933, printed in *A J*, 28 (1934), Suppl, pp 59 60

[2] See *Societé Énergie Électrique du Littoral Méditerranéen* v *Compagnia Imprese Elettriche Liguri*, decided in 1939 by the *Italian Court of Cassation* (*Annual Digest*, 1938 1940, Case No 47) for the interpretation of a French Italian Treaty of 1914 on the utilisation of the River Roja which flows partly in Italy and partly in France And see Annexes III and V to the Peace Treaty of 1946 with Italy concerning the supply of water and hydro electric plants on the Italian frontiers with France and Yugoslavia

Lakes and Land-locked Seas State Property of Riparian States

§ 179 Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of this State Thus Lake Windermere is part of British territory, and the Lake of Como is Italian territory As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists The majority of writers consider these lakes and land-locked seas to be parts of the surrounding territories, but several [1] dissent, asserting that these lakes and seas do not belong to the riparian States, but are free like the open sea The practice of the States seems to favour the opinion of the majority of writers, for special treaties frequently arrange what portions of such lakes and seas belong to each of the riparian States [2] Examples are The Lake of Constance,[3] which is surrounded by the territories of Germany (Baden, Wurtemberg, Bavaria), Austria, and Switzerland (Thurgau and St Gall), the Lake of Geneva, which belongs to Switzerland and France [4], the Lakes of Huron, Erie, and Ontario, which belong to the British Dominion of Canada and the United States of America [5]

So called International Lakes and Land-locked Seas

§ 180 On analogy with so-called international rivers, such lakes and land-locked seas as are surrounded by the territories of several States, and are at the same time navigable from the open sea, are called 'international lakes and land-

[1] See, for instance, Calvo, 1 § 301, Caratheodory in *Holtzendorff*, II p 378

[2] As regards the utilisation of the flow of such lakes and seas, the position is the same as with regard to the utilisation of the flow of rivers See above, § 178*a*, as to Lake Michigan In time of war such lakes and seas are likened to the open sea for the purpose of the law of maritime prize see *In re Craft captured on the Victoria Nyanza*, [1919] P 83, and American cases there discussed, and see below, vol II § 181 (n)

[3] See Stoffel, *Die Fischereiverhaltnisse des Bodensees unter besonderer Berucksichtigung der an ihm bestehenden Hoheitsrechte* (1906), Lederle in *Strupp, Wört*, 1 pp 149-151, Reber, *Der Bodensee im Völkerrecht* in *Annalen des deutschen Reichs*, 59 (1926), pp 70 197, Doka, *Der Bodensee im internationalen Recht* (1927)

[4] See Fauchille, § 519 (3)

[5] As regards jurisdiction, fisheries, and navigation on the Canadian-American lakes see Moore, 1 §§ 136 143, Callahan, *The Neutrality of the American Lakes and Anglo American Relations* (1898), and *U S* v *Rodgers* (1893), 150 U S 249 (Scott, *Cases*, p 222) These lakes are not neutralised, because the agreement made by an exchange of Notes between Great Britain and the United States on April 28 and 29, 1817, does not stipulate neutralisation, but only limits the number of war vessels to be kept on the lakes by the two Governments See Moore, 1 § 143

locked seas' However, although some writers[1] dissent, hitherto the Law of Nations has not recognised the principle of free navigation on such lakes and seas In the case of the lakes within the Congo district free navigation is stipulated for by treaty[2] It is probable that in the near future this principle will be recognised, as practically all so-called international lakes and land-locked seas are actually open to merchantmen of all nations Good examples of such international lakes and land-locked seas are the above-named Lakes of Huron, Erie, and Ontario

The Black Sea.

§ 181 The Black Sea is a land-locked sea which was undoubtedly wholly a part of Turkish territory as long as the enclosing land was all Turkish, and as long as the Bosphorus and the Dardanelles, the approach to the Black Sea, which were exclusively part of Turkish territory, were not open for merchantmen of all nations But matters changed when Russia, Roumania, and Bulgaria became littoral States It would be wrong to maintain that the Black Sea then became part of the territories of the four States, for the Bosphorus and the Dardanelles, although belonging to Turkish territory, are nevertheless parts of the Mediterranean Sea, and are open to merchantmen of all nations The Black Sea is consequently now part of the open sea,[3] and is not the property of any State Article 11 of the Peace Treaty of Paris[4] of 1856 neutralised the Black Sea, and declared it open to merchantmen of all nations, but interdicted it to men-of-war of the littoral as well as of other States, admitting only a few Turkish and Russian public vessels for the service of their coasts But although the neutralisation was stipulated 'formally and in perpetuity,' it lasted only till 1870 In that year, during the Franco-Prussian War, Russia shook off the restrictions of the Treaty of Paris, and

[1] See, for instance, Rivier, i p 230, Caratheodory in *Holtzendorff*, ii p 378, Calvo, i § 301

[2] Article 15 of the General Act of the Congo Conference—see Martens, *N R G*, 2nd ser, 10, p 417—by which free navigation was originally stipulated, was abrogated by the Convention signed at St Germain on September 10, 1919 (Treaty Series, No 18 (1919), Cmd 477), so far as the signatories of that Convention are concerned, but the free navigation of these lakes is provided for in the new convention.

[3] See below, § 252.

[4] See Martens, *N R G*, 15, p 775

the Powers assembled at the Conference of London signed, on March 13, 1871, the Treaty of London,[1] by which the neutralisation of the Black Sea and the exclusion of men-of-war therefrom were abolished But the right of the Porte to forbid foreign men-of-war passage through the Dardanelles and the Bosphorus [2] was upheld by that Treaty, as was also free navigation for merchantmen of all nations on the Black Sea No change was made in the latter respect either by the Straits Convention, annexed to the Treaty of Lausanne of 1923, which maintained freedom of transit and navigation between the Mediterranean Sea and the Black Sea,[3] or by the Montreux Convention of 1936 which replaced it [4] Thus the Black Sea continues to be an open sea [5]

V

CANALS

Westlake, I pp 338-349—Lawrence, § 90, and *Essays*, pp 37-146—Phillimore, I §§ 99*a* and 207—Moore, III §§ 336 371—Hackworth, II §§ 216 219—Hershey, § 201—Hyde, I §§ 20, 198—Caratheodory in *Holtzendorff*, II pp 386 405—Liszt, § 37—Ullmann, § 106—Hatschek, pp 196 198—Fauchille, §§ 511 515—Despagnet, § 418—Mérignhac, II pp 597 605—Pradier Fodére, II §§ 658 660—Nys, I pp 516 539—Rivier, I § 16—Calvo, I §§ 376 380—Fiore, *Code*, §§ 988-992—Martens, II § 59—De Louter, I pp 457 462—Sir Travers Twiss in *R I*, 7 (1875), p 682, 14 (1882), p 572, 17 (1885), p 615—Keith's Wheaton, pp 404 413—Holland, *Studies*, pp 270 293—Asser in *R I*, 20 (1888), p 519—Bustamante in *R I*, 27 (1895), p 112—Rossignol, *Le Canal de Suez* (1898)—Camand, *Étude sur le régime juridique du Canal de Suez* (1899)—Charles Roux, *L'Isthme et le Canal de Suez* (1901)—Othalom, *Der Suezkanal* (1905)—Muller Heymer, *Der Panamakanal in der Politik der Vereinigten Staaten* (1909)—Arias, *The Panama Canal* (1911)—Catellani, *Il Canale di Panama* (1913)—Bunau-Varilla, *Panama* (1913)—Dedreux, *Der Suezkanal im internationalen Rechte* (1913)—Georgi Dufour, *Urkunden zur Geschichte des Suezkanals* (1913)—Laun, *Die Internationalisierung der Meerengen und Kanale* (1918)—Whittuck, *International Canals* (1920) (British Foreign Office Peace Handbook)—Charles de Visscher, *Le Droit international des communications* (1924)—Benno, *La situation internationale du Canal de Suez* (1929)—Schiarabath, *De la condition juridique du Canal de Suez avant et après la grande guerre* (1930)—Hallberg, *The Suez Canal* (1931)—Wilson, *The Suez Canal* (1933)—Saint Victor, *Le Canal de Suez* (1934)—Molfino, *Il canale di Suez e il suo regimo internazionale* (1936)—Rheinstrom, *Die*

[1] See Martens, *N R G*, 18, p 303
[2] See below, § 197
[3] As to the position of the Straits see below, § 197
[4] See below, § 197
[5] Fauchille, §§ 497-505, discusses the status of a number of particular seas

volkerrechtliche Stellung der internationalen Kanale (1937)—Schonfield, *The Suez Canal* (1939)—Dupuis in *Hague Recueil*, 1924, i pp 194 218—Hains, Davis, Knapp, Olney, Wambaugh, and Kennedy in *A J*, 3 (1909), pp 354 and 885, 4 (1910), p 314, 5 (1911), pp 298, 615, 620—Lehmann in *Z I*, 23 (1913), pp 46 102—Baty in *Jahrbuch des Volkerrechts*, i (1913), pp 453-480—Diena in *Z I*, 25 (1915), pp 14 22—Buell in *Geneva Special Studies*, vi (1935) No 3—Wilson in *Grotius Society*, xxi (1935), pp 127-144—Hoskins in *A J*, 37 (1943), pp 373 385

Canals State Property of Riparian States

§ 182 That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways And there ought to be no doubt [1] that all the rules regarding rivers [2] must analogously be applied to canals The matter would need no special mention at all were it not for the inter-oceanic canals which were constructed during the second half of the nineteenth century or are contemplated in the future As regards one of these, the Corinth Canal, which connects the Gulf of Corinth with the Gulf of Ægina, there is not much to be said [3] It is entirely within the territory of Greece, and although the canal is kept open for navigation to vessels of all nations, Greece exclusively controls the navigation thereof

The Suez Canal

§ 183 The most important of the interoceanic canals is that of Suez, which connects the Red Sea with the Mediterranean In 1875 Sir Travers Twiss [4] proposed the neutralisation of the canal, and in 1879 the Institute of International Law voted [5] in favour of the protection of free navigation on the canal by an international treaty. In 1883 Great Britain proposed an international conference to the Powers for the purpose of neutralising it, but it took several years before agreement was achieved This was done by the Convention of Constantinople [6] of October 29,

[1] See, however, Holland, *Studies*, p 278

[2] That is, national rivers, see above, § 176 The waters in canals, at any rate a canal not internationalised, are national waters

[3] See below, vol ii § 325c (n 7), and Fauchille, §§ 514, 1460

[4] See *R I*, 7, pp 682 694

[5] See *Annuaire*, 3 and 4, i p 349

[6] See Martens, *N R G*, 2nd ser, 15, p 557. Great Britain became a party to the Convention of Constantinople subject to a certain reservation, which was, however, removed by Article 6 of the Declaration respecting Egypt and Morocco signed at London on April 8, 1904, by Great Britain and France (see *Parl Papers*, France, No 1 (1904), p 9) See Holland, *Studies*, p 293, and Westlake, i p 345 The status of the Suez Canal was discussed by the Permanent Court in the *Wimbledon* case, Series A, No 1.

1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and Turkey This Treaty comprises seventeen articles, the more important stipulations of which are the following

(1) The canal is open in time of peace as well as of war to merchantmen and men-of-war of all nations No attempt to restrict this free use of the canal is allowed in time either of peace or of war The canal can never be blockaded (Article 1)

(2) In time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself or within three sea miles from its ports [1] Men-of-war of the belligerents have to pass through the canal without delay They may not stay longer than twenty-four hours, a case of absolute necessity excepted, within the harbours of Port Said and Suez, and twenty-four hours must intervene between the departure from those harbours of a belligerent man-of-war and a vessel of the enemy Troops, munitions, and other war material may neither be shipped nor unshipped within the canal and its harbours All rules regarding belligerents' men-of-war are likewise valid for their prizes (Articles 4, 5, 6)

(3) No men-of-war are allowed to be stationed inside the canal, but each Power may station two men-of-war in the harbours of Port Said and Suez Belligerents, however, are not allowed to station men-of-war in these harbours (Article 7) No permanent fortifications are allowed in the canal (Article 2)

(4) The signatory Powers are obliged to notify the treaty to others and to invite them to accede thereto (Article 16)

[1] As to the position of the canal during the First World War see *The Pindos, Heligoland, and Bostock* [1916] 2 A C 193, 2 B and C P C 146, *The Südmark* [1917] A C 620, 2 B and C P C 473, *H M Procurator* v *Deutsches Kohlen Depot* [1919] A C 291, 3 B and C P C 265, below, vol II p 145, n 6, and Garner, *Prize Law during the World War* (1927), §§ 174, 217 As to the position of the Suez Canal in the event of application of sanctions under Article 16 of the Covenant see Buell in *Geneva Special Studies*, VI (1935), No 3, and in *R G*, 43 (1936), pp 50-76, Guibal, *Peut-on fermer le Canal de Suez?* (1937), Landecker in *R I (Geneva)*, 13 (1935), pp 204 220, Hoskins in *Foreign Affairs (U S A)*, 14 (1935), pp 93-101 Throughout the Italo Abyssinian dispute it was never maintained by the British Government that, as between members of the League, the provisions of the Convention of 1888 possessed, in relation to Articles 16 and 20 (see above, § 167*oo*) of the Covenant, a status different from or superior to any other treaty binding upon members of the League This attitude, it is believed, was in accordance with the existing legal position The difficulties in the way of closing the Suez Canal to Italian shipping were of a political, not legal, nature See (1935) Cmd 5072 It was stated on May 6, 1936, by the British Foreign Secretary that 'the Canal could not have been closed except by League action' 311 H C Deb 5 s, cols 1732 1741

On December 18, 1914, Great Britain proclaimed a protectorate over Egypt By the Treaties of Peace, Germany [1] and Austria [2] consented to the transfer to the British Government of the powers conferred by the Suez Canal Convention upon the Sultan, and by Article 17 of the Treaty of Lausanne of 1923 Turkey renounced all her rights and titles over Egypt as from November 5, 1914 Great Britain, in declaring the independence of Egypt on February 28, 1922, reserved for future negotiation between the British and Egyptian Governments the question, amongst others, of the defence of the canal [3] In Article 8 of the Treaty of Alliance of August 26, 1936, between Great Britain and Egypt, the parties recognised that, while the canal was an integral part of Egypt, it was an essential means of communication between the different parts of the British Empire Provision was therefore made for ensuring the defence of the canal by British forces stationed in Egyptian territory in collaboration with Egyptian forces [4]

The Kiel Canal

§ 183a The Kiel Canal, which connects the Baltic with the North Sea, was constructed by Germany, mainly for strategic purposes It runs wholly through German territory, and before the First World War, although Germany in fact kept it open to vessels of other nations, she controlled navigation, and could at any time have closed it to them, apart from any special treaty relations But by Articles 380-386 of the Treaty of Peace with Germany it is provided that ' the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality,'

[1] Article 152.

[2] Article 107

[3] See above, § 93a

[4] Treaty Series, No 6 (1937), Cmd 5360 An Annex to Article 8 lays down the size of British forces to be stationed in Egypt At the end of twenty years the question whether the presence of British forces in Egypt is still necessary, shall be decided, in case of disagreement, by the Council of the League or another body to be agreed upon by the parties See Le Goff in *R G*, 46 (1939), pp 142 158 For the British-Italian Agreement (Annex 8) of April 16, 1938, reaffirming the intention of the parties to abide by the provisions of the Convention of 1888, see Cmd 5726 (1938), *Documents*, 1938 (1), p 148 In August 1940, following upon previous precautionary measures, the British naval authorities in command of the defences of the Canal took over the control of the interests of the Suez Canal Company During the war the Canal was repeatedly attacked by Italian and German air forces See Hoskins in *A J*, 37 (1943), pp 373-385

and that only such charges shall be levied as are intended to cover in an equitable manner the cost of maintaining or improving the conditions of navigation

In 1923 the status of the Kiel Canal came before the Permanent Court in the case of the *Wimbledon* [1] The Court by a majority,[2] in giving judgment against Germany, held that the Kiel Canal was to be open to States at peace with Germany, even if these were engaged in a war in which Germany was neutral Further, the Court, after examining the Treaty provisions affecting the Suez and Panama Canals (which, however, differ from the Kiel Canal provisions in that the last, unlike the two former, has not been placed outside the region of war), stated that the precedents of the Suez and Panama Canals [3]

'are merely illustrations of the general opinion according to which, when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie'

On November 14, 1936, Germany denounced unilaterally Articles 380-386 of the Treaty of Versailles There was no express protest on the part of the majority of the interested signatories of the Treaty [4]

The Panama Canal

§ 184 On November 18, 1901, the United States and Great Britain concluded the so-called Hay-Pauncefote Treaty [5] providing for a canal between the Atlantic and Pacific Oceans, by whatever route might be considered

[1] Series A, No 1 This was a British ship chartered to a French company and carrying a cargo of munitions from Salonika to Danzig for the Polish Government, then at war, or assumed for the purposes of the judgment to be at war, with Russia The German Government refused to grant a request for the passage of this vessel through the Kiel Canal under Article 380 of the Treaty of Peace, on the ground that such passage would constitute a breach of certain German Neutrality Orders and involve Germany in a breach of neutrality The vessel eventually proceeded by Skagen to Danzig, and lost thirteen days owing to the denial of passage through the canal For literature see below, vol II § 25*ag*, p 68, n 1

[2] MM Anzilotti and Huber and Professor Schucking delivered important dissenting judgments

[3] At p 28

[4] See above, § 178*a*.

[5] See Moore, III § 366 368

expedient, and superseding the Clayton-Bulwer Treaty [1] Under it the United States has the exclusive right of providing for the regulation and management of the canal, and a number of rules, substantially as embodied in the Suez Canal Convention, are adopted 'as the basis of the neutralisation' of the canal [2]

It is to be free and open to the vessels of commerce and of war of all nations observing these rules 'on terms of entire equality' [3], it is never to be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it The United States is, however, at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder [4] The transit of belligerent vessels and prizes through the canal is to be effected with the least possible delay, and they may not revictual, or take any stores, except so far as may be strictly

[1] Already in 1850 Great Britain and the United States, in the Clayton-Bulwer Treaty of Washington (see Martens, *N R G*, 15, p 187, and Moore, III §§ 351 365, applicable also by Article 8 to a proposed canal through the Isthmus of Panama), had stipulated the free navigation and neutralisation of a canal between the Pacific and the Atlantic Ocean proposed to be constructed by way of the river St Juan de Nicaragua and either or both of the lakes of Nicaragua and Managua In 1881 the building of a canal through the Isthmus of Panama was taken in hand, but in 1888 the work was stopped in consequence of the financial collapse of the company undertaking its construction After this the United States came back to the old project of a canal by way of the river San Juan de Nicaragua For the eventuality of the completion of this canal, Great Britain and the United States signed, on February 5, 1900, the Convention of Washington, which stipulated for free navigation on, and neutralisation of, the proposed canal on the analogy of the Convention of Constantinople, 1888, regarding the Suez Canal, but this convention was not ratified, because the Senate made amendments which Great Britain could not accept

[2] The status of the Panama Canal was discussed by the Permanent Court in the *Wimbledon* case, Series A, No 1

[3] For the dispute with the United States which arose upon this expression and was amicably settled in 1914 see *Parl Papers*, Misc No 12 (1912), Cmd 6451, Oppenheim, *The Panama Canal Conflict* (2nd ed, 1913), Richards, *The Panama Canal Controversy* (1913), Root, *The Obligations of the United States as to Panama Canal Tolls* (1913), and articles in the *Law Magazine and Review*, 38 (1912-1913), *A J*, 6 (1912), and 7 (1913), *R I*, 2nd ser, 14 (1912), *Z V*, 6 (1913), *Z I*, 23 (1913), *Jahrbuch für Volkerrecht*, 1 (1913), and *A S Proceedings*, 7 (1913)

[4] On the question whether the United States has a right to fortify the Panama Canal see Hains and Davis in *A J*, 3 (1909), pp 354 394 and pp 885 908, and Olney, Wambaugh, and Kennedy in *A J*, 5 (1911), pp 298 615, 620 In February 1929 the United States issued regulations concerning air navigation in the Panama Canal Zone and declared the latter, including the three mile limit, to be a 'military air space reservation' The regulations prohibit, *inter alia*, the making of any photograph of military or naval installations of the Panama Canal Zone without the permission of the Governor *A J*, 23 (1929), Suppl, pp 121-129 See also above, § 171

necessary No belligerent is to embark or disembark troops or munitions of war in the canal, or in the waters within three marine miles of either end of it A belligerent war-vessel may not remain in such waters for more than twenty-four hours at any one time, except in distress, and may not depart within twenty-four hours from the departure of a war-vessel of the other belligerent All works necessary to the construction, operation, and maintenance of the canal are to enjoy immunity from attack and injury in time of war as in time of peace

On November 18, 1903, the so-called Hay-Varilla Treaty [1] was concluded between the United States and the new Republic of Panama, according to which, on the one hand, the United States guarantees and will maintain the independence of the Republic of Panama, and, on the other hand, the Republic of Panama grants to the United States in perpetuity for the construction, administration, and protection of a canal between Colón and Panama the use, occupation, and control of a strip of land required for the construction of the canal, and, further, of land on both sides of the canal to the extent of five miles on either side, with the exclusion, however, of the cities of Panama and Colon and the harbours adjacent to these cities [2] According to Article 18 of this Treaty the canal and the entrance thereto shall be neutral in perpetuity, and shall be open to vessels of all nations as stipulated by Article 3 of the Hay-Pauncefote Treaty

The Panama Canal was opened in 1914,[3] and rules for its operation and navigation were issued by the United States [4]

[1] See Martens, *N R G*, 2nd ser, 31, p 599

[2] In the Treaty of March 2, 1936 (ratified in 1939), the United States waived its right to make use of the lands and waters outside the Canal Zone, other than those already under its jurisdiction (Art 2) *A J*, 34 (1940), Suppl, p 140

[3] By a Treaty between the United States and Nicaragua, signed at Washington on August 5, 1914, and ratified on June 22, 1916, Nicaragua granted to the United States, in return for a sum of $3,000,000, the exclusive right to construct and manage an interoceanic canal through Nicaragua See *A J*, 10 (1916), Suppl, p 258, and see Finch in *A J* 10 (1916), pp 344 351, and for a protest against this Treaty see above, § 135 (2)

[4] After the outbreak of the First World War, on November 13, 1914, a proclamation was issued prescribing rules for its use by belligerent vessels (*A J*, 9 (1915), pp 167-175), and when the United States had entered the war a further proclamation was issued on May 23, 1917 (*A J*, 11 (1917), Suppl, pp 165 168), and see below, vol II § 72 (4) For the various measures taken by the United States in relation to the Panama

VI

MARITIME BELT

Grotius, II c 3, §§ 9 12—Vattel, I §§ 287 290—Hall, §§ 41, 42—Westlake, I pp 187-196—Lawrence, § 87—Phillimore, I §§ 197 201—Twiss, I §§ 144, 190 192—Halleck, I pp 167-179—Taylor, §§ 247-250—Walker, § 17—Wharton, I § 32—Moore, I § 144 152—Wheaton, §§ 177-180—Hershey, §§ 191 194—Hyde, I §§ 141 145, 154—Fenwick, pp 250 256—Bluntschli, §§ 302, 309 310—Hartmann, § 58—Hackworth, I §§ 92-99—Heffter, § 75—Stoerk in *Holtzendorff*, II pp 409 453—Gareis, § 21—Liszt, § 16 (I)—Ullmann, § 87—Hatschek, pp 190-194—Kohler, § 49 (I III)—Verdross, pp 201 210—Fauchille, §§ 491-495, 517, 518, 624 626—Despagnet, §§ 403-414—Mérignhac, II pp 370 392—Pradier Fodéré, II §§ 617 639—Nys, I pp 540 569—Rivier, I pp 145 153—Calvo, I §§ 353 365—Suarez, §§ 112-114, 121—Gemma, pp 183-187—Fiore, II §§ 801 807, and *Code*, §§ 267-271, 276 278, 1030—Martens, I § 99—De Louter, I pp 389 400, 425 430—Travers, §§ 885 943—Holland, *Lectures*, pp 139 147—Smith, II pp 124 254—Gidel, *Le droit international public de la mer*, vol II (1932) and vol III (1934) (this is a momumental work indispensable for any detailed study of the question)—Higgins and Colombos, §§ 77 142, 279 286—Bynkershoek, *De Dominio Maris* and *Quaestiones Juris publici*, I c 8—Ortolan, *Diplomatie de la mer* (1856), I pp 150 175—Heilborn, *System*, pp 37 57—Imbart Latour, *La mer territoriale*, etc (1889)—Godey, *La mer côtière* (1896)—Schucking, *Das Küstenmeer im internationalen Rechte* (1897)—Perels, § 5—Fulton, *The Sovereignty of the Sea* (1911), pp 537 603—Raestad, *La mer territoriale* (1913), and in *R G*, 19 (1912), pp 598 623, 21 (1914), pp 401 420—Schramm, *Das Prisenrecht* (1913), pp 66 74—Hille, *Die Rechtsverhaltnisse der Küstengewasser* (1918)—Crocker, *The Extent of the Marginal Sea* (Collection of Official Documents and Views of Representative Publicists (Washington, 1919))—Wilson in *Hague Recueil*, 1923, pp 127 145—Dupuis, *ibid*, 1924, I pp 162 181—Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927)—Mercker, *Die Küstengewasser im Volkerrecht* (1927)—Masterson, *Jurisdiction in Marginal Seas* (1929)—Bustamante y Sirven, *La mer territoriale* (translated from Spanish, 1930)—Coenen, *Das Küstenmeer im Frieden* (1933)—Munch, *Die technischen Fragen des Küstenmeers* (1934)—Baldoni, *Il mare territoriale nel diritto internazionale commune* (1934)—Cansacchi, *L'occupazione dei mari costieri* (1936)—Meyer, *The Extent of Jurisdiction in Territorial Waters* (1937)—Barclay in *Annuaire*, 12 (1892), pp 104-136, and 13 (1894), pp 125 162—Martens in *R G*, 1 (1894), pp 32 43—Aubert, *ibid*, pp 429 441—Engelhardt in *R I*, 26 (1894), pp 209-

Canal as a neutral and belligerent in the Second World War see Padelford, *The Panama Canal in Peace and War* (1942), pp 122 182 When in 1941 Congress provided for the acquisition of domestic and foreign vessels within the jurisdiction of the United States, the President authorised the seizure of foreign vessels lying idle not only in the ports of the United States, but also in those of the Philippine Islands and of the Panama Canal see *ibid*, pp 177 180 See also generally McCain, *The United States and the Republic of Panama* (1937), Padelford, *op cit*, and in *A J*, 34 (1940), pp 416 442, 601-637, and 35 (1941), pp 54 89, Cosentini in *R I F*, 8 (1939), pp 175-189

213—Godey in *R G*, 3 (1896), pp 224 237—Lapradelle in *R G*, 5 (1898), pp 264-284, 309 347—Balch in *A S Proceedings*, 6 (1912), pp 132-141—Barclay and Charteris in *International Law Association's Twenty-Seventh Report* (1912), pp 81-127—Kraemer in *Z V*, 7 (1913), pp 123 152—Salmond in *L Q R*, 34 (1918), pp 235 252—Wetering in *R I (Geneva)*, 1 (1923), pp 33 53—Brown in *A S Proceedings*, 1923, pp 15 31—Nielsen, *ibid*, pp 32 39—Brown in *A J*, 17 (1923), pp 89 95—Colombos in *Grotius Society*, 9 (1924), pp 89 100—Paulus in *R I*, 3rd ser, 5 (1924), pp 397 424—Clemmson in *B Y*, 1925, pp 144 158—Fenn in *A J*, 20 (1926), pp 465 482 (historical)—Grey in *L Q R*, 42 (1926), pp 350 367—Niemeyer in *Z I*, 36 (1926), pp 1 40—Report for League Codification Committee by Schucking, de Magalhaes, and Wickersham in *A J*, 20 (1926), Special Suppl, pp 62 147 (an exhaustive study), and comment by Brown in *A J*, 21 (1927), pp 101 105, and by Fraser in *Cornell Law Quarterly*, 11 (1926), pp 455 481, and in *R I (Paris)*, 1 (1927), pp 133 142—Hostie in *R I*, 3rd ser, 8 (1927), pp 215 238—Grey, *ibid*, pp 123 142—Wilson in *A S Proceedings*, 1928, pp 93 101—Raestad in *R I*, 3rd ser, 11 (1930), pp 147 163—Kelsen in *Hague Recueil*, vol 42 (1932) (iv), pp 226 234—Gidel, *ibid*, vol 48 (1934) (ii), pp 137 240—Baty, pp 145-170, in *A J*, 22 (1928), pp 503 537—Harvard Draft Convention (and Comment), *A J*, 23 (1929), April, Special Number, pp 243-365—Conference for the Codification of International Law, *Bases of Discussion*, vol ii Territorial Waters—Walker in *B Y*, 22 (1945), pp. 210-231

State Property of Maritime Belt contested

§ 185 The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the littoral States But no unanimity exists with regard to the nature of the sway of the littoral States [1] Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters Whereas it is nowadays universally recognised that the open sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage for their merchantmen through the coast waters [2] On the other hand, a minority of writers [3]

[1] Fauchille, §§ 492-492 (9), discusses the different theories in great detail

[2] But these waters are not national but territorial waters see above, § 172

[3] Their arguments are very ably stated by Lapradelle in *R G*, 5 (1898), pp 273 284 and 309 330 See also the *Thireaut* case, decided on May 24, 1935, by the French *Conseil d'État* to the effect that territorial waters do not form part of State territory *R I (Paris)*, 17 (1936), pp 303 310, *Annual Digest*, 1935-1936, Case No 59 And see, to the same effect, the decision of the Civil Tribunal of Brest of April 27, 1939 *ibid*, 1938 1940, Case No 48 (*Compagnie Française des Câbles Télégraphiques* v *Administration Française des Douanes*)

emphatically deny the territorial character of the maritime belt, and concede to the littoral States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty The practice of States seems to agree with the first-mentioned view Thus, for instance, in the Air Navigation Convention of 1919 [1] the contracting parties defined State territory as including, amongst others, the territorial waters adjacent thereto (Article 1) Supporters of that view rightly maintain [2] that the universally recognised fact of the exclusive right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, is consistent only with the territorial character of the maritime belt The argument of their opponents that, if the belt is to be considered a part of State territory, every littoral State must have the right to cede and exchange its coast waters, can properly be met by the statement that territorial waters of all kinds are inalienable appurtenances [3] of the littoral and riparian States [4]

Breadth of Maritime Belt

§ 186 Be that as it may, the question arises how far into the sea those waters extend which are coast waters, and are therefore under the sway of the littoral State Here, too, no unanimity exists as to the breadth of the belt or the point on the coast from which it is measured

(1) Whereas the starting line is sometimes drawn along high-water mark, many writers draw it along low-water

[1] See below, p 470 In the course of the preparatory work of the Hague Codification Conference in 1930 practically all States, including Great Britain, Germany, Italy, and Japan, expressed themselves in favour of the same principle *Bases of Discussion* II pp 12 17

[2] Hall, § 41 The question is discussed by Heilborn, *System*, pp 36 58, Schucking, *op cit*, pp 14 20, and Gidel, III pp 23 45, 153-192

[3] See above, § 175 Bynkershoek's opinion (*De Dominio Maris*, c 5) that a littoral State can alienate its maritime belt without the coast itself is at the present day untenable This question was discussed in connection with the Belgo Dutch negotiations regarding the Scheldt Treaty and the passage of Wielingen see above, § 178, and Fauchille, § 492 (10), p 172, n 1

[4] The fact that Article 1 of Convention 13 (Rights and Duties of Neutral Powers in Maritime War) of the second Hague Peace Conference, 1907, speaks of 'sovereign rights in neutral waters' would seem to indicate that the States themselves consider their sway over the maritime belt to be of the nature of sovereignty The Privy Council in *A G for British Columbia* v *A G for Canada* [1914] A C 153, at p 174, declared that the question was not settled And see the Lübeck Bay dispute mentioned below, § 191, p 460, n 3

mark. Others draw it along the depths where the waters cease to be navigable, others again along those depths where coast batteries can still be erected, and so on [1] But the number of those who draw it along low-water mark is increasing The Institute of International Law [2] has voted in favour of this starting line, and many treaties stipulate the same

(2) With regard to the breadth of the maritime belt various opinions have in former times been held, and very exorbitant claims have been advanced by different States, such as a range of sixty or a hundred miles, or a range of vision (about fourteen miles) Although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis* [3] is now generally recognised by theory and practice, and consequently a belt of such breadth is considered under the sway of the littoral State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally [4] recognised as the breadth of the maritime belt

[1] See Schücking, *op cit*, p 13

[2] See *Annuaire*, 13, p 329 But before the First World War the Institute was reconsidering the question See reports by Barclay in *Annuaire*, 25 (1912), pp 375 396, by Oppenheim in *Annuaire*, 26 (1913), pp 403 412, and by Barclay, Niemeyer, Hurst, and Montluc in *Annuaire*, 32 (1925), pp 146-164, and discussion at pp 518 530 And see for a comprehensive treatment of the whole question Gidel, III pp 45-152, 493 663 The Anglo American Liquor Treaty of 1924 (see below, § 190 (II)) measures the three marine miles from low water mark As to some proposals at the Hague Codification Conference see Boggs in *A J*, 24 (1930), pp 541 548, and *Bases of Discussion*, II pp 35 39

[3] For the history of the cannon shot rule see Walker in *B Y*, 22 (1945) pp 210 231

[4] But not universally Thus Norway claims a breadth of four miles and Spain a breadth of six miles As regards Norway see Aubert in *R G*, 1 (1894), pp 429-441, Boye in *Bulletin de l'Institut Intermédiare International*, 18 (I) (1928), pp 2 8, and a Memorandum prepared by the Royal Norwegian Committee in November 1924, and entitled 'the Principal Facts concerning Norwegian Territorial Waters' As regards Sweden see Gihl in *R I*, 3rd ser, 7 (1926), pp 525 554, *Till Fragan om Gransen för Sveriges Territorialvatten* (1928) (a publication of the Swedish Foreign Office), Gihl, *Gransen for Sveriges Territorialvatten* (1930), Soderqvist, *Droit international maritime suédois* (1930) See also generally on the Scandinavian claims Kalijarvi in *A J*, 26 (1932), pp 57 65 As to Iceland, with regard to fisheries, see Bohmert in *Z V*, 20 (1936), pp 385-433, and as regards Denmark, Norway, and Sweden, Stael Holstein in *R I*, 3rd ser, 5 (1924), pp 630 679, and in *Z V*, 13 (1926), pp 321-323 See Anzilotti in *Rivista*, 11 (1917), pp 107, 108, 166, who considers that no rule of International Law has been developed to take the place of the abandoned 'shore batteries' rule And see, for several claims to more than three miles for the purpose

But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns Moreover, technical developments in sea transport and communications, in the range of guns, and other changes have not been altogether without effect upon the three miles rule [1] Although the great majority of States, as shown by their attitude during the Hague Codification Conference, adhere to the limit of three miles,[2] many of them make it dependent upon the recognition of a further protective, so-called contiguous, zone which for many purposes is indistinguishable from territorial waters [3] And even States, like Great Britain, which reject the idea of a contiguous zone not subject to the principle of the freedom of the sea admit that circumstances may arise in which a State cannot tolerate acts performed in the zone contiguous to its territorial sea, and that in these circumstances it is the duty of foreign States to agree to some measure of control over its merchant-vessels on the part of the littoral State [4] It was owing to disagreement on the question of the extent

of neutrality, below, vol II § 71 And note the view that there is no one maritime belt, but a number of them varying in breadth according to the nature of the interest to be protected—fisheries, sanitation, neutrality, etc (see Paulus, *op cit*) For a statement and examination of the claims of a number of States see Hyde, I §§ 142, 143, Jessup, *op cit*, pp 49 60, Baty in *A J*, 22 (1928), pp 503 537, Bustamante y Sirven, *La mer territoriale* (1930), pp 189 200, Gidel, III pp 493 663, Reeves in *A J*, 24 (1930), pp 491 494, Borchard, *ibid*, 40 (1946), pp 56 66 For an extract from the minutes of the Second Committee of the Codification Conference showing the claims of the various States see *A J*, 24 (1930), Suppl, pp 253 257, see also Schucking, *Der Kodifikationsversuch betreffend die Rechtsverhaltnisse des Küstenmeers* (1931), Raestad in *R I (Paris)*, 7 (1931), pp 107-146, and the answers of various States in *Bases of Discussion*, II pp 22-33 As to Greenland fisheries see Bohmert in *Z V.*, 21 (1937), pp 18 85

[1] See the British reply, at pp 28, 29 of the *Bases of Discussion*, vol II

[2] Among those adhering to the three mile limit were Great Britain and the British Dominions, the United States, France, Germany, Japan, Belgium, Holland, China, and Poland, among the States claiming the six mile limit were Italy, Brazil, Spain, Persia, Roumania, Turkey, and Yugoslavia

[3] These include Germany, Belgium, France, and Poland

[4] *Loc cit* The Institute of International Law has voted in favour of six miles, or two marine leagues, as the breadth of the belt see *Annuaire*, 13, p 286 A good survey of the attitude of all maritime States concerning the width of the maritime belt is given by Raestad in *R G*, 21 (1914), pp 401 420, by Crocker, *op cit*, and in Report for League Codification Committee, *op cit*, pp 70 76 The Anglo-American Liquor Treaty of 1924 (see below, § 190 (II)) contains a solemn affirmation of the principle of three marine miles And see p 444, n 4

of the maritime belt and of the contiguous zone that the Codification Conference of 1930 produced no convention on territorial waters

Fisheries, *Cabotage*, Police, and Maritime Ceremonials within the Belt

§ 187 Theory and practice agree upon the following principles [1] with regard to fisheries, *cabotage*, police, and maritime ceremonials within the maritime belt.

(1) The littoral State may reserve the fisheries within the maritime belt [2] exclusively for its own subjects, whether fish or pearls or amber or other products of the sea are under consideration

(2) The littoral State may, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called *cabotage*,[3] and reserve this *cabotage* exclusively for its own vessels *Cabotage* meant originally navigation and trade along the same stretch of coast between the ports thereof, such coast belonging to the territory of one and the same State However, the term *cabotage* or coasting trade as used in commercial treaties comprises now [4] sea trade between any two ports of the same country, whether on the same coasts or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of colonies or dominions of such countries

[1] For a suggestion to create an *Office International des Eaux* for the determination and study of questions connected with territorial waters see the Report by Strupp in *Annuaire*, 35 (1) (1929), pp 154-181, and the observations by Gidel, *ibid*, pp 199-219

[2] See Gidel, iii pp 222 325 and Higgins and Colombos, §§ 121 130 Most treaties stipulate for the purpose of fisheries a territorial maritime belt three miles wide See, for instance, Article 2 of the Hague Convention concerning Police and Fishery in the North Sea of May 6, 1882, Martens, *N R G*, 2nd ser, 9, p 556 On the British municipal aspect of fisheries within the maritime belt see *A G for British Columbia* v *A G for Canada* [1914] A C 153 On the history see Fulton, *op cit*, Fenn, *Origin of the Right of Fishery in Territorial Waters* (1926), and Bower in *J C L*, 3rd ser, 9 (1927), pp 220 227 For a comprehensive survey of and comment on various treaties see Daggett in *A J*, 28 (1934), pp 693 717 See also Reid, *International Servitudes* (1932), Chapters vii, viii, and ix And see the Temporary Fisheries Agreement of May 1930 between Great Britain and Soviet Russia, allowing British boats to fish within three to twelve miles of the northern coasts of Russia Treaty Series, No 22 (1930) For a recent example of a treaty regulating the use of the shore see the Convention of 1928 between Japan and Soviet Russia *L N T S*, 80, pp 341-399 As to the Spitsbergen fisheries see Böhmert in *Z o V*, 9 (1939), pp 317-338, 449-482

[3] See Pradier-Fodéré, v §§ 2441, 2442

[4] See below, § 579

(3) The littoral State may exclusively exercise powers of police and control within its maritime belt in the interest of its customs duties, the secrecy of its coast fortifications, and the like Thus foreign vessels can be ordered to take certain routes and to avoid others

(4) The littoral State may make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt [1]

Navigation within the Belt

§ 188 Although the maritime belt is a portion of the territory of the littoral State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, *cabotage* excepted And it is the common conviction [2] that every State has by customary International Law the *right* to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State Such right is correctly said to be a consequence of the freedom of the open sea, for without this right navigation on the open sea by vessels of all nations would in fact be an impossibility And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt Although the littoral State may spend a considerable amount of money on the erection and maintenance of lighthouses and other facilities for safe navigation within its maritime belt, it cannot make foreign vessels merely passing pay for such outlays It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the littoral State Some writers [3] maintain that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a littoral State may prevent such passage This view cannot be accepted An attempt on the part of a littoral State to prevent free navigation through the maritime belt in time

[1] See Twiss, 1 § 194, Gidel, III pp 193 212, Higgins and Colombos, § 131

[2] See above, § 142

[3] Kluber, § 76, Pradier-Fodére, 1 § 628

of peace would meet with stern opposition on the part of all other States

But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognised [1] Although many writers assert the existence of such a right, many others emphatically deny it As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt [2] It may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace, and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war [3] However that may be, *passage* must not be confounded with entering a port or roadstead No State need allow this, although all States do allow [4] it under certain conditions and with certain exceptions

Jurisdiction within the Belt

§ 189 That the littoral State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognised [5] Thus it may exclude foreign pilots, may make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like But it is a moot point [6] whether such foreign

[1] The answer of Governments in this matter in connection with the Codification Conference of 1930 revealed that the differentiation in the treatment of merchant-vessels and men of-war was smaller than was expected see *Bases of Discussion*, II pp 65 78 See also Hackworth, I § 94, Higgins and Colombos, § 215 In the case of *The David* the United States-Panama Claims Commission held that, notwithstanding any right of innocent passage, the littoral State is entitled to arrest on civil process merchant vessels passing through its territorial waters *Annual Digest*, 1933 1934, Case No 52

[2] Gidel, III pp 277-289

[3] See below, § 449

[4] The regulations of a number of States concerning visits of foreign men of war are printed in *A J*, 10 (1916), Suppl, pp 121-178

[5] See Gidel, III pp 212 277 For an example of a State conceding jurisdictional rights in its own territorial waters to another State see the Treaty of June 13, 1935, between the United States and Mexico, made to facilitate assistance and salvage, by vessels of their own nationality, of vessels of either country in danger or ship wrecked on the coast or within the territorial waters of the other country See Wilson in *A J*, 30 (1936), pp 494, 495

[6] See *Annuaire*, 17 (1898), p 273, for a 'Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers,' adopted by the Institute of International Law in 1898 The decision of the Supreme

vessels as do not stay but merely pass through the belt are for the time being under this jurisdiction It is for this reason that the British Territorial Waters Jurisdiction Act of 1878, which claims such jurisdiction, has called forth protests from many writers [1] The controversy itself can be decided only by the practice of the States The British Act quoted, the basis of which is, it is believed, sound and reasonable, is an important factor in initiating such a practice, but as yet no common practice of the States can be said to exist [2] The jurisdiction of the littoral State over foreign merchantmen which anchor within the maritime belt is discussed below (§ 190c)

Zone for Revenue and Sanitary Laws

§ 190 (1) Not to be confused with the territorial maritime belt is the zone of the open sea over which a littoral State extends the operation of its revenue and sanitary laws The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound for one of their ports as are approaching, but not yet within, their territorial maritime belt [3] Writers like Twiss and Phillimore agree in stating

Court of the United States of America in the Ship's Liquor case (*Cunard Steamship Co et al* v *Mellon*) asserts jurisdiction over foreign ships entering American territorial waters, and does not appear to consider anchoring or entering a port essential (*A J*, 17 (1923), pp 504 507 and 563-572, *B Y*, 1924, pp 184-187) See also *Zacharıassen* v *The United States*, decided in 1941 by the United States Court of Claims, *Annual Digest*, 1941-1942, Case No 71

[1] See Perels, pp 69 77, and *Annuaire*, 13, p 328

[2] See *Bases of Discussion*, II pp 78-87

[3] The matter is treated by Moore, I § 151, Taylor, § 248, Twiss, I § 190, Phillimore, I § 198, Stoerk in *Holtzendorff*, II pp 475 478, Perels, § 5, pp 25 28, Raestad, *op cit*, pp 118 120, 128-130, 142 143, Hyde, I § 235, Higgins and Colombos, §§ 111-120, and, in particular, by Gidel, III pp 361 492, and in *Bases of Discussion*, II pp 87 91 See also Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 108-109, *Annuaire*, XIII (1894) p 135, Smith, II pp 165 221, the British so called Hovering Acts (9 Geo 2, c 35, and 24 Geo 3, c 47) have been repealed, and the present English law on the subject is contained in the Customs Consolidation Act, 1876, §§ 53, 147, 179, 181, 189 As to the United States 'Anti Smuggling' Act of August 5, 1935, see Jessup in *A J*, 31 (1937), pp 101 106, and Briggs in *R I*, 3rd ser, 20 (1939), pp 217-255 The Act, which is printed in *A J*, 31 (1937), Suppl, p 183, provides, *inter alia*, for penalties for vessels not exceeding five hundred net tons and encountered within a twelve mile limit while not in possession of a certificate of importation into the United States of spirits, wines, or alcoholic liquors See also *The Reidun* on the interpretation of the term 'customs waters' used in the Act of 1935 14 F Supp 771, 15 F Supp 112, *Annual Digest*, 1935-1937,

that in strict law these Municipal Laws have no basis since every State is by the Law of Nations prevented from extending its jurisdiction over the open sea, and that it is only the Comity of Nations which admits tacitly the operation of such Municipal Laws as long as foreign States do not object, and provided that no action is taken within the territorial maritime belt of another nation However, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the Law of Nations may be said to exist which allows littoral States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound for their ports as are approaching, although not yet within, their territorial maritime belt

Claims to Protective Jurisdiction outside the Maritime Belt

§ 190 (ii) Other instances have occurred of claims to supplement, either by way of anticipation or of subsequent punitive action,[1] a State's admitted jurisdiction within the maritime belt by acts done outside it in the open sea. The use of force by the littoral State upon a foreign merchantman outside its maritime belt but intending to enter it with a view to injuring the littoral State or its territory or nationals would certainly be excusable as a necessary act of self-preservation upon the conditions already discussed [2] But

Case No 81 And see on protective jurisdiction generally *The People* v *Stralla*, decided in 1939 by a Californian Court, *Annual Digest*, 1938 1940, Case No 101 In the course of the preparatory work of the Hague Codification Conference the British Government reaffirmed this view with regard both to civil and criminal jurisdiction (*Bases of Discussion*, II p 86) The Final Act of the Hague Codification Conference of 1930, however, approved the rule that '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' and that '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' Article 16 of the Harvard Draft Convention on Territorial Waters is to the same effect In a case decided in June 1933, the General Claims Commission between the United States and Panama declined to accept the view adopted in the Hague Final Act as representing a rule of International Law (*Compañia de Navigación Nacional* v *The United States of America*), see comment thereon by Jessup in *A J*, 27 (1933), pp 747-750 See also Charteris in *B Y*, 13 (1932), pp 125-128

[1] As to the so called Right of Pursuit see below, § 266 (3)

[2] See above, §§ 129, 130, and 133, Westlake, I pp 175, 176, Hyde, I § 235, Brown in *A J*, 17 (1923), pp 89 95, and discussion in

if the object of the voyage of the foreign merchantmen is merely to take part in an attempt to defeat a prohibition by the laws of the littoral State of the importation of articles considered by it to be noxious, such anticipatory force outside the maritime belt could not, it is believed, in the present state of International Law, be strictly justified, though it is arguable that on grounds of International Comity it should be condoned [1] This question attracted some attention in connection with the enforcement by the United States of America of its Prohibition Amendment and National Prohibition Act (the Volstead Act), but the British and American Governments by the conclusion of the Anglo-American Liquor Treaty of 1924 [2] placed the exercise of this protective jurisdiction upon a solid conventional basis for the purpose of this particular traffic [3] This Treaty, after recording the firm intention of the contracting parties 'to uphold the principle that three marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters,' proceeded to establish a one-hour zone—that is, a zone represented by the distance capable of being traversed in one hour by the suspected vessel or, where transhipment

Proceedings of American Society of International Law, 1923, pp 15 47, Dickinson in *H L R*, 40 (1926), pp 1-29, Jessup, *op cit*, ch II and V, Hackworth, I §§ 98 99, and Masterson in *Grotius Society*, 13 (1928), pp 53-74 See also *Croft* v *Dunphy* [1933] A C 156, which, however, was decided on a point of British constitutional law The question of the extent to which International Law recognises the doctrine of the contiguous zone has been recently studied and widely discussed, but there is no consensus of opinion See Jessup, *op cit*, p 95, and Masterson, *op cit*, p 380, whose answer is in the affirmative but see Baty, pp 152-156, and the replies of Governments to the questionnaire circulated in connection with the Codification Conference in 1930 C 74 M 39, 1929 V See Brierly in *B Y*, 14 (1933), pp 155 157 And see for an exhaustive treatment of the question of contiguous zones Gidel in *Hague Recueil*, vol 48 (1934) (II), pp 241-273, and the same, *Le droit international public de la mer*, vol III La mer territoriale et la zone contigue (1934)

[1] As to Jurisdiction on the Open Sea, see below, §§ 260 271 With regard to vessels lying outside the maritime belt, but communicating by means of small boats with the shore or the territorial waters, see Hughes in *A J*, 18 (1924), pp 232, 233

[2] Treaty Series, No 22 (1924), Cmd 2199 *B Y*, 1924, pp 187-190, *A J*, 18 (1924), Suppl, pp 127-130

[3] Treaties for the same purpose but not always on the same lines have been concluded by the United States with a number of other countries, see Dickinson in *A J*, 20 (1926), pp 340-346, and Jessup, *op cit*, ch VI.

is intended, by the vessel available for transhipment. Within this one-hour zone Great Britain undertook to raise no objection to the boarding and search of British vessels suspected of endeavouring to import into the United States alcoholic beverages in violation of its laws [1] The *quid pro quo* obtained in return for this concession was that British vessels were permitted to carry alcoholic liquor under seal within American ports and territorial waters either as sea stores or as cargo destined for a non-American port [2]

Protective Jurisdiction with regard to Fisheries

§ 190 (III) Occasionally States have put forward claims to jurisdiction on the high seas adjacent to their territorial waters for the purpose of safeguarding fisheries against indiscriminate exploitation In thus claiming to exercise control over foreign nationals on the high seas States have relied either on the right of self-protection against activities threatening the extinction of an industry vital to the economic life of the nation or on the narrower ground of an alleged right of property in animals attached in some way to the territory or the territorial waters of the States con-

[1] Can the conventional limits, thus extended, be treated in all respects as territorial waters? This question arose and was, it seems, answered in the negative in the *I'm Alone* case in which a Canadian vessel, engaged in the smuggling of alcoholic liquor, was sunk by a United States coast guard vessel on the high seas more than two hundred miles from the coast of the United States, after having refused to stop or allow herself to be boarded when summoned to do so at a point beyond the three mile limit but, apparently, within the one hour's sailing distance The question was submitted to two Commissioners who, without giving reasons, held in 1935 that the sinking was not justified either by the terms of the Convention or by International Law see for the Joint Final Report, *A J*, 29 (1935), p 329, Dennis, *ibid*, 23 (1928), pp 355 362, Hyde, *ibid*, 29 (1935), pp 296 301, Fitzmaurice in *B Y*, 17 (1936), pp 82 111 And see § 266 (3)

[2] See Brown in *L Q R*, 39 (1923), pp 327-340, Wilson in *Hague Recueil*, 1923, pp 164 168, Dickinson, *ibid*, 20 (1926), pp 111 117 and 444 452, and in *R I*, 3rd ser, 7 (1926), pp 371-387, Jessup, *op cit*, ch IV and V As to measures of co operation between the British and American Governments to prevent the smuggling of alcoholic liquor see correspondence between them, Cmd 2647 As to the judicial interpretation of the Treaty see Dickinson in *A J*, 21 (1927), pp 505 509, *Ford* v *United States*, 47 Supreme Court Reporter, 531, and *Annual Digest*, 1925-1926, Case No 110, and Jessup, *op cit*, ch VII, *Cook* v *The United States* (1933), 288 U S 102, *A J*, 27 (1933), pp 559-569, *The United States of America* v *Santos Flores*, *A J*, 27 (1933), pp 569 579 See also Jones, *The Eighteenth Amendment and our Foreign Relations* (1933), and Masterson in *Grotius Society*, 14 (1928), pp 45 56 For a list of the liquor treaties see *A J*, 28 (1934), p 101, n 1 And see Dickinson, *ibid*, pp 101-104, for a refutation of the view that these treaties lapsed as the result of the repeal, in 1933, of Amendment XVIII to the Constitution

cerned The latter argument was unsuccessfully invoked by the United States in 1893 before the Tribunal in the Behring Sea Arbitration with regard to the protection of the fur seals fishery [1] A similar claim by Russia was subsequently successfully challenged by the United States [2] In denying to a State the right to exercise protective jurisdiction over fisheries on the high seas contiguous to its territories, international tribunals were upholding the principle of the freedom of the seas It is probable that the rigid application, in cases of this nature, of the principle of the freedom of the seas is open to criticism as failing to protect important interests of the littoral State against the unscrupulous exercise of a legal right [3] Moreover, although the three-mile limit of territorial waters must still be regarded as the rule of International Law on the subject, it is a rule which is in need of modification in relation to the various interests involved [4]

On the other hand, it is doubtful whether unilateral action, not preceded by serious efforts to obtain an agreed solution of the difficulty, can be regarded as the proper method of bringing about an adequate rule of International Law in the matter In September 1945 the United States 'in view of the pressing need for conservation and protection of fishery resources' proclaimed the establishment of conservation zones in the areas of the high seas contiguous to the coasts of the United States [5] A distinction was made between areas in which fishing activities are maintained by nationals of the United States only and those in which they are conducted jointly by the nationals of the United States and other States With regard to the first, the United States asserted an exclusive right of regulation and control With regard to the second, such regulation and control was made subject to agreements to be concluded with other States [6]

[1] See Lauterpacht, *Analogies*, § 99

[2] For an account of this dispute see Leonard, *International Protection of Fisheries* (1944), pp 83 89

[3] See Lauterpacht, *Function of Law*, pp 97 100

[4] See above, p 444, n 4

[5] For the text of the Presidential Proclamation and of executive orders see *Bulletin of Department of State*, 13 (1945), pp 484 487, *A J*, 40 (1946), Suppl, pp 45 48

[6] It was announced in the Proclamation that the United States would concede to other States a similar right to establish conservation zones off their shores provided that corresponding recognition would be given to fishery interests of nationals of the United States.

In announcing that unilateral measure the United States disclaimed any intention of interfering either with the free and unimpeded navigation in the conservation zones thus established or, generally, with their character as part of the high seas [1]

No Maritime Belt around Lighthouses in the Sea

§ 190a. Since the most important lighthouses are built outside the maritime belt of the littoral States, the question arises whether a State can claim a maritime belt around its lighthouses in the open sea—a question which Sir Charles Russell,[2] the British Attorney-General, in the *Behring Sea Seal Fisheries* case answered in the affirmative It is tempting to compare such lighthouses with islands,[3] and argue in favour of a maritime belt around them, but such an identification is misleading Lighthouses must be treated on the same lines as anchored lightships Just as a State may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea [4]

The Surface and Subsoil of the Sea Bed beneath the Maritime Belt.

§ 190b It seems to follow [5] from the opinion which has been adopted above that [6] the part of the sea which forms the maritime belt is the property of the littoral State, that the surface and subsoil of the sea bed under the maritime belt is also the property of the littoral State and cannot be appropriated by any other State [7] Some deny this, and

[1] For a discussion of the Proclamation see Borchard in *A J*, 40 (1946), pp 53-70 And see generally on the protection of coastal fisheries Hyde, §§ 143 144, Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938), Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), Leonard, *International Regulation of Fisheries* (1944)

[2] See Moore, *Arbitrations*, 1 pp 900 901, and see below, § 284

[3] See Smith, vol II pp 221 241 It does not matter that the island in question is uninhabited *Middleton* v *United States* (United States Circuit Court of Appeals) (1929), 32 F (2d) 239, *Annual Digest*, 1929-1930, Case No 59 See also *Bases of Discussion*, II pp 48 55 And see *Rex* v *Conrad*, decided in 1938 by the Supreme Court of Nova Scotia *Annual Digest*, 1938, 1940, Case No 50, *State* v *Ruvido*, decided in 1940 by the Supreme Judicial Court of Maine *ibid*, Case No 51

[4] See to the same effect Westlake, 1 pp 119, 190 See also Lindley, pp 66, 67, who arrives at a similar conclusion on a different ground, namely, that the occupation of a rock or barren island not 'for its own sake but merely to facilitate fishing and navigation in the surrounding ocean' is not 'a sufficient justification for extending the sovereignty of the occupying State over those waters' As to fortified rocks and islands in the open sea see Lindley, pp 65-66

[5] Fauchille, § 494, does not think so.

[6] See above, § 185

[7] See Westlake, 1 p 188, and Rivier, 1 p 148 (as to fisheries, sedentary and otherwise)

prefer to say that it is capable of becoming the property of the littoral State by occupation [1] However that may be, it is the practice of a number of States to reserve for their own Government or nationals the exploitation both of the surface—for instance, by means of sedentary fisheries—and of the subsoil—for instance, by mining for coal and other minerals—and to assume by their legal systems that they have the exclusive property in both [2] The surface and the subsoil beneath the open sea form the subject of different considerations, and are discussed later [3]

Ports, Harbours and Roadsteads

§ 190c The status of the waters in ports, harbours, roadsteads, and the mouths of rivers is, however, different from that of the waters of the maritime belt, as has been explained above, for the former are national or internal, and the latter territorial Consequently the jurisdiction over foreign merchantmen passing through the maritime belt, which has already been mentioned, is different from the jurisdiction over such vessels when they enter a port, harbour, roadstead, or mouth of a river [4] In such cases, and also when a foreign merchant-ship casts anchor [5] within the maritime belt, the vessels, and the persons thereon, fall under the jurisdiction of the littoral State in case peace and order outside the ship are disturbed, or persons other than crew or passengers are affected But many writers maintain, and the practice of France and some other States supports their view, that the littoral State has no jurisdiction in case only the internal order of the ship is affected, or the relations

[1] See Fauchille, *loc cit*

[2] See as to Great Britain, Hurst in *B Y*, 1923-1924, pp 36 43 The Privy Council, in *A G for British Columbia* v *A G for Canada* [1914] A C 153, declined to express an opinion The draft Convention attached to the Report of the League Codification Committee on Territorial Waters, *op cit*, at pp 141 and 143, is in accord with the view stated above

[3] See below, § 287*bb*, as to the surface, and § 287*c* as to the subsoil

[4] For a review of the practice of a number of States see Charteris in *B Y*, 1920 1921, pp 45 96, and Praag, §§ 260 270 And see Hyde, 1 §§ 221-226, and Jessup, *op cit*, pp 144-194, on the difference between the so-called French rule and the British practice, see also a decision of the Supreme Court of the Philippines of October 19, 1922 (as to the possession of opium on a foreign vessel), reported in *Bulletin de l'Institut Intermédiaire International*, 12 (1925), p 285 See also Report of Committee in *International Law Association's Thirty-fourth Report* (1927), pp 449 458 And see in particular Gidel, vol II pp 39 252

[5] There is probably no right of anchorage in the maritime belt see Hurst in *B Y*, 1922-1923, at pp 53 54

between members of the crew or passengers are alone concerned [1] However, there is no rule of International Law which limits its jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen as have cast anchor within the maritime belt or entered a port, together with the persons on board [2] On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties [3] stipulated that in such cases as those in which the internal order of the ship is alone concerned, jurisdiction should be exercised, not by the littoral State, but by the home State through its consul But it should be mentioned that, even where a littoral State claims full jurisdiction over foreign merchantmen in its ports, this jurisdiction is to a certain small extent limited when the vessel has been compelled to enter a port in distress,[4] because the ship must then in a small degree be regarded as exterritorial

[1] For instance, in 1925 the chief officer of a Canadian Pacific liner who shot the commander of the vessel on board while in the port of Antwerp was tried for murder in England London *Times* newspaper, November 19, 1925

[2] On the question of the jurisdiction of the littoral State over persons under detention on board foreign merchantmen entering its ports see Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), at p 81, *R* v *Keyn* (1876) 2 Ex D at p 83, and the case of *Tulop and Szıber* in New South Wales in May 1922, discussed by Charteris in *J C L*, 3rd ser, 8 (1926), pp 246-249 And see *Bases of Discussion*, II pp 97 101 See also, in connection with the *Insull* case (see below, p 641, n 1), Makarov in *Z o V*, 4 (1934), pp 618 625 By the La Follette Seamen's Act (46 U S C A sec 597) United States courts were given jurisdiction with regard to claims to wages on the part of foreign seamen within a port of the United States (including the payment of wages upon the completion of a voyage ending in a United States port) See, for an application of the Act to war bonus, *Lakos et al* v *Saliaris*, *Annual Digest*, 1941 1942, Case No 38

[3] See Hall, § 58, Moore, II 204-208, Stoerk in *Holtzendorff*, II pp 446 453, Despagnet, §§ 429 430, De Louter, I pp 425 429, Nielsen in *A J*, 13 (1919), pp 5 12, Hackworth, II §§ 139-149 (on jurisdiction in and over ports generally), Higgins and Colombos, §§ 279 286 See also the American case of *Wildenhus* (1886) 120 U S 1, Hudson, *Cases*, p 602 As to the jurisdiction over nationals with regard to offences committed on national vessels within the territorial limits of a foreign State see *United States* v *Flores* (1932) 289 U S 137

[4] See Moore, II § 208, the award in the case of the *Enterprise* in Moore, *Arbitrations*, IV p 4349 As to immunities of vessels in distress see *The Rebecca*, decided on April 2, 1929, by the United States Mexican Claims Commission *Annual Digest*, 1929-1930, Case No 82 And see *The May* v *The King, The Queen City* v *The King and other ships*, (1931) *Can S C R* 374, 387, (1931) 3 *D L R* 15, 147, and *Cashin* v *The King*, *Canada Law Reports* [1935] Ex C R 103, on the meaning of 'stress of

A Convention and Statute respecting the International Régime of Maritime Ports [1] was signed at Geneva on December 9, 1923 It has been ratified by a number of States, including Great Britain, and is now in force It provides that on a basis of reciprocity the sea-going vessels of the contracting parties shall enjoy equality of treatment in, and freedom of access to, their maritime ports—that is, 'all ports which are normally frequented by sea-going vessels and used for foreign trade' The Statute applies to 'all vessels, whether publicly or privately owned or controlled,' other than 'warships or vessels performing police or administrative functions' (Article 13) or fishing-vessels (Article 14), but it does not apply to the 'maritime coasting trade'—that is, *cabotage* [2] (Article 9)—nor does it prescribe the rights and duties of belligerents and neutrals in time of war (Article 18) [3]

VII

GULFS AND BAYS

Grotius, II c 3 § 8—Vattel, I § 291—Hall, § 41—Westlake, I pp 187 196—Lawrence, § 72—Phillimore, I §§ 200 201*a*—Twiss, I §§ 181, 182—Hackworth, I §§ 100 102—Halleck, I pp 175, 176—Taylor, §§ 229 231—Walker, § 18—Hershey, § 195—Wharton, I §§ 27, 28—Moore, I § 153—Wheaton, §§ 181 189—Hyde, I §§ 146 148—Bluntschli, §§ 309, 310—Hartmann, § 58—Heffter, § 76—Stoerk in *Holtzendorff*, II pp 419 428—Gareis, § 21—Liszt, § 16, I (3)—Ullmann, § 88—Hatschek, pp 198, 199—Fauchille, §§ 516 516 (10)—Despagnet, §§ 405, 406—Mérignhac, II pp 394 398—Pradier Fodéré, II §§ 661 681—Nys, I pp 477 488—Rivier, I pp 153 157—Calvo, I §§ 366, 367—Fiore, II §§ 808 815, and *Code*, §§ 279 283—Cavaglieri, pp 285 288—Martens, I § 100—Perels, § 5—Keith's Wheaton, pp 361 369—Baty, pp 70 80—Smith, II pp 243-250—Higgins and Colombos, §§ 143 155—Fulton, *The Sovereignty of the Sea* (1911), pp 586 589 and 717-734—Schucking, *Das Küstenmeer im inter-*

weather and other unavoidable cause' See also Laing in *A J*, 26 (1932), pp 374-379 And see Lord Stowell in *The Eleanor* (1809), *Edward's Admiralty Reports*, 135, at pp 159, 160 'Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws'

[1] Treaty Series, No 24 (1925), Cmd 2419, *L N T S*, 58, p 284, summary in *B Y*, 1924, pp 200, 201 By Article 103 of the Treaty of Lausanne of 1923 Turkey undertook to adhere to this Convention See Laun, *Le droit international des ports* (1928) And see below, p 543, n 2

[2] See above, § 187

[3] See Fauchille, § 517 (3), and Hostie, in *R I* 3rd ser, 5 (1924), pp 681-708, and *ibid*, 6 (1925), pp 115 154

nationalen Rechte (1897), pp 20-24—Mochot, *Le régime des baies et des golfes en droit international* (1938)—Barclay in *Annuaire*, 12, pp 127-129—Charteris in *International Law Association's Reports*, 23 (1907), pp 103-132, and 27 (1912), pp 107 127—Wilson in *Hague Recueil*, 1923, pp 146 154—Jessup, *Law of Territorial Waters* (1927), ch viii (discussing a number of particular bays)—Oppenheim in *Z V*, 1 (1907), pp 579 587, and 5 (1911), pp 74 95—Salmond in *L Q R*, 34 (1918), pp 235 252—Hurst in *B Y*, 1922-1923, pp 42-54—Kaljarvi in *A J*, 26 (1931), pp 55 69 (as to Scandinavian countries)—*Bases of Discussion*, ii pp 39 45

Territorial Gulfs and Bays

§ 191 Such gulfs and bays as are enclosed by the land of one and the same littoral State, and have an entrance from the sea not more than six miles wide, are certainly territorial[1], those, on the other hand, that have an entrance too wide to be commanded by coast batteries erected on one or both sides of it, even though enclosed by one and the same littoral State, are certainly not territorial These two propositions may safely be maintained It is, however, controversial how far bays and gulfs encompassed by a single littoral State, and possessing an entrance more than six miles wide, yet not too wide to be commanded by coast batteries, can be territorial Some writers[2] state that no such gulf or bay can be territorial, and Lord Fitzmaurice declared in the House of Lords on February 21, 1907, in the name of the British Government, that only bays with an entrance *not* more than six miles wide were to be regarded as territorial But in the *North Atlantic Coast Fisheries*

[1] The expression 'territorial bay' must not be allowed to obscure the facts (1) that the waters contained in territorial bays, and in the territorial portions of bays not wholly territorial, are not territorial waters and part of the maritime belt, but national waters, and (2) that the limit of the national waters is the datum line for the measurement of the maritime belt see Hurst, *op cit*, and above, § 172 As to this dividing line see also the following *Annuaire*, 13 (1894), pp 291-296, Despagnet, § 406, Fauchille, § 516 (9), Taylor, § 229, Westlake, i p 191, Lawrence, § 72, Lapradelle in *R G*, 5 (1898), p 264, Hatschek, pp 198, 199, Villeneuve, *De la détermination de la ligne séparative des eaux nationales et de la mer territoriale, spécialement dans les baies* (1914), Boggs in *A J*, 24 (1930), pp 541-555 In the dispute between Lübeck and Mecklenburg Schwerin, decided by the German *Staatsgerichtshof* in July 1928, the Court expressed preference for the view that the sovereignty over the same part of the bay may be divided functionally, *i e* one State may exercise sovereignty with respect to some matters and the other State with respect to others *Annual Digest*, 1927-1928, Case No 88

[2] See Walker (§ 18) Westlake (i p 191) cannot be cited in favour of it, since he distinguishes between bays and gulfs in such a way as is not generally done by international lawyers, and as is certainly not recognised by geography, for the very examples which he enumerates as *gulfs* are all called *bays*, namely, those of Conception, of Cancale, of Chesapeake, and of Delaware

case, which was decided by the Permanent Court of Arbitration at The Hague in 1910, Great Britain disowned [1] the declaration by Lord Fitzmaurice The United States contended for its accuracy, but the Court refused to agree. Other writers maintain that gulfs and bays with an entrance more than ten miles wide, or three and a third marine leagues, cannot belong to the territory of the littoral State, and the practice of several States, such as Germany, Belgium, and Holland, accords with this opinion But the practice of other countries, approved by many writers, goes beyond this limit Thus France holds the Bay of Cancale to be territorial, although its entrance is seventeen miles wide, Great Britain holds the Bay of Conception [2] in Newfoundland and the Bays of Chaleurs [3] and Miramichi in Canada to be territorial, although the width between their headlands is twenty, sixteen, and fourteen miles respectively [4] Even the Hudson Bay in Canada, which embraces about 580,000 square miles, and the entrance to which is fifty miles wide, is claimed as territorial by Canada [5] Norway claims the Varanger Fiord as territorial, although its entrance is thirty-two miles wide The United States claims the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial,[6] although the entrance

[1] See *Oral Argument*, part 1 pp 270 271

[2] See *Direct U S Cable Co* v *Anglo American Telegraph Co* (1877) L R 2, App Ca 394

[3] See *Mowat* v *McFee* (1880) 5 Can S C, 66, cited by Hurst, *op cit*, at p 47

[4] In *The Fagernes* [1927] P 311, the Court of Appeal, considering itself bound by a statement made by the Attorney General on behalf of the Crown, held that a particular spot in the Bristol Channel where it is twenty miles in width was 'not within the limits to which the territorial sovereignty of His Majesty extends,' and thus differed from the view stated in *Reg* v *Cunningham* (1859) Bell's Crown Cases 72, to the effect that the whole of the Bristol Channel was within the bodies of the adjacent counties (The spot in question in the latter case was much higher up than in *The Fagernes*) See Beckett and Bellot in *B Y*, 1928, pp 120 126

[5] But the claim is denied by the United States See Balch in *R I*, 2nd ser, 13 (1911), pp 539 586, 15 (1913), pp 153-172, and in *A J*, 6 (1912), pp 409-459, 7 (1913), pp 546 565, Kenneth Johnston in *B Y*, 15 (1934), pp 1-20

[6] See Taylor, § 229, Wharton, 1 §§ 27, 28, Moore, 1 § 153, and *The Alleganean* (1885), Scott, *Cases*, p 282 See also *United States* v *Carillo*, D C (1935) 13 F Supp 121, *Annual Digest*, 1935 1937, Case No 56 (as to the Bay of San Pedro in California), *State* v *Ruvido* (1940), 15 A (2d) 293, *Annual Digest*, 1938-1940, Case No 51 (as to the Penobscot Bay in the State of Maine), *The People* v *Stralla and Adams* (1939), 96 Pac (2d) 941, *Annual Digest*, 1938-1940, Case No 52 (as to the Santa Monica Bay in California).

to the one is twelve miles wide and to the other ten miles The Institute of International Law has voted in favour of a twelve-miles-wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than one hundred years [1]

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not Examples of territorial bays in Europe are the Zuider Zee,[2] which is Dutch, and the Bay of Stettin, in the Baltic, which is German, as is also the Jade Bay in the North Sea [3] An international congress is desirable to settle once for all which gulfs and bays are to be considered territorial And it must be speedily observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,[4] which include portions of the sea between lines drawn from headland to headland

Non-territorial Gulfs and Bays

§ 192 Gulfs and bays surrounded by the land of one and the same littoral State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, as a rule,[5] all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial [6] They are parts of the open sea, the

[1] See *Annuaire*, 13, p 329

[2] See Jessup, *op cit*, at p 438

[3] For a purely domestic dispute between two German States regarding Lübeck Bay, in the course of which the rules of International Law were involved see Wenzel, *Die Hoheitsrechte in der Lübecker Bucht* (1926), and *Annual Digest*, 1925 1926

[4] Whereas Hall (§ 41, p 159) says 'England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers,' Phillimore (1 § 200) still keeps up this claim, as did the Attorney General before the Hague Court of Arbitration in the *North Atlantic Coast Fisheries* case (see *Oral Argument*, Part II p 1308) The attitude of the British Government in the *Moray Firth* case—see below, § 192—would seem to demonstrate that this claim is no longer upheld, but see Atkin L J in *The Fagernes* [1927] P at p 326 See also Lawrence, § 87, Westlake 1 p 192, Grant in *L Q R*, 31 (1915), pp 410-422 Fulton, *op cit*, p 121, gives a fascimile of a chart prepared by Trinity House in 1604 showing the bearings of the King's Chambers

[5] For an exception to the rule, see the next note as to the Gulf of Fonseca

[6] This is not uncontested A few writers—see, for instance, Twiss, 1 § 181—assert that narrow gulfs and bays surrounded by the land of two different States are territorial, the central line dividing the territorial portions However, the majority of writers do not accept this opinion, and it would seem that the practice of States likewise rejects it, except in the case of such bays as possess the characteristics of a closed sea Thus, in the case of *San Salvador* v *Nicaragua*, the International Court

marginal belt inside the gulfs and bays excepted. They can never be appropriated [1], they are in time of peace and war open to vessels of all nations, including men-of-war, and foreign fishing-vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral State concerning the mode of fishing [2]

of the Central American Republics (see *A J*, 11 (1917), pp 693, 700-717) decided in 1917 that, taking into consideration its geographical and historical conditions, as well as its situation, extent, and configuration, the Gulf of Fonseca must be regarded as 'an historic bay possessed of the characteristics of a closed sea,' and that it therefore was part of the territories of San Salvador, Honduras, and Nicaragua The decision of this Court has, of course, only force with regard to the three Central American States concerned, but the United States acknowledges the territorial character of this gulf The attitude of other States is not known

As regards the Bay of Fundy see *The Schooner Washington*, British American Claims Commission, 1853-1855, Report of Decisions, p 170, Scott, *Cases*, p 229

[1] See, however, Hurst, *op cit*, at p 54, who contends that if and when a non-territorial inlet narrows 'to such an extent as to be obviously a bay,' say, ten miles in width, the water in the upper and narrower portion are national waters, and the maritime belt will be drawn from the imaginary limit of the national waters And note the following documents in support of this view the North Sea Fisheries Convention, 1882 (see *B Y*, 1922 1923, at p 42, and below, p 462, n 1), the draft of general treaty between Great Britain and Soviet Russia of 1924 (Cmd 2215), ch ii Annex, Section ii, and Article 4 of the draft convention in the Report on Territorial Waters adopted by the League Codification Committee (*A J*, 20 (July 1926), Special Suppl, p 142) In the Temporary Fisheries Agreement between Great Britain and Soviet Russia of May 22, 1930, it was provided that as regards bays the distance of three miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed ten miles Treaty Series, No 22 (1930), Cmd 3583

[2] An illustrative case is that of the fisheries in the Moray Firth, *Mortensen v Peters* (1906) 14 Sc L T 227 By Article 6 of the Herring Fishery (Scotland) Act, 1889, beam and otter trawling is prohibited within certain limits of the Scottish coast, and the Moray Firth inside a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire is included in the prohibited area In 1905, Mortensen, the captain of a Norwegian fishing vessel, but a Danish subject, was prosecuted for an offence against the above mentioned Article 6, convicted, and fined by the Sheriff Court at Dornoch, although he contended that the incriminating act was committed outside three miles from the coast He appealed to the High Court of Justiciary, which, however, confirmed the verdict of the Sheriff Court, correctly asserting that, whether or not the Moray Firth could be considered as a British territorial bay, the Court was bound by a British Act of Parliament, even if such Act violates a rule of International Law The British Government, while recognising that the Scottish courts were bound by the Act of Parliament concerned, likewise recognised that, the Moray Firth not being a British territorial bay, foreign fishing vessels could not be compelled to comply with an Act of Parliament regulating the mode of fishing in the Moray Firth beyond three miles from the coast, and therefore remitted Mortensen's fine

To remedy the conflict between Article 6 of the above-mentioned Herring Fishery (Scotland) Act, 1889, and the requirements of International Law, Parliament passed the Trawling in Prohibited Areas Pre-

Navigation, Fishery, and Jurisdiction in Territorial Gulfs and Bays

§ 193 As regards navigation, fishery, and jurisdiction in territorial gulfs and bays the majority—rightly, it is believed—contend that the same rules of the Law of Nations are valid as in the case of navigation and fishery within the territorial maritime belt The right of fishery may, therefore, be reserved exclusively for subjects of the littoral State [1] And navigation, *cabotage* excepted, must be open [2] to merchantmen of all nations, though foreign men-of-war need not be admitted, unless the gulfs or bays in question form part of the highways of international traffic But the matter is not settled, and there are some who maintain that foreign vessels may be excluded altogether from territorial gulfs and bays, or admitted only on payment of dues, rates, etc [3]

VIII

STRAITS

Grotius, II c 3, § 8—Vattel, I § 292—Hall, § 41—Westlake, I pp 197-201—Lawrence, §§ 87 89—Phillimore, I §§ 180 196—Twiss, I §§ 183, 184, 189—Halleck, I pp 178, 179—Taylor, §§ 230 231—Walker, § 17—Wharton, I §§ 27-29—Wheaton, §§ 181 191—Moore, I §§ 133, 134—Hershey, § 196—Bluntschli, § 303—Hartmann, § 65—Heffter, § 76—Stoerk in *Holtzendorff*, II pp 419 428—Gareis, § 21—Liszt, §§ 15, II 36, II (3, 4—Ullmann, § 88—Strupp, *Éléments*, § 9D—Fauchille, §§ 506 510 (6)—Despagnet, §§ 415 417—Pradier-Fodéré, II §§ 650 656—Nys, I pp 492 515—Rivier, I pp 157-159—Calvo, I §§ 368 372—Cruchaga, §§ 442 453—Cavaglieri, pp 288 291—Fiore, II §§ 745 754, and *Code*, §§ 285 287—Martens, I § 101—Keith's Wheaton, pp 375 284—Smith, II pp 255 272—Gidel, III pp 728 764—Higgins and Colombos, §§ 159 178—Holland, *Studies*, pp 277-279—Laun, *Die internationalisierung der Meerengen und Kanale* (1918)—

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vention Act, 1909, according to which no prosecution can take place for the exercise of prohibited fishing methods beyond three miles from the coast, but the fish so caught may not be landed or sold in the United Kingdom (see Oppenheim in *Z V*, 5 (1911), pp 74 95)

[1] The Hague Convention concerning Police and Fishery in the North Sea, concluded on May 6, 1882, between Great Britain, Belgium, Denmark, France, Germany, and Holland, by Article 2 reserves the fishery for subjects of the littoral States of such bays as have an entrance from the sea not wider than ten miles, but reserves likewise a maritime belt of three miles to be measured from the line where the entrance is ten miles wide Practically the fishery is therefore reserved for subjects of the littoral State within bays with an entrance much wider than ten miles See Martens, *N R G*, 2nd ser, 9, p 556

[2] But this is not universally recognised See, for instance, Twiss, I § 181, Calvo, I § 367

[3] See above, § 191

Brüel, *International Straits*, 2 vols (1947)—Wilson in *Hague Recueil*, 1923, pp 155-163—Report of Committee in *International Law Association's Thirty fourth Report* (1927), p 44—Salmond in *L Q R*, 34 (1918), pp 235 252—F de Visscher in *R I*, 3rd ser, 4 (1923), pp 537 572, and *ibid*, vol 5 (1924), pp 13 57—Guerra in *R G*, 31 (1924), pp 232 254—Rougier, *ibid*, pp 309-338—Hague Codification Conference, 1930, *Bases of Discussion*, II pp 55 59

What Straits are Territorial

§ 194 All straits which are not more than six miles wide are certainly territorial Therefore, straits of this kind which divide the land of one and the same State belong to the territory of such State Thus the Solent, which divides the Isle of Wight from England, and the Menai Strait, which divides Anglesey from Wales, are British, the Straits of Messina are Italian, and the Great Belt, which divides the islands of Fyn and Sjaelland, is Danish On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, and the boundary line runs, in default of a special treaty making another arrangement, through the mid-channel [1]

It is, however, controversial whether a strait more than six miles wide, yet narrow enough to be commanded by coast batteries erected on one or both sides of the straits, can be territorial The majority of writers, including Hall [2] and Hershey,[3] assert that it can, but a minority, including Westlake [4] and Taylor,[5] maintain that it cannot

However this may be, it would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries can no longer be upheld Thus Great Britain used formerly to claim the Narrow Seas—namely, the St George's Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial, and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested But it must be emphasised that this right *is* contested, and though it was put forward in 1910 by the Attorney-General before the Hague Tribunal in the *North Atlantic Coast Fisheries* case, it is doubtful how far Great Britain would now persist

[1] See below, § 199 As to the passage of Wielingen, which is the subject of a difference between Belgium and Holland see Charles de Visscher and Ganshof in *R I*, 3rd ser, 1 (1920), pp 293 328, and see above, § 178

[2] § 41 [3] At p 303.

[4] Vol I p 197 [5] § 230

in upholding her former claim [1] The Territorial Waters Jurisdiction Act, 1878, does not mention it

Navigation, Fishery, and Jurisdiction in Straits

§ 195 All rules of the Law of Nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits Foreign merchantmen, therefore, cannot [2] be excluded, foreign men-of-war must be admitted to such straits as form part of the highways for international traffic [3], the right of fishery may be reserved exclusively for subjects of the littoral State, and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each littoral State within the boundary line running through the mid-channel, unless otherwise arranged by treaty

It must, however, be stated that the rule that foreign merchantmen cannot be excluded from the passage through territorial straits applies only when they connect two parts of the open sea In case a territorial strait belonging to one and the same State connects a part of the open sea with a territorial gulf or bay, or with a territorial land-locked sea belonging to the same State—as, for instance, the Strait of Kertch,[4] and formerly the Bosphorus and the Dardanelles [5] —foreign vessels can be excluded therefrom

The Former Sound Dues

§ 196 See below [6]

[1] See Phillimore, I § 189, and above, § 191 (King's Chambers) In *A G for British Columbia* v *A G for Canada* [1914] A C at p 174 the Privy Council considered that the 'narrow seas' limit discussed by the older authorities, 'such as Selden and Hale, may safely be said to be now obsolete'

[2] The claim advanced by Russia—see Waultrin in *R G*, 15 (1908), p 410—to have a right to exclude foreign merchantmen from passage through the Kara and the Yugor Straits was therefore unfounded As regards the Kara Sea see below, § 253

[3] As, for instance, the Straits of Magellan These straits were neutralised in 1881—see below, vol II § 72—by a treaty between Chile and Argentina See Abribat, *Le détroit de Magellan au point de vue international* (1902), Nys, I pp 511-515, Moore, I § 134, Fauchille, §§ 510 510 (6), Cruchaga, § 452, Smith, II pp 257 262, and see below, vol II § 72 (5) (n 1) See also Escudero Guzman, *La Situation juridique internationale des eaux du détroit de Magellan* (1930) As to Gibraltar see Abbott, *An Introduction to the Documents Relating to the International Status of Gibraltar, 1704 1934* (1935)

[4] See below, § 252, and Fauchille, § 506 (2), 2

[5] See below, § 197

[6] § 196 *The Former Sound Dues* The rule that foreign merchantmen must be allowed inoffensive passage through territorial straits without

The Bosphorus and the Dardanelles

§ 197. The Bosphorus and Dardanelles, the two territorial straits which connect the Black Sea with the Mediterranean, must be specially mentioned [1] So long as the Black Sea was entirely enclosed by Turkish territory, and was therefore a portion of this territory, Turkey could exclude [2] foreign vessels from the Bosphorus and the Dardanelles altogether, unless prevented by special treaties But when in the eighteenth century Russia became a littoral State of the Black Sea, which, therefore, ceased to be entirely a territorial sea, Turkey, by several treaties with foreign Powers, conceded free navigation through the Bosphorus and the Dardanelles to foreign merchantmen But she always upheld the rule that foreign men-of-war should be

any dues and tolls whatever, had one exception until the year 1857 From time immemorial, Denmark had not allowed foreign vessels the passage through the two Belts and the Sound, a narrow strait which divides Denmark from Sweden and connects the Kattegat with the Baltic, without payment of a toll, the so called Sound Dues (see the details, which have historical interest only, in Twiss, 1 § 188, Phillimore, 1 § 179, Wharton, 1 § 29, Scherer, *Der Sundzoll* (1845), Hill, *The Danish Sound Dues and the Command of the Baltic* (1926), and in *Hague Recueil*, vol 45 (1933) (III), pp 529 552, Brüel in *Z I*, 41 (1929), pp 76 97, Stael Holstein in *R I*, 3rd ser, 13 (1932), pp 800 812, Moller, *International Law* (Part I 1931), p 206, note) And see, on the Little Belt, in connection with the construction in 1935 of a bridge over it, Bruel in *Nordisk T A*, 6 (1935), pp 142 156 and Favilli in *R I*, 3rd ser, 17 (1936), pp 633 644 Whereas in former centuries these dues were not opposed, they were not considered any longer admissible as soon as the principle of free navigation on the sea became generally recognised, but Denmark nevertheless insisted upon the dues In 1857, however, an arrangement (the Treaty of Copenhagen of March 14, 1857, see Martens, *N R G*, 16, part II p 345) was completed between the maritime Powers of Europe and Denmark by which the Sound Dues were abolished against a heavy indemnity paid by the signatory States to Denmark And in the same year the United States entered into the Convention of Washington of April 11, 1857 (see Martens *N R G*, 17, part I p 210), with Denmark for the free passage of their vessels and likewise paid an indemnity With these dues has disappeared the last witness of former times when free navigation on the sea was not universally recognised For suggestions as to the future regulation of the Danish straits see Brüel in *Z I*, 38 (1928), pp 185 196 And see, generally, on the Danish Straits in International Law, the same in *Hague Recueil*, vol 55 (1936) (I), pp 599 690

[1] See Holland, *The European Concert in the Eastern Question* (1885), pp 224 226, Perels, p 29, Goriainov, *Le Bosphore et les Dardanelles* (1910), Dascorra, *La question du Bosphore et des Dardanelles* (1915), Phillipson and Buxton, *The Question of the Bosphorus and the Dardanelles* (1919), Shotwell, International Conciliation Pamphlet, No 180 (1922) (a short history), Headlam Morley, *Studies in Diplomatic History* (1930), pp 212-253, Kabbara, *Le régime des détroits (Bosphore et Dardanelles)* (1929), de Lapradelle and others, *Constantinople et les détroits*, 2 vols (1931) For a valuable historical account of Russian policy see Mandelstam in *Hague Recueil*, vol 47 (1934) (I), pp 603 798

[2] See above, § 195

excluded from these straits, and by Article 1 of the Convention of London of July 13, 1841, between Turkey, Great Britain, Austria, France, Prussia, and Russia, this rule was definitely accepted Article 10 of the Peace Treaty of Paris of 1856 and the Convention No 1 annexed to this Treaty, and, further, Article 2 of the Treaty of London, 1871, again confirmed the rule, and all those Powers which were not parties to these Treaties nevertheless submitted to it [1] According to the Treaty of London of 1871, however, the Porte could open the straits in time of peace to the men-of-war of friendly and allied Powers for the purpose, if necessary, of securing the execution of the stipulations of the Peace Treaty of Paris of 1856 [2]

The Treaty of Lausanne of 1923 removed most of the limitations hitherto weighing upon non-Black Sea Powers and imposed in turn far-reaching restrictions upon Turkey including the demilitarisation of the Straits zone and supervision by an International Commission [3] Both were

[1] As to the United States see Wharton, 1 § 29, pp 79, 80, and Moore, 1 § 134, pp 666 668 See also Roxburgh, *International Conventions and Third States* (1917), p 29

[2] On the whole, the rule was in practice upheld by Turkey Foreign light public vessels in the service of foreign diplomatic envoys at Constantinople could be admitted by the provisions of the Peace Treaty of Paris of 1856, and on several occasions when Turkey admitted a foreign man of-war carrying a foreign monarch in a visit to Constantinople, there was no opposition by the Powers (see Perels, p 30) But there were cases when foreign warships passed the straits in violation of the rule For instance, in 1847, Turkey permitted two French men of-war to pass the straits for the purpose of towing some corn vessels from the Black Sea to France, the Powers protested, although Turkey had given permission on humanitarian grounds alone Again, in 1858, the United States Government, which had obtained permission to send a light war-vessel for the service of the American Legation at Constantinople, sent the *Wabash*, a large frigate armed with fifty guns, the other Powers protested, whereupon the *Wabash* departed Further, in 1902, Turkey allowed four Russian torpedo destroyers to pass through the straits on condition that these vessels should be disarmed and sail under the Russian commercial flag, and Great Britain protested When, in 1904, during the Russo-Japanese War, *Peterburg* and *Smolensk*, two vessels belonging to the Russian volunteer fleet in the Black Sea, were allowed to pass through to the Mediterranean, no protest was raised, because it was impossible to assume that these vessels, which were flying the Russian commercial flag, would later on convert themselves into men of-war by hoisting the Russian war flag (see below, vol II § 84) During the First World War, Turkey, before she became a belligerent, permitted two German cruisers, the *Goeben* and the *Breslau*, to pass through the straits to Constantinople

[3] Treaty Series, No 16 (1923), Cmd 1929 See also *Off J*, 1926, pp 951 974

abolished by the Convention of Montreux of July 20, 1936.[1] That Convention provides for complete freedom of transit and navigation for merchant-vessels of all nations in time of peace and war, subject only to charges and sanitary measures authorised by the Convention and to the right to refuse passage to merchant-vessels of States at war with Turkey.

With regard to war vessels permitted to enter the Black Sea the Convention distinguishes between their passage in time of peace and in time of war *In time of peace* the aggregate tonnage of non-Black Sea Powers permitted to enter the Black Sea must not exceed 30,000 tons or, in certain circumstances, 45,000 tons, the tonnage of any one non-Black Sea Power is limited to two-thirds of the aggregate tonnage of these Powers As to passage through the Straits, the aggregate tonnage of all foreign naval vessels in course of transit through the Straits must not exceed 15,000 (Article 14), but Black Sea Powers may send capital ships through the Straits without restriction of tonnage provided that they pass through the Straits singly, escorted by not more than two destroyers (Article 11) These restrictions do not apply to light surface vessels, minor war vessels and auxiliary vessels either of Black Sea or of non-Black Sea Powers

In time of war, when Turkey is not a belligerent, warships of belligerents enjoy freedom of passage only in so far, it appears, as their passage takes place in conformity with the obligations of the Covenant of the League of Nations [2] or in cases of assistance rendered to an attacked State in pursuance of a treaty of mutual assistance binding upon Turkey and concluded within the framework of the Covenant (Article

[1] Cmd 5249, Turkey No 1 (1936), *A J*, 31 (1937), Special Suppl, p 1, Hudson, *Legislation*, vii p 386 And see Suche, *Der Meerengenvertrag von Montreux* (1936), Kirkpatrick in *Geneva Special Studies*, vii No 6 (1936), Warsamy, *La convention des Détroits* (*Montreux*, 1936) (1937), Djonker, *Le Bosphore et les Dardanelles* (1938), Jenks in *The New Commonwealth Quarterly*, 2 (1936) pp 242 253, Fenwick in *A J*, 30 (1936), pp 701-706, Colliard in *R I* (*Paris*), 18 (1936), pp 121-152, De Visscher in *R I*, 3rd ser, 17 (1936), pp 669-718, Herz in *Friedenswarte*, 37 (1937), pp 126 144, Routh in Toynbee, *Survey*, 1936, pp 584-651, Fitzmaurice in *B Y*, 18 (1937), pp 186-191

[2] The relevant provision of Article 25 of the Convention is somewhat obscure and refers, apparently, to the rights and obligations of Article 16 of the Covenant.

19) There is no right of passage, except by permission of the Turkish Government, when Turkey is a belligerent (Article 20) or when she considers herself to be threatened with imminent danger of war But in the latter case the Council of the League, acting by a two-thirds majority, might decide that the measure was not justified, and it had thereupon to be discontinued by Turkey (Article 21) It is probable that when the Convention is revised the relevant functions of the League will be taken over by the United Nations

IX

THE AIR AND AERIAL NAVIGATION

Higgins in Hall, § 42*a*—Winfield in Lawrence, § 73—Hyde, 1 §§ 188 193—Fenwick, pp 311 316—Keith's Wheaton, pp 414 416—Hold-Ferneck, II pp 83-88—Hamel in *Répertoire*, II pp 292 311—Hershey, §§ 217 221*a*—Fauchille, §§ 531 (2) 531 (21), 626 629 (4)—Despagnet, §§ 433 *bis* and 433 *ter*—Mérignhac, II pp 398 410—Nys, 1 pp 568, 587—Holtzendorff, II. p 230—Liszt, §§ 15 (III) and 40, D—De Louter, 1 pp 321-326—Gemma, pp 195 197—Suarez, §§ 132 136—Fauchille, *Le domaine aérien* (1901)—Grunwald, *Das Luftschiff*, etc (1908)—Meili, *Das Luftschiff*, etc (1908)—Meurer, *Luftschiffahrtsrecht* (1909)—Meyer, *Die Erschliessung des Luftraums in ihren rechtlichen Folgen* (1909)—Magnani, *Il diritto sullo spazio aereo e l' aeronautica* (1909)—Leech, *The Jurisprudence of the Air* (1910), a reprint from the *Journal of the Royal Artillery*, vol 37—Lycklama à Nijeholt, *Air Sovereignty* (1910)—Hazeltine, *The Law of the Air* (1911)—Bielenberg, *Die Freiheit des Luftraums* (1911)—Catellani, *Il diritto aereo* (1911) (French translation published in Paris, 1912)—Sperl, *Die Luftschiffahrt*, etc (1911)—Loubeyre, *Les principes du droit aérien* (1911)—Thibaut, *Le domaine aérien des états en temps de paix* (1911)—D'Hooghe, *Droit aérien* (1912)—Bellenger, *La guerre aérienne et le droit international* (1912)—Erle Richards, *Sovereignty over the Air* (1912)—Reports of the Civil Aerial Transport Committee (1918), Cmd 9218—Spaight, *Aircraft in Peace and the Law* (1919)—Spiropoulos, *Der Luftraum integrierender Bestandteil des Staatsgebietes* (1922)—Henry-Coüannier, *Examen de principe de la convention international de 13 octobre 1919* (1922)—Garner, *Developments*, pp 141 188—Charles de Visscher, *Le droit international des communications* (1924), pp 135-151—Dupuis in *Hague Recueil*, 1924, 1 pp 274 280—Lauterpacht, §§ 47, 48—Henry-Coüannier, *Éléments créateurs du droit aérien* (1929)—Volkmann, *Internationales Luftrecht* (1930)—Colegrove, *International Control of Aviation* (1930)—Haupt, *Der Luftraum* (1931)—McNair, *The Law of the Air* (1932)—Bruns, *Der Begriff des 'freien Luftraums' im Volkerrecht* (1932)—Giannini, *Saggi di diritto aeronautico* (1932)—Le Goff, *Traité théorique et pratique de droit aérien* (1934)—Kroell, *Traité de droit international public aérien*, 2 vols (1934)—Lissitzyn, *International Air Transport and National Policy* (1942)—Mance, *International Air Transport* (1943)—Schoenborn in *Hague Recueil*, vol 30 (1929) (V), pp 151-158—

Hudson in *A J*, 24 (1930), pp 228 240—Lee, *ibid*, 25 (1931), pp 238-251—Hise in *Iowa Law Review*, 16 (1930-1931), pp 169 194—Burchall in *International Affairs*, 14 (1935), pp 89 107—*Annuaire*, 21 (1906), pp 327 329, 24 (1911), pp 23-126, 303 345—Zollmann, *Law of the Air* (1927)—Fauchille in *Annuaire*, 19 (1902), pp 19 114, 24 (1911), pp 23 126, and in *R G*, 8 (1901), pp 414 485, 17 (1910), pp 55 62—Zitelmann in *Zeitschrift für internationales privat- und offentliches Recht*, 19 (1909), pp 458 496—Baldwin and Kuhn in *A J*, 4 (1910), pp 95 108, 109 132—Baldwin in *Z V*, 5 (1911), pp 394 399—Sperl in *R G*, 18 (1911), pp 473 491—Hershey in *A J*, 6 (1912), pp 381 388—Staël-Holstein in *La vie internationale*, ii (1912), pp 343 370—Lee in *A J*, 7 (1913), pp 470 496—Hazeltine in *J C L*, 3rd ser, 1 (1919), pp 76 89—Kuhn in *A J*, 14 (1920), pp 369 381—de Montmorency in *B Y*, 1921 1922, pp 167-173—Garner in *R I*, 3rd ser, 4 (1923), pp 356 394, 628-652—Ripert in 50 *Clunet* (1923), pp 775 784—Homburg in *R I*, 3rd ser, 5 (1924), pp 231 240—Schleicher in *Z I*, 33 (1924 1925), pp 1-16—F de Visscher in *R I*, 3rd ser, 8 (1927), pp 182 214—Goedhuis in *R I*, 3rd ser, 17 (1936), pp 350 405, and in *A J*, 36 (1942), pp 596 613—Jennings in *B Y*, 22 (1945), pp 191-209, and 23 (1946), pp 358 363—Latchford in *A J*, 46 (1946), pp 280 302—Cooper in *Yale Law Journal*, 55 (1946), pp 1191 1213—Prentice in *Bulletin of State Department*, 16 (1947), pp 1145 1151 And see articles in the *Revue juridique internationale de la locomotion aérienne*, *Revue générale de droit aérienne*, *Revue aéronatique internationale* and some of the works cited below, vol ii § 214*a*

Theories as to the Air Space

§ 197*a* The development of aerial navigation in the early years of the present century gave rise to much speculation as to the juridical nature of the air space and the extent of rights in it That the air space over the open sea and over unoccupied territory is free and in the former case incapable of appropriation may be taken as almost universally admitted [1] With regard, however, to the air space over occupied land and waters, both national and territorial, there have been a number of competing theories, which may be summarised as follows (1) that the air space is entirely free [2], (2) that upon the analogy of the maritime belt there is a lower zone of territorial air space and a higher unlimited zone of free air space, (3) that the air space to an unlimited height is entirely within the sovereignty of the subjacent State, which is an application—though not necessarily the correct application [3]—of the private law maxim, *cujus est solum ejus est usque ad coelum et ad inferos*, (4) that the air space is within the sovereignty of the sub-

[1] See Hazeltine, *Law of the Air* (1911), p 9

[2] Grotius (ii c 2, § 3) refers incidentally to the air, and seems to suggest that in his opinion it should be likened to the open sea and be incapable of appropriation

[3] Hazeltine, *op cit*, pp 54-77 Lauterpacht, *Analogies*, § 48

jacent State subject to a servitude [1] of innocent passage for foreign civil but not military aircraft [2]

British Legislation

§ 197b Aerial navigation, both by British nationals and by aliens, over the land and waters, both national and territorial, of Great Britain and Northern Ireland is now governed by the Air Navigation Act, 1920, and the Orders in Council made thereunder This Act, which asserts that 'the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air [3] superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto,' may be extended by Order in Council to any part of the British Empire other than India and the Self-Governing Dominions, and 'to any territory under His Majesty's protection' Its main purpose is to empower the Crown to make such Orders in Council as may be necessary for giving effect to the Convention for the Regulation of Aerial Navigation of 1919 about to be discussed [4]

Convention of 1919 for the Regulation of Aerial Navigation

§ 197c International aerial navigation is at present governed by (i) the Convention for the Regulation of Aerial Navigation of 1919 [5] and a number of amending Protocols [6], (ii) other conventions, either bilateral or plurilateral, and

[1] See below, §§ 203 208

[2] As to the stratosphere above the air column see Korovine in *R G*, 41 (1934), pp 675 686

[3] See as to this the general discussion by Gidel, in pp 333-338

[4] It is worth noticing that Section 9 of the Act relating to actions for trespass or nuisance rejects the literal application of the maxim *cujus est solum ejus est usque ad coelum et ad inferos* by providing that no action for trespass or for nuisance shall lie 'by reason only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather, and all the circumstances of the case, is reasonable', but nevertheless the same section imposes upon the owner of an aircraft an absolute liability for any material damage caused to any person or property on land or water by the aircraft in flight, taking off, or landing, or by any article falling from the aircraft, except where the damage was caused or contributed to by the person by whom it was suffered And see Section 15 of the Air Navigation Act, 1936 (26 Geo 5 & 1 Edw 8, c 44) for a limitation of that liability, as well as Section 21 providing for Orders in Council deemed necessary to give effect to the Rome Convention of May 29, 1933, for the unification of certain rules relating to damage caused by aircraft to third parties As to the legal position in other countries see Kaftan, *La responsabilité pour dommage causé par les aéronefs aux tiers à la surface* (1933)

[5] Treaty Series, No 2 (1922), Cmd 1609

[6] October 27, 1922, Cmd 2328, and June 30, 1923, Cmd 2329 For the Amendment adopted in June and December 1929 see Treaty Series, No 33 (1933), Cmd 4423, *British and Foreign State Papers*, 134, pp 432, 437 And see (1936) Cmd 5332 for the texts of various Protocols amending the 1919 Convention

either supplementing the Convention of 1919 or in place of it [1], or (iii) customary International Law Of these three sources of rules each will be dealt with in its turn

The Convention of 1919 was drawn up at the Peace Conference of 1919, and signed on October 13, 1919. It applies to the time of peace only, and does not affect the freedom of action of the parties in time of war, either as belligerents or neutrals (Article 38) Its principal provisions are as follows [2]

(*a*) *Sovereignty over the Air* —It recognises that 'every State has complete and exclusive sovereignty in the air space above its territory and territorial waters,' but each party undertakes to accord in time of peace freedom of innocent passage to the private aircraft of other parties [3] so long as they comply with the rules made by, or under the authority of, the Convention Any regulations laid down by a party in accordance with the Convention as to the admission of such aircraft are to be applied without distinction of nationality [4] Each contracting State, however, reserves the right to prohibit all private flying over certain areas for military reasons or for public safety [5]

(*b*) *Nationality of Aircraft* —Aircraft must be registered in the State of which their owners are nationals, and in that State alone Their nationality is that of the State in which they are registered, and they must bear their nationality and registration marks, and the name and residence of their owner, when engaged in international navigation [6]

(*c*) *International Navigation by Private Aircraft* —Every private aircraft engaged in international navigation must carry (1) a

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[1] See *e g* the Convention on Commercial Aviation adopted in 1928 by the Sixth International American Conference *A J*, Suppl, 22 (1928), pp 124-133, Hudson, *Legislation*, iv p 2354 The Convention contains provisions analogous to those of the Air Navigation Convention of 1919

[2] See Lee in *H L R*, 33 (1919), pp 23 28, Roper, *La Convention internationale du 13 octobre 1919* (1930), Pessereau, *Des modifications à la Convention du 13 octobre 1919* (1935)

[3] As to permitting transit by the aircraft of non contracting parties, see Article 5 as amended by the Protocol of Amendment of October 27, 1922, which has been signed and ratified by a considerable number of States

[4] Articles 1 2

[5] Article 3

[6] Articles 5-10 As to the flags of aircraft see Müller in *Z V*, 13 (1926), pp 233 265, 353 397, F de Visscher in *Hague Recueil*, vol 48 (1934) (ii), pp 285 304 On the project of a convention on the juridical status of commanders of aircraft adopted in 1931 by the International Technical Committee of Experts in Aerial Law see Goedhuis in *R I*, 3rd ser, 14 (1933), pp 134-150 As to flying boats see Oppikoffer in *Archiv für Luftrecht*, 1934, ii pp 81 *et seq*, Goedhuis in *R I*, 3rd ser, 17 (1936), pp 375-377

certificate of registration, (2) a certificate of airworthiness from the State to which it belongs, (3) certificates of competency and licences in respect of each member of the operating crew, (4) a list of passengers (if any), (5) bills of lading and manifest for freight (if any), (6) log books, (7) special licences for wireless equipment and for the wireless operators (if any) Private aircraft exercising their right of innocent passage across another State without landing must follow the route prescribed by the State flown over, and must land even against their will if ordered to do so Private aircraft intending to land in another State must land at the aerodromes appointed for the purpose, if the regulations of the State concerned so require But except for this provision, every aerodrome in a contracting State which upon payment of charges is open to public use by its national aircraft is likewise to be open to the aircraft of all other contracting States The establishment of international airways is to be subject to the consent of the States flown over[1] *Cabotage*[2] is reserved for aircraft of the territorial State, Article 16 providing that it shall have the right to reserve to its national aircraft the 'carriage of persons and goods for hire between two points on its territory' With regard to aircraft wrecked at sea, the rules applicable to salvage of ships will apply, in the absence of agreement to the contrary[3], aircraft of contracting States are to enjoy the measures of assistance for landing accorded to national air vessels, particularly in case of distress[4]

(*d*) *Jurisdiction over Private Aircraft* —The authorities of the territorial State have the right to visit every foreign private aircraft, and verify its documents, upon landing and upon departure Each contracting State undertakes to adopt measures to ensure that every aircraft flying over its territory, and every aircraft bearing its nationality marks, wherever it may be, complies with the rules of navigation formulated by the Convention It also undertakes to ensure the prosecution and punishment of all persons contravening them[5]

[1] Article 15, Article 24

[2] See above, § 187 (2)

[3] See below, § 271, and Article 23

[4] Article 22

[5] The first draft of the Convention had further laid down general rules for jurisdiction over private aircraft, but objection was taken to them, and they were deleted Consequently, all questions of jurisdiction which are not covered by the stipulations just mentioned must be settled by reference to the general principles of International Law (See above, §§ 123 124, 143 145) As to crimes committed in the air outside the territory of the aircraft's State of registration see Travers, §§ 280 284, and McNair, *The Law of the Air* (1932), pp 87 103 See also Morpurgo in *Revue juridique internationale de la locomotion aérienne*, 12 (1928), p 399, Hirschberg in *Z I*, 42 (1930), pp 138-207, Volkmann in *Droit aérien*, 15 (1931), pp 26 *et seq*, F de Visscher in *Hague Recueil*, vol 48 (1934) (II), pp 324 379, and in *R I*, 3rd ser, 17 (1936), pp 118 137, *Harvard*

(*e*) *State Aircraft* —State aircraft are of two classes · (1) *military*, *i e* those 'commanded by a person in military service detailed for the purpose,' and (2) *non-military*, but exclusively employed in State service, such as posts, customs, and police

(1) *Military* aircraft may not fly over, or land in, the territory of another party without special authorisation, but having obtained such authorisation, they are to enjoy in principle, in the absence of special stipulation, the privileges of exterritoriality customarily accorded to foreign war vessels [1] On the other hand, a military aircraft landing on the territory of another party under any other circumstances can claim no such privileges

(2) *Non-military* With regard to police and customs aircraft, the States are to arrange among themselves the conditions upon which they may cross the frontier Such aircraft are not in any case to enjoy exterritoriality All other non-military State aircraft are to be treated as private aircraft [2]

(*f*) *The International Commission* —The Convention established an International Commission for Air Navigation [3] as a permanent commission under the direction of the League of Nations Its principal duties were to receive or make proposals for amending the Convention, to amend the technical annexes, to carry out duties assigned to it by the Convention, to collect and disseminate information bearing upon air navigation, to publish air maps, and to give an opinion on questions submitted to it for examination [4]

(*g*) *Amendments to the Convention* —While the International Commission can, by the requisite majority, itself amend the annexes, it cannot do more than recommend an amendment of the Convention [5]

§ 197*d* A large number of other conventions have been entered into both by signatories of the last-mentioned Convention of 1919 with non-signatory States and by non-signatory States amongst themselves providing for mutual rights of innocent

Other International Conventions.

Research (1935), pp 509 519 For the Resolution of the Seventh Pan-American Conference of December 1933 on offences committed on board aircraft see *A J*, 28 (1934), Suppl, pp 54, 55

[1] See below, § 450 And see Klein, *Staatsschiffe und Staatsluftfahrzeuge im Volkerrecht* (1934)

[2] Articles 30 33

[3] By Article 34, as amended by the Protocol of Amendment of June 30, 1923, which was signed and ratified by a considerable number of States, the Commission consisted of two representatives of the United States of America, France, Italy, and Japan, one representative of Great Britain and one of each of the British Dominions and of India, and one representative of each of the other contracting States On the work and the organisation of the Commission see Gibson in *Temple Law Quarterly*, 5 (1930-1931), pp 562-583, Pignochet, *La Commission internationale de Navigation aérienne* (1935)

[4] Article 34, as amended (see note 3 above)

[5] See Spaight in *B Y*, 1924, pp 183, 184

passage and landing [1] for civil aircraft subject to compliance with regulations [2] In February 1928 a number of American States, including the United States, concluded a Convention on Commercial Aviation which followed the general lines of the Paris Convention without, however, creating a special international organisation [3] Of special importance is the Convention for the Unification of Certain Rules regarding International Air Transport signed at Warsaw on October 12, 1929 [4]

[1] Unruh, *Flughafenrecht* (1934)

[2] See Fauchille, § 531 (15) An instance is the Convention between Great Britain and Germany of June 29, 1927, ratifications exchanged on December 1, 1927 Cmd 3010 For a survey of the air navigation agreements see Gibson in *Temple Law Quarterly*, 6 (1931 1932), pp 57 86 (bipartite), and 5 (1930 1931), pp 404 424 (multipartite) See also Maschino in 59 *Clunet* (1932), pp 569 588, Goedhuis in *R I*, 3rd ser, 17 (1936), pp 383-394, Slotemaker, *Freedom of Passage for International Air Services* (1932) With regard to the position prior to 1919 see Gibson in *Temple Law Quarterly*, 5 (1930-1931), pp 161 184 And see Wegerdt in *R I (Paris)*, 3 (1929), pp 131-162 (with regard to Germany) In some cases treaties provide for the establishment of special air transport lines see *e g* the Convention of December 7, 1934, between Great Britain and Italy Treaty Series, No 2 (1935), Cmd 4808

[3] Hudson, *Legislation*, IV p 2354 On the various bilateral agreements see Tombs, *International Organisation in European Air Transport and National Policy* (1942)

[4] The object of the Convention is to regulate in a uniform manner the conditions of international carriage by air with regard to documents of carriage and the responsibility of the carrier It contains detailed provisions concerning passengers and luggage, pilots, air consignment notes, the liability of the carrier, and combined carriage Treaty Series, No 11 (1933), Cmd 4284, *British and Foreign State Papers*, 134, p 406, *L N T S*, 137, p 11, Hudson, *Legislation*, V p 100, *A J*, 28 (1934), Suppl, pp 84 96, Giannini, *La Convenzione de Varsavia* (1929), Blanc-Dannery, *La Convention de Varsovie* (1933), Goedhuis, *La Convention de Varsovie* (1933), the same, *National Air Legislation and the Warsaw Convention* (1937), Maschino in *Droit aérien*, 14 (1930), pp 4-26, Ripert in *Clunet*, 57 (1930), pp 90 100, Sack in *Air Law Review*, 4 (1933), pp 345 388 And see, as to Great Britain, Carriage by Air Act, 1932 (22 and 23 Geo 5, c 36) See also *Grein* v *Imperial Airways* (1936) 55 Ll L 318 [1937] 1 K B 50, *Annual Digest*, 1935-1937, Case No 214 See also below, § 510, n For an Agreement concerning Customs Regulations applicable to Air Traffic and signed on May 5, 1926, see Treaty Series, No 12 (1926), Cmd 2664, Hudson, *Legislation*, III p 1878 For the International Sanitary Convention for Aerial Navigation of 1944 modifying the Convention of 1933 see Cmd 6638 For the Convention of May 29, 1933, concerning the unification of certain rules relating to damage caused by aircraft to third parties on the surface and concluded at the Third International Conference on Private Air Law held at Rome see Hudson, *Legislation*, VI p 334 And see Tombs, *International Organisation in European Air Transport* (1936) The Fourth International Conference on Private Air Law, held in Brussels in September 1938, adopted a Convention for the unification of certain rules relating to assistance and salvage of aircraft or by aircraft at sea For details see Hackworth, IV § 367 See also *Watson* v *R C A Victor Company* (1934), 50 Ll L Rep 77—an action for salvage in connection with the rescue by a British fishing vessel of a seaplane which was compelled to descend on the sea near Greenland

§ 197*e* Where there is no convention permitting the transit and landing of foreign aircraft, the position is governed by customary International Law The practice of States seems to accord with the theory of the sovereignty of the subjacent State in the air space over its territory and waters, both national and territorial, unmitigated by any servitude or other right of innocent passage [1] It is possible that with the development of International Law and the extension of obligatory jurisdiction of international tribunals the principle prohibiting the abuse of rights [2] will be effectively resorted to as a means of checking unjustifiably obstructive action on the part of States relying on the right of sovereignty over the air In the meantime, however, the grant of the right of passage and landing is often used as a bargaining weapon for obtaining economic advantages or even as an instrument of political pressure or prejudice While a network of bilateral treaties has to some extent alleviated the consequences of the customary law as at present understood, no corresponding progress has as yet been achieved by way of general treaties [3] Customary International Law

§ 197*ea* The Air Navigation Convention of 1919, although of great significance as the first attempt, on a large scale, at international regulation of aerial navigation, constituted only nominal progress with regard to the most important aspects of the problem which it set out to solve In the first instance, although the Contracting Parties undertook in time of peace to accord freedom of innocent passage above their territories to the aircraft of other Contracting Parties,[4] such right of innocent passage did not necessarily include the right to land (except, probably, for aircraft not engaged in international scheduled service) [5] Secondly, the Convention authorised the parties to prohibit 'for military The Drawbacks of the Air Navigation Convention of 1919

[1] As to the Persian action in 1927 with regard to the air route between Great Britain and India see Toynbee, *Survey*, 1928, pp 351 354

[2] See above, § 155*aa*

[3] As to aviation and jurisdiction over Arctic airspace see Plischke in *American Political Science Review*, 37 (1943), pp 999-1013.

[4] Article 2

[5] Article 15 provided that 'any aircraft of a contracting State has the right to cross the airspace of another State without landing' Another implied limitation of the right to landing, if any, was contained in Article 2 (2), which laid down that regulations as to admission of foreign aircraft shall be applied without distinction of nationality

reasons or in the interest of safety' the passage of aircraft over their territories [1] That permissive provision has been interpreted in practice in such a way as to limit substantially the right of innocent passage [2] Thirdly, the Convention reserved for the Parties the right to establish restrictions in favour of their own aircraft with regard to so-called *cabotage*, *i e* carriage of persons and goods between two points of their territory [3] While *cabotage* in the sphere of maritime transport covers only traffic along the coast-line, *cabotage* in relation to aerial navigation is of much wider application and may cover distant points in metropolitan territory as well as places between the latter and the colonies of the State concerned Finally, and most significantly, the right of innocent passage was expressly excluded with regard to 'international airways' [4] The right of passage for such international—regular and scheduled—services was made subject to the consent of the States concerned As the result, the Convention excluded the most important aspect of international air transport from the operation of its principal provision Governments did not hesitate to avail themselves of the freedom of action which the Convention left them in this respect In 1939 Spain refused to British aircraft permission to cross Spanish territory *en route* to Portugal [5]

It is thus clear that the Air Navigation Convention of 1919 left unsettled, to a large extent, one of the principal problems of international civil aviation, namely, the securing of freedom of passage for international air services Moreover, the Convention failed to take into account the close

[1] Article 3

[2] See Jennings in *B Y*, 22 (1945), p 204, who points out that, for instance, on the North Italian frontier the prohibited areas before the Second World War were so extensive that only a few limited corridors remained open

[3] Article 16

[4] Article 15, paragraph 2

[5] Apparently on the ground that such right ought to be reserved for countries which assisted the Spanish Government then in power, during the Civil War of 1936-1939 See Goedhuis in *A J*, 36 (1942), p 603, who gives an account of the attitude of a number of States which were not parties to the Convention of 1919 Thus Persia obstructed the plan of British Imperial Airways for a service to India The United States, by refusing foreign aircraft permission to land at Hawaii, acquired a virtual monopoly of Trans Pacific Services The United States, China, Germany, Brazil Persia, as well as some other countries, never acceded to the Convention of 1919 See also Christensen, *Der Grundsatz der Verkehrsfreiheit im überseeischen Luftverkehr* (1939)

connection between freedom of passage for international traffic and the necessity of international regulation of civil aviation in the economic sphere The latter would include the elimination of wasteful competition and the safeguarding of the legitimate interests of the countries granting freedom of passage by means of international agreement providing for scheduled international routes and for the allocation of the total number of services—so-called frequencies—on such routes as well as for the abandonment of the system of uneconomic subsidies for air lines for the sake of national prestige or of military considerations [1] An agreement on these lines might involve the creation of an international authority having the power to license services and to prescribe routes The view is widely held that only the internationalisation of air lines operated under the control of an international organ, set up on a universal or regional basis, would be adequate to cope with the intricacies of the problem presented by international aviation

The Chicago Civil Aviation Agreements of 1944

§ 197*eb* The circumstance that the International Civil Aviation Conference, convened at Chicago in November 1944, was unable to take into account the inter-connection between freedom of passage and other aspects of international regulation of aviation accounts for its comparative failure to effect the much-needed improvement on the Convention of 1919 [2] The Conference adopted a widely signed convention on International Civil Aviation which follows, on

[1] For a lucid statement of the policy of the British Government for the regulation of air transport on these lines see Cmd 6561 (1944)

[2] This applies, for instance, to nationality and registration of aircraft (Articles 17 21 of the Chicago Convention) However, in so far as the existing provisions render it difficult, if not impossible, to afford the benefits of the Convention to aircraft owned and operated by international bodies, Article 77 of the Convention opens the possibility of a less rigid regulation by enjoining the Council to determine in what manner the provisions of the Convention relating to nationality of aircraft 'shall apply to aircraft operated by international operating agencies' For a useful discussion of the question of nationality of aircraft see Jennings, *op cit*, pp 206 208 With regard to *cabotage*, Article 7 of the Convention limits, to some extent, possible abuses by prohibiting the exclusive grant of the privilege of *cabotage* to any single State With regard to prohibited areas, Article 7 of the Chicago Convention permits their establishment only 'for reasons of military necessity or public safety' (Article 3 of the Paris Convention referred to military 'reasons') The same Article requires that prohibited areas 'shall be of reasonable extent and location so

the whole, the lines of the Convention of 1919 The Convention entered into force in April 1947 By August 1947 forty-three States were bound by the Convention In addition to the Final Act which includes resolutions and recommendations on various technical matters, such as transfer of title to aircraft and standard form of agreement for provisional air routes,[1] the Conference also adopted

(1) *An Interim Agreement on International Civil Aviation* [2] The Agreement, which is intended to operate pending the entry into force of the principal Convention, lays down some general principles adopted in the latter and establishes between the parties a provisional international organisation of a technical and advisory nature for the purpose of collaboration in the field of international aviation The organisation, whose seat is in Canada, consists of an Interim Assembly and Interim Council Among the duties of the latter is the setting up of committees on air transport, on air navigation, and on an international convention on civil aviation The function of these bodies is to collect information, to study and to advise on various aspects of international aviation

(2) *An International Air Transport Agreement* (so-called 'five-freedoms agreement') That Agreement, intended to fill with regard to scheduled international services the gap left by the general Convention, provides for the following five freedoms for such services (1) the privilege to fly across the territory of a State without landing, (2) the privilege to land for non-traffic purposes, (3) the privilege to put down passengers, mail and cargo taken on in the territory

as not to interfere unnecessarily with air navigation,' and that prohibitions and restrictions shall apply 'uniformally to the aircraft of other States' Finally, with regard to aircraft not engaged in scheduled international services, Article 5 lays down that no prior authorisation shall be required either for transit or for landing for non-traffic purposes, the term 'innocent passage' does not occur in the Convention However, with regard to landing for non-traffic purposes, the privilege of taking on or discharging passengers, cargo, or mail is subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions, or limitations as it may consider desirable For a comparison of the Chicago Agreements with the Conventions of Paris and Havana see Latchford in *Department of State Bulletin*, No 298, 12 (1945), pp 411 420

[1] Printed in *A J*, 39 (1945), Suppl, p 111 And see for the Final Act of the Conference and the Appendices, Cmd 6614 (1945)

[2] *A J*, 39 (1945), Suppl, p 122.

of the State whose nationality the aircraft possesses [1]; (4) the privilege to take on passengers, mail, and cargo for the territory of that State [2], (5) the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory [3] The 'freedoms' enumerated in (3), (4) and (5) were, however, limited to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses [4]

This Agreement, although signed by nineteen States, was not accepted by Great Britain and some other countries in a position to provide facilities for transit [5] It was sponsored mainly by the United States who throughout the Conference identified itself most conspicuously with the principle of freedom of international navigation without, however, being prepared to accept what must be regarded as the necessary concomitant of that principle, namely, a substantial measure of regulation by or under the auspices of an international authority [6]

[1] *E g* the right of British aircraft to put down in France (assuming that she is a party to the Convention) passengers taken on in Great Britain

[2] *E g* the right of British aircraft to take on in France passengers for Great Britain

[3] *E g* the right of British aircraft to take on in France passengers for the territory of any contracting Party and to set down in France passengers taken on in the territory of any contracting Party

[4] Section 3 of Article 3 provides that a Party which offers to the air lines of another contracting State the privilege of landing for non traffic purposes may require these air lines to offer reasonable commercial service at the points of landing

[5] Following upon the Chicago Conference a number of States concluded bilateral treaties in which the 'fifth freedom' was granted subject to certain limitations and conditions See *e g* the Bilateral Civil Aviation Agreement between Great Britain and the United States of February 11, 1946 The Agreement gives to parties the right to carry 'fifth freedom' traffic in accordance with defined principles It provides that rates to be charged by air carriers operating between points in the United Kingdom and points in the United States shall be subject to governmental review It lays down that each country shall have the right to determine the frequency of operation of its air-lines See *Bulletin of State Department*, 14 (1946), p 302 However, by the end of 1946 little progress had been made in bringing into effect the general 'five freedoms agreement' In July 1946 the United States announced its withdrawal from the Agreement Some other countries, including China, did the same

[6] While the United States advocated unrestricted free competition in the exploitation of international air lines, Australia and New Zealand proposed full international control and operation of international air ways Canada put forward a compromise plan which combined the concession of the first four freedoms (see above) with the control of air-line frequencies by an international

(3) *An International Air Service Transit Agreement* (so-called 'two-freedoms agreement') in which the parties agreed to grant to international air services the privilege to fly across their territory without landing and to land for non-traffic purposes (*i e* for refuelling and repairs). This Agreement, which was adopted by way of compromise, was signed, by February 1945, by thirty-three States including the principal transit States with the exception of Australia, China, Brazil and Soviet Russia [1]

It would thus appear that the solution of the problem of international civil aviation is still a matter of the future Aviation, more perhaps than any other aspect of international economic relations, exemplifies the interdependence of States in modern conditions Such interdependence

body—a Board of Directors acting as the executive committee of the International Air Assembly—authorised to allocate frequencies to national air lines in accordance with agreed principles In particular, each line was to be entitled to increase its frequencies on showing that, for a considerable time, more than 65 per cent of its total carrying capacity had been occupied by revenue paying commercial load On the other hand, the lines were to suffer a diminution of their frequencies if the proportion of revenue paying cargo was less than 40 per cent The British plan for a new Convention—as outlined in a White Paper (Cmd 6561) published in October 1944—proposed that the Convention should

'(iii) define the international air routes which should be subject to international regulation, these would be reviewed from time to time as necessary,

(iv) provide for the elimination of uneconomic competition by the determination of frequencies (total services of all countries operating on any international route), the distribution of those frequencies between the countries concerned, and the fixing of rates of carriage in relation to standards of speed and accommodation,

(v) provide for the licensing of international air operators who undertook to observe the convention and to abide by the rulings of the appropriate authority, and for the withdrawal of the licence in the event of a breach of the obligations,

(vi) provide for the denial of facilities to any unlicensed operator'

The plan included a recognition of the first four freedoms

[1] The latter did not participate in the Conference It may be noted that both the 'two freedoms agreement' (Article 2, § 1) and the 'five freedoms agreement' (Article 4, § 2) give the International Civil Aviation Organisation powers of a quasi judicial nature to deal with situations arising out of a complaint that the action of one party to the Agreement causes injustice or hardship to another The Council of the Organisation, after investigating the complaint, may make appropriate recommendations and, if the State concerned fails to take 'suitable corrective action,' the Council may recommend to the Assembly, acting by a two-thirds majority, that the recalcitrant State 'be suspended from its rights and privileges under the Agreement until such action has been taken' The question of international co ordination is also likely to arise in the matter of the relation of sea transport to air transport

cannot be effectively recognised by international agreement unless States are willing to limit their sovereignty in this respect not only by permitting freedom of transit but also by acquiescing in a measure of international regulation without which freedom of transit may be productive both of the disregard of legitimate economic interests of countries granting the right of transit and of the danger of unchecked economic supremacy of some States The close connection between the latter and considerations of military security tend to emphasise the desirability of a substantial measure of international control of civil aviation

Wireless Communications

§ 197*f* The principle of exclusive sovereignty in the air space for the subjacent State, which has received general approval in connection with aerial navigation, enables that State to prohibit the disturbance of the air space over its territory by means of Herzian waves caused for the purpose of wireless communication and emanating from a foreign source Neither the Washington Convention of November 25, 1927,[1] nor the General Radio communication Regulations attached to the International Telecommunication Convention concluded in Madrid on December 9, 1932,[2] and revised there in the course of the Conference held between February 1 and April 9, 1938, nor the European Broadcasting Convention of Lucerne of June 19, 1933,[3] derogate from that principle But these Conventions mark the beginning of attempts to introduce a substantial element of legal regulation in a domain of human activity which by its very nature transcends the borders of the territorial State The last-named Convention, in which the Parties have undertaken definite obligations with regard to the operation and installation of broadcasting stations, is an important step in this direction It is possible that the growing number of treaties in this field will contribute to the more general acceptance of the principle prohibiting the abuse of rights[4]

[1] See above, § 174 and below, §§ 287*a*, 287*b*

[2] *L N T S*, 151, p 7 That Convention includes also the important Telegraph and Telephone Regulations See Appendix A, below, p 882

[3] Hudson, *Legislation*, VI p 345

[4] See above, §§ 155*aa* and 174

with regard to both the emission [1] and the passage of waves [2]

X

BOUNDARIES OF STATE TERRITORY

Grotius, II c 3, §§ 16-18—Vattel, I § 266—Hall, § 38—Westlake, I pp 144, 145—Twiss, I §§ 147, 148—Taylor, § 251—Moore, I §§ 154 162—Hackworth, I §§ 103-107—Hershey, §§ 162 165—Hyde, I § 151—Bluntschli, §§ 296 302—Hartmann, § 59—Heffter, § 66—Holtzendorff in *Holtzendorff*, II pp 232 239—Gareis, § 19—Liszt, § 15 (1)—Ullmann, § 91—Fenwick, pp 273 277—Hatschek, pp 178-180—Ancel in *Hague Recueil*, vol 55 (1936) (1), pp 207 294—Verdross, pp 195-198—Fauchille, §§ 486 489 (7), 606 (1) 606 (6)—Despagnet, § 377—Pradier Fodéré, II §§ 759 777—Merignhac, II pp 358—Nys, I pp 446 472—Rivier, I § 11—Calvo, I § 342—Fiore, II §§ 799 806, and *Code*, §§ 1045 1054—Martens, I § 89—Cruchaga, §§ 421-430—De Louter, I pp 331 336—Lindley, pp 270 283—Ralston, §§ 566 572, 574*a*—Lord Curzon of Kedleston, *Frontiers* (Romanes lecture of 1907)—Holdich, *Political Frontiers and Boundary Making* (1915)—Schulthess, *Das internationale Wasserrecht* (1915)—Fawcett, *Frontiers* (1918)—Lederle, *Das Recht der internationalen Gewasser* (1920), pp 9 38—Adami, *National Frontiers in relation to International Law* (1927) (translation from the Italian)—P de Lapradelle, *La Frontière* (1928), and in *Répertoire*, VIII pp 487 514—Flach, *Das Problem der Territorialkonflikte* (1929)—Boggs, *International Boundaries* (1940)—Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean* (1941)—S B Jones, *Boundary Making* (1945)—Carpenter in *A J*, 19 (1925), pp 517 529—Sir John Simon in *International Affairs*, 12 (1933), pp 703 723

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[1] As to the Convention of 1936 concerning the use of Broadcasting in the cause of Peace see above, § 127 (n) For the South-American Regional Agreement on Radiocommunications of June 20, 1937, see Hudson, *Legislation*, VII p 767 And see *ibid*, p 900, for the Inter American Radiocommunications Convention of December 13, 1937, p 923, for the Inter-American Arrangement of the same date concerning Radiocommunications, and p 962 for the North American Regional Broadcasting Agreement signed at Havana on December 13, 1932 See also Hackworth, IV § 354 for other American regional agreements

[2] See, in addition to the writers referred to above, § 174, Hackworth, IV §§ 353 358, Grande, *La radiotelegrafia nel diritto internazionale* (1927), Friedmann, *International Radiotelegraph Conference of Washington*, 1927 (1928), Stenuit, *La radiophonie et le droit international public* (1932), Habaru, *L'organisation internationale de la radiodiffusion* (1934), Tomlinson, *The International Control of Radio Communications* (1945), Stewart in *A J*, 22 (1928), pp 28 49, and 25 (1931), pp 684 693, Cavaglieri in *R I (Paris)*, 2 (1928), pp 860 872, Davis in *Georgetown Law Journal*, June 1928, pp 400-414, Brenot in *Revue juridique internationale de la radio électricité*, 1928, No 14, pp 83 *et seq*, Amelio and Gneme, *ibid*, No 16, pp 247 *et seq*, Giannini, *ibid*, pp 255 *et seq*, Fabel in *R I (Paris)*, 12 (1933), pp 566 580, Hostie in *R I*, 3rd ser, 18 (1937), pp 10 33, Le Roy in *A J*, 32 (1938), pp 719 373, Colt de Wolf in *Yale Law Journal*, 55 (1946), pp 1281-1290

Natural and Artificial Boundaries

§ 198 Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the open sea [1] The course of the boundary lines may or may not be indicated by boundary signs. These signs may be natural or artificial, and one speaks, therefore, of natural in contradistinction to artificial boundaries *Natural* [2] boundaries may consist of water, a range of rocks or mountains, deserts, forests, and the like *Artificial* boundaries are such signs as have been purposely put up to indicate the way of the imaginary boundary line They may consist of posts, stones, bars, walls,[3] trenches, roads, canals, buoys in water, and the like It must, however, be borne in mind that the distinction between artificial and natural boundaries is not sharp, in so far as some natural boundaries can be artificially created Thus a forest may be planted, and a desert may be created, as was the frequent practice of the Romans of antiquity, for the purpose of marking the frontier [4]

Boundary Waters

§ 199 Natural boundaries consisting of water must be

[1] On the importance of fixed boundaries for the recognition of a State *de jure* see *Deutsche Continental Gas-Gesellschaft* v *Polish State* decided by the Germano Polish Mixed Arbitral Tribunal on August 1, 1929 *Annual Digest*, 1929 1930, Case No 5 The Tribunal held that statehood is not absolutely dependent on the existence of rigidly fixed boundaries

[2] § 202 *Natural Boundaries* sensu politico Whereas the term 'natural boundaries' in the theory and practice of the Law of Nations means natural signs which indicate the course of boundary lines, the same term is used politically (see Rivier, 1 p 166) in various different meanings Thus the French often speak of the river Rhine as their 'natural' boundary, as the Italians do of the Alps Thus, further, the zones within which the language of a nation is spoken are frequently termed that nation's 'natural' boundary Again, the line enclosing such parts of the land as afford great facilities for defence against an attack is often called the 'natural' boundary of a State, whether or not these parts belong to the territory of that State But such conceptions are political and are outside the domain of International Law

[3] The Romans of antiquity very often constructed boundary walls, and the Chinese Wall may also be cited as an example

[4] The usual practice adopted by the Peace Conference in 1919 with regard to boundaries was to specify them in words, so far as was practicable, and leave the actual delimitation to Boundary Commissions, which were to fix the frontier line on the spot in conformity with the provisions of the treaties Maps were used to illustrate the boundaries, but in case of a discrepancy between the text of a treaty and a map, the text was to prevail On maps as evidence in international boundary disputes see Hyde in *A J*, 27 (1933), pp 311 316 See also Timm, *The International Boundary Commission United States and Mexico* (1941)

specially discussed on account of the different kinds of boundary waters Such kinds are rivers, lakes, land-locked seas, and the maritime belt

(1) Boundary rivers [1] are such rivers as separate two different States from each other [2] If such river is not navigable, the imaginary boundary line as a rule runs down the middle of the river,[3] following all turnings of the border line of both banks of the river If navigable, the boundary line as a rule runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river,[4] and this general rule was adopted by the Treaties of Peace in 1919, except in special cases [5] But it is possible that the boundary line is one bank of the river, so that the whole bed belongs to one of the riparian States only [6] This is an exceptional case created by immemorial possession, by treaty, or by the fact that a State has occupied the lands on one side of a river at a time prior to the occupation of the lands on the other side by some other State [7] And it must be remembered that, since a river sometimes changes its course more or less, the boundary line is thereby also altered [8] In case a bridge is built over a boundary river,

[1] See Huber in *Z V*, 1 (1907), pp 29-52 and 159 217, Hyde in *A J*, 6 (1912), pp 901-909, Schulthess, *op cit*, pp 8-16 and 19 24, Adami, *op cit*, pp 13-27, Kercea, *Die Staatsgrenzen in den Staatsflussen* (1916)

[2] This case is not to be confused with the other, in which a river runs through the lands of two different States In this latter case the boundary line runs across the river

[3] Or its principal arm, if it has more than one

[4] Or its principal channel, if it has more than one For an interesting application of the rule relating to *Thalweg* see *State of New Jersey* v *State of Delaware* (1934) 291 U S 361, *Annual Digest*, 1933-1934, Case No 48, *A J*, 29 (1935), p 331, and comment by Garner, *ibid*, p 309, and Hyde in *B Y*, 18 (1937), pp 4, 5 See also *Wisconsin* v *Michigan* (1935) 295 U S 455, *Annual Digest*, 1935 1937, Case No 54, *Iowa* v *Illinois* (1893) 147 U S 1, and Dickinson, *Cases*, p 336, *Louisiana* v *Mississippi* (1906) 202 U S 1, and Dickinson, *Cases*, p 351, *Arkansas* v *Mississippi* (1919) 250 U S 39, *Arkansas* v *Tennessee* (1940) U S *A J*, 35 (1941), p 154, 310 U S 563 And see *In re Village of Fort Erie and Buffalo*, decided in December 1927 by the Supreme Court of Ontario *Annual Digest*, 1927-1928, Case No 82

[5] *E g* by the Treaty of Peace (1919) with Germany, Article 30

[6] See above, § 175

[7] See Twiss, 1 §§ 147 and 148, Westlake, 1 p 145, Hyde in *A J*, § VI (1912) p 905, and Schulthess, *op cit*, pp 8 10

[8] Unless it is otherwise provided by treaty (see, for example, Treaty of Peace (1919) with Germany, Article 30) Moreover, if a boundary river suddenly leaves its old bed and forms a new one, the boundary line remains in its old place See *Dermit* v *Sergeant Bluff Consolidated Independent School District* (1935) 261 N W 636, decided by the Supreme Court of Iowa And see, for a further

the boundary line runs, failing special treaty arrangements,[1] through the middle of the bridge [2]

(2) Boundary lakes and land-locked seas are such as separate the lands of two or more different States from each other The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States [3]

(3) The boundary line of the maritime belt is, according to details given above (§ 186), uncertain, since no unanimity prevails with regard to the width of the belt It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark.

(4) In a narrow strait separating the lands of two different States the boundary line runs, either through the middle, or through the mid-channel,[4] unless special treaties make different arrangements

qualification of the rule stated in the text, *Hogue* v *Stricker Land and Timber Co* (1934) 69 F (2d) 167, decided by the United States Court of Appeal (5th Circuit)

The statement in the text means that if a river changes its course as the result of gradual accretion on one bank and destruction of the other (see Rivier, 1 p 168, 'changements lents, opérés peu à peu, lesquels entraînent forcément le changement de la frontière'), the boundary line continues to be the middle of the river or of mid channel, but nevertheless that line shifts See below, § 235, and *Arkansas* v *Tennessee* (1918) 246 U S 158, *Arkansas* v *Mississippi* (1919) 250 U S 39, the *Chamizal* Arbitration between the United States of America and Mexico in *A J*, 5 (1911), pp 782 833, *Kansas* v *Missouri*, *A J*, 39 (1945), p 122, Hyde, 1 § 138, and Carpenter in *A J*, 19 (1925), at p 523 For an example of international regulation and rectification of a river boundary exposed to frequent fluctuations and constituting a danger of flooding see the Convention of February 1, 1933, between the United States and Mexico for the rectification of the Rio Grande in the El Paso Juarez Valley, *A J*, 28 (1934), Suppl, p 98 See also Reinhard, *ibid*, 31 (1937), pp 45-54

[1] For an example see Treaty of Peace (1919) with Germany, Article 66, under which existing bridges across the Rhine within the limits of Alsace Lorraine are to belong to France The meaning of this article is controversial see Lederle in *Z V*, 12 (1923), pp 298, 299, Schwalb, *ibid*, pp 365 368, Norden, *Die Rechts und Verkehrsverhältnisse der Rheinbrücken zwischen Baden und Elsass Lothringen nach dem Versailler Vertrag* (1921), and Goellner, *Les ponts français sur le Rhin* (1933)

[2] As regards the boundary lines running through islands rising in boundary rivers and through the abandoned beds of such rivers see below, §§ 234, 235

[3] See above, § 179, and Schulthess, *op cit*, pp 16 18

[4] See Twiss, 1 §§ 183, 184, and above, § 194 See 18 and 19 Geo 5, c 23, to approve an agreement with the Sultan of Johore determining the boundary in the territorial waters between the Straits Settlement and the State and Territory of Johore For an instance of regulation of a maritime boundary see the Convention of July 6, 1932, between Great Britain and the United States concerning the boundary between the Philippine Archipelago and the State of North Borneo. Treaty Series, No. 2 (1932), Cmd 4241

Boundary Mountains

§ 200 Boundary mountains or hills are such natural elevations from the common level of the ground as separate the territories of two or more States from each other Failing special treaty arrangements, the boundary line runs on the mountain ridge along with the watershed But it is quite possible that boundary mountains belong wholly to one of the States which they separate [1]

Boundary Disputes

§ 201 Boundary lines are, for many reasons, of such vital importance, that disputes relating thereto are inevitably very frequent and have often led to war During the nineteenth century, however, a tendency began to prevail to settle such disputes peaceably [2] The simplest way in which this can be done is always by a boundary treaty, provided the parties can come to terms [3] In other cases arbitration can settle the matter, as, for instance, in the Alaska Boundary dispute between Great Britain (representing Canada) and the United States, settled in 1903 [4] Sometimes International Commissions are

[1] See Fiore, II § 800, and Adami, *op cit*, pp 7-12

[2] As to the doctrine of *uti possidetis* adopted by the Spanish American States for the purpose of avoiding and solving boundary disputes see Alvarez, *Le droit international américain* (1910), p 65, and the arbitration between Colombia and Venezuela decided in 1922 by the Swiss Federal Council and quoted in Ralston, § 574*a*, and reported in *Annual Digest*, 1919 1922, Case No 54 See for a discussion and application of that doctrine the *Opinion and Award of the Special Boundary Tribunal between Guatemala and Honduras* (Washington, D C, 1933, and *Annual Digest*, 1933 1934, Case No 117 (at pp 117, 118) and comment thereon by Fisher in *A J*, 27 (1933), pp 403-427 And see Hackworth, I § 105 See also as to the boundary dispute between Peru and Ecuador in 1936 Woolsey in *A J*, 31 (1937), pp 97 100

[3] A good example of such a boundary treaty is that between Great Britain and the United States of America respecting the demarcation of the international boundary between the United States and the Dominion of Canada, signed at Washington on April 11, 1908 (see Martens, *N R G*, 3rd ser, IV p 191) For numerous boundary arbitrations between South American States see Cruchaga, §§ 429, 430, Woolsey in *A J*, 25 (1931), pp 324 333, and Accioly in *R I (Paris)*, 15 (1935), pp 36 45 As to Brazilian boundary disputes see *Bulletin of the American Union*, 1935, pp 155 168 As to boundary disputes generally see Fauchille, §§ 489 (3), 489 (4) The delimitation of boundaries formed the subject-matter of two Advisory Opinions of the Permanent Court, *Publications of the Court*, Series B, No 8 (Poland and Czecho Slovakia), and No 9 (Albania and the Serb-Croat Slovene State)

[4] See Balch, *The Alaska Frontier* (1903) For a useful synopsis of disputed boundaries and territories see *Strupp, Wort*, III pp 1187-1199 See also Ireland, referred to above, p 482, Hill, *Claims to Territory in International Law and Relations* (1944)

specially appointed to settle the boundary lines [1] After the First World War, Boundary Commissions were constituted by the Treaties of Peace to settle many frontiers [2]

§ 202 Natural Boundaries *sensu politico* (See above, § 198) Natural Boundaries *sensu politico*

XI

STATE SERVITUDES

Vattel, II § 89—Hall, § 42*—Westlake, I p 61—Phillimore, I §§ 281-283—Twiss, I § 245—Taylor, § 252—Moore, I §§ 163 168, II § 177—Hershey, §§ 166 168—Hyde, I §§ 152, 153—Fenwick, pp 288 295, 305-311—Bluntschli, §§ 353 359—Hartmann, § 62—Heffter, § 43—Holtzendorff in *Holtzendorff*, II pp 242 252—Gareis, § 71—Liszt, § 14, III 3—Ullmann, § 99—Hatschek, pp 154 164—Kohler, §§ 38, 40—Fauchille, §§ 339-344 (2)—Despagnet, §§ 190 192—Mérignhac, II pp 366 368—Pradier Fodéré, II §§ 834-845, 1038—Rivier, I pp 296-303—Nys, II pp 319 330—Calvo, III § 1583—Fiore, I § 380, and *Code*, §§ 1100-1102—Martens, I §§ 94, 95—Keith's Wheaton, pp 416-420—Balladore Pallieri, pp 449, 456—Salle, I pp 113-117—De Louter, I pp 336 339—Lauterpacht, §§ 51, 52, 106 108—Henrich in *Strupp, Wort*, II pp 533 536, and *Theorie des Staatsgebietes* (1922), pp 85 98—Clauss, *Die Lehre von den Staatsdienstbarkeiten* (1894)—Fabres, *Des servitudes dans le droit international* (1901)—Hollatz, *Begriff und Wesen der Staatsservituten* (1910)—Labrousse, *Des servitudes en droit international public* (1911)—Münch, *Ist an dem Begriff der volkerrechtlichen Servitut festzuhalten?* (1931)—Reid, *International Servitudes in Law and Practice* (1932), and in *Hague Recueil*, vol 45 (1933) (III), pp 5 68—Váli, *Servitudes of International Law* (1933)—Mercier, *Les servitudes internationales* (1939)—Nys in *R I*, 2nd ser, 7 (1905), pp 118-125, and 13 (1911), pp 314-323—Basdevant in *R G*, 19 (1912), pp 512 521—Potter in *A J*, 9 (1915), pp 627 641—de Stael-Holstein in *R I*, 3rd ser, 3 (1922), pp 424 462, and in *R G*, 41 (1934), pp 5 21—McNair in *B Y*, 1925, pp 111-127—Crusen in *Hague Recueil*, vol 22 (1928) (II), pp 1-74

§ 203 State servitudes are those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State Thus a State may by a convention be Conception of State Servitudes

[1] For an example of a boundary agreement following upon the delimitation of the boundary by a joint commission see the Agreement of May 6, 1929, between Great Britain and France concerning the boundary between Senegal and Gambia Treaty Series, No 13 (1929), Cmd 3340

[2] See above, § 198.

obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier

Servitudes must not be confused [1] with those general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike These restrictions are named 'natural' restrictions of territorial supremacy (*servitutes juris gentium naturales*), in contradistinction to the conventional restrictions (*servitutes juris gentium voluntariae*) which constitute State servitudes in the technical sense of the term Thus, for instance, it is not a State servitude but a 'natural' restriction on territorial supremacy, that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt

That State servitudes are of great importance, there can be no doubt The vast majority [2] of writers and the practice of States [3] accept the conception of State servitudes, although they do not agree upon its definition or extent, and are often divided as to whether a particular restriction upon territorial supremacy is or is not a State servitude Some passages in the award of the Permanent Court of Arbitration in the case of the *North Atlantic Fisheries* (1910) created the impression that the Court rejected the con-

[1] This is done, for instance, by Heffter (§ 43), Martens (§ 94), Nys (II pp 320 ff), and Hall (§ 42*), Hall speaks of the right of innocent use of territorial seas as a servitude On 'administrative lines' as distinguished from a boundary in cases where the frontier is disputed see, with special reference to the Polish Lithuanian frontier, Natkevicius in *R G*, 38 (1931), pp 633 662 See also Advisory Opinion of October 15, 1931, Series A/B, No 42

[2] The conception of State servitudes is rejected by Bulmerincq (§ 49), Gareis (§ 71), Liszt (§ 14, III 3, see, however, Fleischmann's note 12), Jellinek (*Allgemeine Staatslehre*, p 366) Hyde, I § 153, dislikes the use of the term McNair, in *B Y*, 1925, pp 111-127, takes the view that the application of the terminology and conceptions of the Roman law of servitudes to such treaty restrictions upon territorial supremacy is regrettable, and that the effect of these restrictions can usually be achieved by means of the application of other and less controversial principles

[3] For a modern instance of the use of the term 'servitude' see the final settlement of May 15, 1929, of the Tacna Arica controversy between Chile and Peru which expressly provides that certain canals passing through Chilean territory 'shall enjoy the most complete servitude in perpetuity in favour of Peru' The servitude includes the right to widen the canals, change their course, and to appropriate all their waters passing through Chilean territory *A J*, 23 (1929), Suppl, p 183

ception of servitudes In fact, the Court was prepared to accept it, but, for reasons which gave rise to some criticism,[1] it demanded an express grant to that effect It is now being increasingly recognised that whatever may be the terminological objections militating against the use of the term 'servitude,' neighbourly adjustments in the shape of restrictions of sovereignty in the economic or even military sphere often constitute a better means of obviating international friction than cessions of territory pure and simple[2] Purely territorial changes frequently create as many difficulties as they remove[3]

[1] Mainly upon three grounds (1) that a servitude in International Law predicated an express grant of a sovereign right (2) that the doctrine of international servitudes originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire, (3) that, being little suited to the principle of sovereignty which prevails in States under a constitutional Government and to the present international relations of sovereign States, it had found little, if any, support from modern writers In answer to this it may be pointed out that the fact that it originated in the peculiar conditions of the Holy Roman Empire does not make it unfit for the conditions of modern life if its practical value can be demonstrated The assertion that it is but little suited to the principle of sovereignty which prevails in States under a constitutional Government, and has therefore found little, if any, support from modern writers, does not agree with the facts See the official report of the case, pp 115, 116, Hogg in *L Q R*, 26 (1910), pp 415 417, Richards in *J C L*, New Ser, 11 (1910), pp 18 27, Lansing in *A J*, 5 (1911), pp 1-31, Balch and Louter in *R I*, 2nd ser, 13 (1911), pp 5 23, 131-157, Drago and Basdevant in *R G*, 19 (1912), pp 5 and 421, Anderson in *A J*, 7 (1913), pp 1-16, Scott in Schücking, *Das Werk von Haag*, 2nd ser, 1 part 2 (1915 1917), particularly pp 248 312, Niemeyer in *Strupp, Wort*, 1 pp 116, 117, Lauterpacht, *Analogies*, pp 119-124

[2] See below, § 206 (1) The existence of State servitudes was recognised by the Cologne Court of Appeal in 1914 (see *A J*, 8 (1914), pp 858 860, 907-913) It was also recognised, to the extent of implying a partial abandonment of sovereignty, by the Swiss Federal Council in the case of *Canton of Thurgau* v *Canton of St Gallen*, decided on February 10, 1928 *Annual Digest*, 1927 1928, Case No 289 See also the judgment of the District Labour Court of Karlsruhe of June 1928, in the *German Railway Station at Basle* case *ibid*, Case No 90 As to the discussion upon servitudes in the *Wimbledon* case before the Permanent Court in 1923, Series A, No 1, see McNair, *op cit*, at pp 115, 116, and particularly Schücking's dissentient judgment as to the rules of restrictive interpretation and *civiliter uti*

[3] For an interesting example of the elasticity of jurisdictional arrangements see the Treaty of March 2, 1936 (ratified in 1939), between Panama and the United States, Article VIII of which provides for a corridor in favour of Panama and subject to Panama's jurisdiction across the United States Zone and for a right of transit for the United States across the corridor thus set aside for Panama *A J*, 34 (1940), Suppl, p 144 In March 1942 the United States and Canada agreed that the former should build through Canada a military highway to Alaska No rights over the highway were to be acquired by the United States For the Exchange of Notes see *A J*, 36 (1942), Suppl, p 153

Subjects of State Servitudes

§ 204 Subjects of State servitudes are States only and exclusively, since State servitudes can exist between States only (*territorium dominans* and *territorium serviens*) Whatever rights may be granted by a State to foreign individuals and corporations, such rights can never constitute State servitudes.

Object of State Servitudes

§ 205. The object of State servitudes is always the whole or a part of the territory of the State the territorial supremacy of which is restricted by any such servitude Since the territory of a State includes not only the land, but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these, as well as the service of the land itself, can be an object of State servitudes Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to make and use a tunnel through a boundary mountain, and the like Or again, a State servitude might be created through a State acquiring a perpetual right to send military aircraft through the territorial atmosphere of a neighbouring State or to keep a military force in its territory The open sea can never be the object of a State servitude, since it is no State's territory

Since the object of State servitudes is the territory of a State, all such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy Thus the perpetual restriction imposed upon a State by a treaty not to keep military, naval, or air forces, or not to keep an army, navy, or air force [1] beyond a certain size, is certainly a restriction on territorial supremacy, but is not, as some writers [2] maintain, a State servitude, because it does not make the territory of one State serve an interest of another

[1] See, for example, Part V of the Treaties of Peace with Germany and Austria

[2] See, for instance, Bluntschli § 356

On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town, region, place, or island,[1] or to the claim of another State for its subjects to be allowed a right of fishing within the former's territorial belt,[2] in all these and the like[3] cases the territorial supremacy of a State *is* in such a way restricted that a part or the

[1] As to the Aaland Islands in the Baltic see Article 32 of the Peace Treaty of Paris, 1856, and the annexed Convention of March 30, 1856 (Martens, *N R G*, 15, pp 780 and 788) See also below, § 522, p 833, n 1, and vol II § 72, Waultrin in *R G*, 14, pp 517 533, and *A J*, 2 (1908), p 397 As to the dispute between Finland and Sweden concerning these islands before the Council of the League in 1920 and their neutralisation and demilitarisation by the Convention of October 20, 1921, see below, vol II §§ 25*f* and 72 (8), McNair in *B Y*, 1925, at pp 114, 115, and literature cited at p 127, Strupp in *Strupp, Wort*, I pp 19 22, and Vlugt, *La question des îles d'Aland, considérations suggérés par le rapport des juristes* (1921), Soderhjelm, *Démilitarisation et neutralisation des îles d'Aland en 1856 et 1921* (1928), Maury, *La question des îles d'Aland* (1930), Vortisch, *Die Ålandfrage* (1933), Remsperger, *Die Rechtslage der Alandsinseln* (1933), Wrede in *Nordisk T A*, 3 (1932), pp 123 143, see also vol II § 72 As to the coastal zone in Morocco see Treaty between France and Spain of November 27, 1912, Article 6 (Martens, *N R G*, 3rd ser, 7, p 323) As to the banks of the Rhine see Treaty of Peace (1919) with Germany, Articles 42 44 and 180 As to Heligoland see *ibid*, Article 115 See also Articles 45 51 of the Peace Treaty with Italy of 1946, and Article 12 of the Peace Treaty with Bulgaria of the same year Thus Article 47 of the Treaty with Italy prohibits permanent fortifications on the Franco Italian frontier where weapons capable of firing into French territory can be emplaced

[2] Examples of such fishery servitudes are

(*a*) The former French fishery rights in Newfoundland, which were based on Article 13 of the Treaty of Utrecht, 1713, and on the Treaty of Versailles, 1783 See the details regarding the Newfoundland Fishery Dispute in Phillimore, I § 195, Clauss, *op cit*, pp 17 31, Geffcken in *R I*, 22, p 217, Brodhurst in the *Law Magazine and Review*, 24, p 67 The French literature on the question is quoted in Fauchille, § 342 (n 1) The dispute was settled by France's renunciation of the privileges due to her according to Article 13 of the Treaty of Utrecht, which took place by Article 1 of the Anglo-French Convention signed in London on April 8, 1904 (see Martens, *N R G*, 2nd ser, 32, p 29) But France retains, according to Article 2 of the latter convention, for her subjects the right of fishing in certain parts of the territorial waters of Newfoundland

(*b*) The fishery rights granted by Great Britain to the United States of America in certain parts of the British North Atlantic Coast by Article 1 of the Treaty of 1818, which gave rise to disputes extending over a long period The dispute was settled by an award of the Hague Permanent Court of Arbitration given in September 1910, in which (see above, § 203) the Court refused to recognise the existence of a servitude in the Treaty of 1818

[3] Phillimore (I § 283) quotes two interesting State servitudes which belong to the past. According to Articles 4 and 10 of the Treaty of Utrecht, 1713, France was, in the interest of Great Britain, not to allow the Stuart Pretender to reside on French territory, and Great Britain was, in the interest of Spain, not to allow Moors and Jews to reside in Gibraltar

whole of its territory is made to serve the interest of another State, and such restrictions are therefore State servitudes [1]

Different Kinds of State Servitudes

§ 206. According to different qualities different kinds of State servitudes must be distinguished

(1) Affirmative, active, or positive, are those servitudes which give the right to a State to perform certain acts on the territory of another State, such as to build and work a railway, to establish a custom-house, to send an armed force through a certain territory (*droit d'étape*), to keep troops in a certain fortress, to use a port or an island as a coaling station, and the like Also affirmative are those servitudes which give the right to a State to demand that its subjects shall be allowed to perform certain acts on the territory of another State, such as to fish within certain territorial waters, etc [2]

(2) Negative, are such servitudes as give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways Thus a State can have a right to demand that a neighbouring State shall not fortify certain towns near the frontier, or that another State shall not allow foreign men-of-war in a certain harbour [3]

(3) Military, are those State servitudes which are acquired for military purposes, such as the right to keep troops in foreign territory, or to send an armed force through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like [4]

[1] The controversial question whether neutralisation of a State creates a State servitude is answered by Clauss, *op cit* (p 167), in the affirmative, but by Ullmann (§ 99), correctly, it is believed, in the negative But a distinction must be drawn between neutralisation of a whole State and neutralisation of certain parts of a State In the latter case a State servitude is indeed created

[2] See above, § 203

[3] Article 7 of the Lateran Treaty of February 1929 between the Vatican City and Italy in which Italy undertakes to prohibit the construction within the territory surrounding the Vatican City of any new buildings which might overlook the latter *Documents*, 1930, p 218 Affirmative State servitudes consist *in patiendo*, negative servitudes *in non faciendo* The Rule of Roman Law *servitus in faciendo consistere nequit* has been adopted by the Law of Nations

[4] See *e g* Articles 4 and 5 of and Annex to the Treaty of Alliance of June 30, 1930, between Great Britain and Iraq in which Iraq grants to Great Britain the use of railways, rivers, ports, and aerodromes in time of war, and certain air bases and the right to maintain armed forces in certain localities in time of peace *Documents*, 1930, p 132, Treaty

(4) Economic, are those servitudes which are acquired for the purpose of commercial interests, traffic, and intercourse in general, such as the right of fisheries in foreign territorial waters to enjoy the advantages of a free zone for customs purpose [1] or of free navigation on a river,[2] to build a railway on or lay a telegraph cable through foreign territory, and the like [3]

Validity of State Servitudes

§ 207 Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent in the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change Therefore, if, after the creation of a State servitude, the part of the territory affected comes by subjugation or cession under the territorial supremacy of another State, such servitude remains in force Thus, when the Alsatian town of Huningen became German in 1871, and again when it became French in 1918, the State servitude created by the Peace Treaty of Paris, 1815, that Huningen should, in the interest of the Swiss canton of Basle, never be fortified, was not extinguished [4] Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny, and

Series, No 15 (1931), Cmd 3797 Article 8 of the Treaty of Alliance between Great Britain and Egypt of August 26, 1936, provides for the stationing, for a period of twenty years in the first instance, of British forces in the vicinity of the Suez Canal with the view to ensuring co-operation with the Egyptian forces in the defence of the canal Article 7 provides that in case of war Great Britain shall have the use of Egyptian ports, aerodromes, and means of communication Treaty Series, No 6 (1937), Cmd 5360 See also Annex to the Treaty of Alliance of March 22, 1946, between the United Kingdom and Trans Jordan providing that the former may station armed forces in Trans Jordan and that the latter shall grant facilities at all times for the movement and training of British armed forces Cmd 6779 (1946) As to the use of the ports of Wei Hai Wei see the Convention of April 18, 1930, between Great Britain and China for the restoration of the territory (Annex, Article 3) Treaty Series, No 50 (1930), Cmd 3741

[1] See below, § 208, as to the Free Zones of Upper Savoy and the District of Gex

[2] *E g* Finland's right of navigation on the river Neva by virtue of the Treaty of June 5, 1923, with Russia *L N T S*, vol 18, p 205

[3] See, for instance, in the Treaty of Peace with Germany (1919), Article 50 (Saar Annex, 22), and Article 89 (the Polish Corridor), and see Hatschek, pp 159 161 For an example of a grant of extensive rights in connection with international communications see the Agreements of 1943, 1944 and 1946 between Great Britain and Portugal concerning facilities in the Azores Cmd 6854 (1946)

[4] Details in Clauss, *op cit*, pp 15 17, and Fleiner, *Schweizerisches Bundesstaatsrecht* (1923), p 717

the whole of the territory of Savoy to the north of Ugine, became French, the State servitude created by Article 92 of the Act of the Vienna Congress, 1815, that Switzerland should during war have temporarily the right to locate troops in these provinces, was not extinguished [1]

It is a moot point whether military State servitudes can be exercised in time of war by a belligerent if the State with whose territory they are connected remains neutral Must such State, for the purpose of upholding its neutrality, prevent the belligerent from exercising the respective servitude—for instance, the right of passage of troops ? [2] There ought to be no doubt that the answer must be in the affirmative, unless, of course, the servitude is granted expressly for the case of war [3]

Extinction of State Servitudes

§ 208 State servitudes are extinguished by agreement between the States concerned, or by express or tacit [4] renunciation on the part of the State in whose interest they were created They are not, according to the correct opinion, extinguished by reason of the territory involved coming under the territorial supremacy of another State But it is difficult to understand why, although State servitudes are called into existence through treaties, it is sometimes maintained that the clause *rebus sic stantibus* [5] cannot be applied in case a vital change of circumstances makes the exercise of a State servitude unbearable Thus it was invoked by France in 1932 before the Permanent Court of International Justice in the case of the Free Zones of Upper

[1] Details in Clauss, *op cit*, pp 8 15 Now, however, by Article 435 of the Treaty of Peace with Germany, the High Contracting Parties have declared that the provisions of Article 92 of the Final Act of the Vienna Congress and other provisions relating to the neutralised zone of Savoy are no longer consistent with present conditions, and 'note the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone, which are and remain abrogated.'

[2] This question became practical when in 1900, during the South African War, Great Britain claimed, and Portugal was ready to grant, passage of troops through Portuguese territory in South Africa See below, vol II §§ 306 and 323, Clauss, *op cit*, pp 212 217, and Dumas in *R G*, 16 (1909), pp 289 316

[3] See above, p 492, n 4

[4] See Bluntschli, § 359*b* The opposition of Clauss, *op cit* (p 219), and others to this sound statement of Bluntschli is not justified

[5] See below, § 539

Savoy and the District of Gex established in 1815[1] The fact that the Court answered on its merits the French claim based on the doctrine *rebus sic stantibus* shows that it did not regard the nature of the right enjoyed by Switzerland as precluding an appeal to the doctrine *rebus sic stantibus*[2]

XII

MODES OF ACQUIRING STATE TERRITORY

Vattel, I §§ 203 207—Hall, § 31—Westlake, I pp 86 118—Lawrence, §§ 74 78—Phillimore, I §§ 222 225—Twiss, I §§ 113 139—Taylor, §§ 217-227—Wheaton, §§ 161-163—Hyde, I § 98—Bluntschli, §§ 278 295—Hartmann, § 61—Heffter, § 69—Holtzendorff in *Holtzendorff*, II pp 252-255—Gareis, § 70—Liszt, § 17—Ullmann, § 92—Kohler, § 45—Fauchille, §§ 532 532 (3)—Despagnet, § 378—Pradier-Fodéré, II §§ 781-783—Mérignhac, II pp 410 413—Rivier, I § 12—Nys, II pp 1-4—Calvo, I § 263—Fiore, II §§ 838 840—Martens, I § 90—Balladore Pallieri, pp 410 422—Heimburger, *Der Erwerb der Gebietshoheit* (1888)—Jerusalem, *Ueber volkerrechtliche Erwerbsgründe* (1911)—Lauterpacht, §§ 41-44—Lindley, pp 82 113—Schätzel, *Volkerbund und Gebietserwerb* (1919), and *Die Annexion im Volkerrecht* (1921), and in *Strupp, Wort*, I pp 366 369—Bleiber, *Die Entdeckung im Volkerrecht* (1933), pp 67 74

Who can acquire State Territory?

§ 209 The acquisition of territory by an existing State and member of the Family of Nations must not be confused, first, with the foundation of a new State, and, secondly,

[1] Series A/B, No 46, p 158, and see below, § 539 See also Series C, No 19 (1), pp 192 199 The second paragraph of Article 435 of the Treaty of Versailles provided that these provisions were no longer consistent with the present conditions, and that it was for France and Switzerland to agree as to the future position of these territories The negotiations which started in 1920 between the two States were not successful, and in 1923 France passed a decree purporting to terminate the regime of free zones and advanced her customs boundary to the political frontier In October 1924 the parties concluded a special agreement asking the Court to declare, *inter alia*, whether the effect of Article 435 was to abrogate the régime of free zones The Court in two pronouncements (see below, p 845) answered this question in the negative See Waldkirch, *Art 435 des Versailles Vertrages* (1924), Grassin, *Les zones franches du pays de Gex et de Savoie* (1924), Rougier in *R G*, 27 (1920), pp 40 85, Paulus in *R I*, 3rd ser, 5 (1924), pp 58 101, Chevallier in *R I (Paris)*, 2 (1928), pp 251 274 And see for further literature below, vol II p 72, n 5 The present regime of the free zones is governed by an arbitral award, the so-called Territet Award of 1933, given in pursuance of the judgment of the Permanent Court The Award lays down the principles governing the exchange of goods between the free zones and Switzerland see *Recueil officiel des Lois et Ordonnances de la Confédération Suisse*, Nouvelle Série, 49 (1933), pp 1028 *et seq*

[2] As regards the question whether a neutralised State is, by its neutralisation, prevented from acquiring territory see above, § 96, and below, § 215

with the acquisition by private individuals or corporations [1] of territory and of sovereignty over territory which lies outside the dominion of the Law of Nations

(1) Whenever a multitude of individuals, living on, or entering into, a part of the surface of the globe which does not belong to the territory of any member of the Family of Nations, constitute themselves a State and nation on that part of the globe, a new State comes into existence. This State is not, merely by reason of its birth, a member of the Family of Nations The formation of a new State is, as will be remembered from former statements,[2] a matter of fact, and not of law It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and a subject of International Law As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition

(2) Not essentially different is the case in which a private individual or a corporation acquires land (together with sovereignty over it) in countries which are not under the territorial supremacy of a member of the Family of Nations In all such cases acquisition is in practice made either by occupation of hitherto uninhabited land, for instance an island, or by cession from a native tribe living on the land Unless the corporation in question is invested by its State with the public power of acquisition and administration,[3] acquisition of territory and sovereignty thereon takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied If the individual or corporation which has made the acquisition requires protection by the Law of Nations, he or it must either declare a new State to be in existence and ask for its recognition by the Powers, as in the case of the former Congo Free

[1] As to the position of the large colonising corporations, such as the British South Africa Company see Lawrence, § 42, Lindley, pp 91-113, Hershey, § 89, Smith, II pp 76 96

[2] See above, § 71

[3] See the account in the *Island of Palmas* Arbitration between the United States and Holland of April 4, 1928 *Annual Digest*, 1927 1928, Case No 70

State,[1] or must ask a member of the Family of Nations to acknowledge the acquisition as having been made on its behalf[2]

Former Doctrine concerning Acquisition of Territory

§ 210 No unanimity exists among writers on the Law of Nations with regard to the modes of acquiring territory on the part of the members of the Family of Nations The topic owes its controversial character to the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius created that science, State territory used to be still, as in the Middle Ages, more or less identified with the private property of the monarch of the State Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States[3] Nowadays, however, the acquisition of territory by a State can mean nothing else than the acquisition of *sovereignty* over such territory Under these circumstances the rules of Roman Law concerning the acquisition of private property can no longer be applied Yet the fact that they have been applied in the past has left traces which can hardly be obliterated, and they need not be obliterated, since they contain a good deal of truth in agreement with the actual facts But the different modes of acquiring territory must be taken from the real practice of the States, and not from Roman Law, although the latter's terminology and common-sense basis may be made use of

Modes of Acquisition of Territory

§ 211 States as living organisms grow and decrease in

[1] See above, § 101. The case of Sir James Brooke, who in 1841 acquired Sarawak, in North Borneo, and established an independent State there, of which he became the sovereign, may also be cited Sarawak was a British protectorate till 1946 when, by voluntary—though somewhat disputed—cession it became a Crown colony This case is discussed at some length by Lindley (pp 86 88), Keith in *J C L*, 3rd ser, 8 (1926), p 306, and Lindley, *ibid*, 9 (1927), pp 138, 139 See also Smith, II pp 77-83

[2] Heimburger, *op cit*, pp 44 77, who defends the opinion represented in the text against Twiss (1 Preface, p x, also in *R I*, 15, p 547, and 16, p 237) and other writers See also Ullmann, § 93.

[3] See above, § 168 The distinction between *imperium* and *dominium* in Seneca's dictum, *omnia rex imperio possidet, singuli dominio*, was well known, and Grotius, II c 3, § 4, mentions it, but the consequences thereof were nevertheless not deduced (See Westlake, *Papers*, pp 129 133, and Westlake, I pp 86-90)

territory. If the historical facts are taken into consideration, different reasons may be found to account for the exercise of sovereignty by a State over the different sections of its territory One section may have been ceded by another State, another section may have come into the possession of the owner in consequence of accretion, a third through subjugation, a fourth through occupation of no State's land Finally, a State may say that it has exercised its sovereignty over the same for so long a period that the fact of having had it in undisturbed possession is a sufficient title of ownership. Accordingly, five [1] modes of acquiring territory may be distinguished, namely cession, occupation, accretion, subjugation, and prescription

Original and Derivative Modes of Acquisition

§ 212 The modes of acquiring territory are correctly divided according as the title they give is derived from the title of a prior owner-State, or not Cession is therefore a derivative mode of acquisition, whereas occupation, accretion, subjugation, and prescription are original modes

XIII

CESSION

Grotius, II c 6—Hall, § 35—Lawrence, § 76—Phillimore, I §§ 262 276—Twiss, I § 138—Walker, § 10—Halleck, I pp 164 167—Taylor, § 227—Moore, I §§ 83 86—Hershey, §§ 174 178—Hyde, I §§ 107-114—Bluntschli, §§ 285 287—Hartmann, § 61—Heffter, §§ 69 and 182—Holtzendorff in *Holtzendorff*, II pp 269 274—Gareis, § 70—Liszt, § 17—Ullmann, §§ 97 98—Hatschek, pp 171-174—Kohler, § 45 (IV)—Fauchille, §§ 557 (1) 557 (4), 557 (13) 579—Mérignhac, II pp 487 498—Despagnet, §§ 381-391—Pradier Fodéré, II §§ 817 819—Rivier, I pp 197 217—Nys, II pp 10 37—Calvo, I § 266—Fiore, II §§ 860 862, and *Code*, §§ 147-164 and 1058—Cavaglieri, pp 299 313—Martens, I § 91—De Louter, I pp 362 371—Cruchaga, §§ 497 518—Fenwick, pp 260-269—Lindley, pp 166-177—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp 110 120—Phillipson, *Termination of War and Treaties of Peace* (1916), pp 277 334—Kaeckenbeeck, *Le règlement conventionnel des consequences de remaniements territoriaux* (1940)—Schoenborn in *Strupp, Wort*, III pp 652 660—Audinet in *Répertoire*, I pp 572, 573, 627 642

[1] On the question whether 'adjudication'—that is, the award of an international tribunal—ought to be regarded as a mode of acquisition see Lauterpacht, p 107, n 3, and Strupp, *Éléments*, p 155 On the adjudication by Pope Alexander VI in the matter of the West Indies between Spain and Portugal see Staedler in *Z I*, 50 (1935), pp 315-334)

Conception of Cession of State Territory

§ 213. Cession of State territory is the transfer of sovereignty over State territory by the owner-State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules [1] for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law.[2] But if such municipal rules contain constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by Heads of States or Governments as violate these restrictions are not binding.[3]

Subjects of Cession.

§ 214. Since cession is a bilateral transaction, it has two subjects—namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are States concern the Law of Nations. Cessions of territory made to private persons and to corporations [4] by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law, neither do cessions of territory by native tribes made to States [5] which are members of the Family of Nations. On the other hand, cession of territory made to a member of the Family of Nations by a State as yet outside that family is, unless it is in the nature of total merger, real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family.

Object of Cession

§ 215. The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as

[1] See above, § 169.

[2] See above, § 21.

[3] See below, § 497. A State may, however, on acquiring territory by cession undertake by treaty not to alienate it, or only to do so *sub modo*, see the case of the cession to Denmark in 1920 of a portion of Slesvig, Treaty Series, No. 17 (1922), Cmd. 1585, *A. J.*, 17 (1923), Suppl., pp. 42-45.

[4] See above, § 209 (2), and the qualification there noted.

[5] See below, §§ 221 and 222.

a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land [1]

Form of Cession

§ 216 The only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be made with or without compensation

If a cession of territory is the outcome of war, it is the treaty of peace which stipulates the cession among its other provisions Such cession is regularly one without compensation, although certain duties may be imposed upon the acquiring State, as, for instance, of taking over a part of the debts of the ceding State corresponding to the extent and importance of the ceded territory, or that of giving the individuals domiciled on the ceded territory the option to retain their old citizenship or, at least, to emigrate

Cessions which are the outcome of peaceable negotiations may be agreed upon by the interested States from different motives and for different purposes, for instance *gift* or *voluntary merger* Thus Austria, during war with Prussia and Italy in 1866, ceded Venice to France as a *gift*, and some weeks afterwards France on her part ceded Venice to Italy The Duchy of Courland ceded in 1795 its whole territory to, and *voluntarily merged* thereby in, Russia , in the same way the then Free Town of Mulhouse merged in France in 1798, the Congo Free State in Belgium in 1908, and the Empire of Korea in Japan in 1910 [2] Cessions have

[1] See above, §§ 175 and 185 The controverted question whether permanently neutralised parts of a not permanently neutralised State can be ceded to another State must be answered in the affirmative—thus in 1860 Sardinia ceded her neutralised provinces of Chablais and Faucigny to France (see above, § 207), although the Powers certainly can exercise an intervention by right On the other hand, a permanently neutralised State could not, except in the case of mere frontier regulation, cede a part of its neutralised territory to another State without the consent of the Powers (see above, § 96, and the literature there quoted)

[2] See Lindley, pp 218, 219, for details of the events which led up to this cession.

in the past often been effected by transactions which are analogous to transactions in private business life As long as absolutism was reigning over Europe, it was not at all rare for territory to be ceded in *marriage contracts* or by *testamentary dispositions*.[1] In the interest of frontier regulations, but also for other purposes, *exchanges* of territory frequently take place [2] *Sale* of territory is quite usual; as late as 1867 Russia sold her Alaskan territory in America to the United States for 7,200,000 dollars, in 1899 Spain sold the Caroline Islands to Germany for 25,000,000 pesetas, and in 1916 Denmark sold the islands of St Thomas, St John, and St Croix in the West Indies to the United States for 25,000,000 dollars.[3] *Pledge* and *lease* [4] are also made use of Thus, the then Republic of Genoa pledged Corsica to France in 1768, Sweden pledged Wismar [5] to Mecklenburg in 1803, China [6] leased in 1898 Kiaochow to Germany,[7] Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang-chou Wan to France, and Port Arthur to Russia [8]

Whatever may be the motive and the purpose of the transaction, and whatever may be the compensation, if any, for the cession, the ceded territory is transferred to the new sovereign with all the international obligations [9] locally connected with the territory (*Res transit cum suo onere*, and *Nemo plus juris transferre potest quam ipse habet*)

Tradition of the Ceded Territory

§ 217 The treaty of cession must be followed by actual

[1] See Phillimore, 1 §§ 274 276

[2] Particularly in the rectification of frontiers see De Louter, 1 p 363, Rapisardi Mirabelli in *R I*, 3rd ser, 4 (1923), pp 663 665

[3] See Tansill, *The Purchase of the Danish West Indies* (1932)

[4] For an attempt to lease territory which is subject to the lessor's sphere of influence see Lindley, pp 215, 240, and, as to leases generally, pp 237 244 And see above, § 171

[5] See above, § 171 (3)

[6] See above, § 171 (3) Perhaps in the case of such leases what is ceded is the exercise of sovereignty rather than sovereignty itself Cession may also take place under the disguise of an agreement according to which territory comes under the 'administration' or under the 'use, occupation, and control' of a foreign State See also above, § 171 (2) and (4)

[7] See Martens, *N R G*, 2nd ser, 30, p 326

[8] See Martens, *N R G*, 2nd ser, 32, pp 89, 90

[9] See above, § 84 The transfer of sovereignty by cession or by subjugation does not *ipso facto* affect rights of private property, though the subsequent legislation of the new sovereign may affect them, see above, § 84, and below, § 240, Hyde, 1 §§ 132, 133.

tradition [1] of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded But the validity of the cession does not depend upon tradition,[2] the cession being completed by ratification of the treaty of cession,[3] and thus enabling the new owner to cede the acquired territory to a third State at once without taking actual possession of it [4] But of course the new owner-State cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory

Veto of Third Powers

§ 218 As a rule, no third Power has the right of *veto* with regard to a cession of territory Exceptionally, however, such right may exist It may be that a third Power has by a previous treaty acquired a right of pre-emption [5] concerning the ceded territory, or that some early treaty has created another obstacle to the cession, as, for instance, in the case of permanently neutralised parts of a not permanently neutralised State [6] States have certainly the right of *veto* in case a permanently neutralised State desires to increase its territory by acquiring land through cession from another State [7] Finally, there is a clear right to refuse recognition when a State seeks to obtain title by means contrary to international law, *e g* by unlawful resort to war But even where no right of *veto* exists, a third Power might intervene for political reasons For there is no duty on the part of third States to acquiesce in such cessions of territory

[1] This was indirectly recognised by Sir W Scott in *The Fama* (1804) 5 C Rob 106

[2] This is controversial Many writers—see, for instance, Rivier, i p 203—oppose the opinion presented in the text The Swiss Federal Council in its Award of March 24, 1922, in the dispute between Colombia and Venezuela refused to adopt the view that tradition is essential, see *Sentence Arbitrale*, p 103, and *Annual Digest*, 1919 1922, Case No 54

[3] In *The Bathori* [1933] P 22, it was held that the Hungarian Government was competent to bind the people of Fiume at the date of the signature of the Treaty of Trianon (June 4, 1920) although at that time the *de facto* control of Fiume no longer rested with Hungary

[4] Thus France, to whom Austria ceded in 1859 Lombardy, ceded this territory on her part to Sardinia without previously having actually taken possession of it

[5] See Lindley, pp 168, 169, for instances and as to the transferability of a right of pre emption with the consent of the State which has granted it

[6] See above, § 215

[7] See above, § 96

as endanger the balance of power or are otherwise of vital importance [1] Thus in 1940 the States of the American continent made clear their intention not to recognise transfers of territory as they then appeared probable in connection with the war in Europe [2] A strong State will often interfere in case a cession of such a kind as menaces its vital interests is agreed upon Thus, when in 1867 the reigning King of Holland proposed to sell Luxemburg to France, the North German Confederation intervened, and the cession was not effected but Luxemburg became permanently neutralised.

Plebiscite

§ 219 As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* [3] by the cession subjects [4] of the acquiring State The hardship involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to a new sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid until the inhabitants have by a plebiscite [5] given their consent to the cession And several

[1] See above, § 136

[2] See above, § 75c

[3] But there are exceptions see Fleischmann in Liszt, § 17 (n 7), when the parties stipulate otherwise by treaty, for instance, in the Treaty of Peace with Germany, Article 79, Annex, paragraph 3, as to Germans born or domiciled in Alsace Lorraine, and Article 122, see Niboyet, *La nationalité d'après les traités de paix* (1921), Schatzel, *Der Wechsel der Staatsangehorigkeit infolge der deutschen Gebietsabtretungen* (1921), pp 23 52, 98 100, and Isay, *Die privaten Rechte im Friedensvertrag* (3rd ed) (1923), §§ 297 304 For an instance of the collective naturalisation of the domiciled inhabitants of territory subject to a mandate (South West Africa) see above, § 94e (1), and *B Y*, 1925, pp 188 191

[4] See Keith, *The Theory of State Succession*, etc (1907), pp 42 45, Cogordan, *La nationalité* (1890), pp 317-398, Moore, iii § 379, Gettys in *A J*, 21 (1927), pp 268 278, and, as to corporations, Jemolo in *Rivista*, 3rd ser, i (1921-1922), pp 81-109 For an able survey of this question by reference to Turkey see Ghali, *Les nationalités détachées de l'Empire Ottoman à la suite de la guerre* (1934)

[5] See Higgins in Hall, § 54 (n) (and literature cited there), Hyde, i §§ 108, 109 (on the principle of self determination), Scelle, ii pp 257 297, Rivier, i p 204, Fauchille, §§ 561 577, Despagnet, § 391, Kohler, pp 96, 97, Liszt, § 17, ii 1, Ullmann, § 97, Stoerk, *Option und Plebiszit* (1879), Freudenthal, *Die Volksabstimmung bei Gebietsabtretungen und Eroberungen* (1891), *Plebiscites* (Foreign Office Peace Handbook, No 25) (1920), Wambaugh, *Monograph on Plebiscites* (1920), Mattern, *Employment of the Plebiscite in the Determination of Sovereignty* (1920), Heatley in *J C L*, 3rd ser, 3 (1921), pp 258 272, de Auer in *Grotius Society*, 6 (1921), pp 45-56, Gonssollin, *Le plébiscite dans le droit international actuel* (1921), Butler and Maccoby, *The Development of International Law* (1928), ch x, Sofronie in *R I* (*Geneva*), 12 (1934), pp 21 44, 87-118.

treaties[1] of cession concluded during the nineteenth century stipulated that the cession should only be valid provided the inhabitants consented to it through a plebiscite But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite[2] The necessities of international policy may now and then allow or even demand such a plebiscite, but in some cases they will not allow it[3]

Option of Nationality and of Emigration

§ 219a The hardship of the inhabitants being handed over to a new sovereign against their will can be lessened by a stipulation in the treaty of cession binding the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration Many treaties of cession concluded during the second half of the nineteenth century contained this stipulation But it must be emphasised that, failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the

[1] See Rivier, I p 210

[2] Although Grotius (II c VI § 4) thought this to be necessary

[3] By the Treaties of Peace after the First World War the method of a plebiscite was adopted in a number of cases, for instance, as to certain areas in the Treaty with Germany, Articles 34 (Eupen and Malmedy), 49 (Saar Basin), 88 (part of Upper Silesia), 94 (part of East Prussia), 109 (part of Schleswig), and as to certain areas in the treaties with Austria and Hungary, see some of the literature cited above, p 503, n 5, and Lipartiti in *Rivista*, 3rd ser, 5 (1926), pp 205-232, and Blogoyevitch, *Le principe de nationalité dans les Traités de Paix de Versailles et de Saint Germain* (1922) And see, in particular, Wambaugh, *Plebiscites since the World War* (2 vols, 1933) As to the Saar plebiscite in 1935 see Wambaugh, *The Saar Plebiscite* (1940), *Documents*, 1934, pp 1-97, Toynbee, *Survey*, 1934, pp 578-627, *Z V*, 18 (1934), pp 339 363, and 19 (1935), pp 221 242, Mouskhéli in *R G*, 42 (1935), pp 361 410, *ibid*, pp 708 748 As to the plebiscite in Tacna Arica see Toynbee, *Survey*, 1927, pp 523 531, and 1930, pp 418 421, *A J*, 20 (1926), pp 605 625, Woolsey, *ibid*, 23 (1929), pp 605 610 The French Constitution of 1946 lays down that no new territory shall be added to France without the consent of its inhabitants (Article 26) In pursuance of that provision a plebiscite was held in 1947 in the villages of Tenda and Briga ceded to France in the Peace Treaty with Italy

[4] As to option see Fauchille, §§ 428 431 (4), 578, Kunz, *Die volkerrechtliche Option*, I (1923), II (1928), in *Hague Recueil*, vol 31 (1930) (I), pp 111 176, and in *Strupp, Wort*, II pp 177 180, Schonborn in *Z V*, 13 (1926), pp 16-27 (historical), and, after the First World War, also Niboyet, *La nationalité après les traités de paix* (1921), Audinet in 48 *Clunet* (1921), pp 377-388, Bruns, *Staatsangehorigkeitswechsel und Option im Friedensvertag von Versailles* (1921), Schätzel, *Der Wechsel der Staatsangehorigkeit infolge der deutschen Gebietsabtretungen* (1921), *Die elsass-lothringische Staatsangehorigkeits regelung und das Volkerrecht* (1929), and in *Z V*, 12 (1923), pp 86 116, Scelle, II pp 152 171

whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring State [1]

The option [2] to emigrate within a certain period, which is frequently stipulated in favour of the inhabitants of ceded territory, is another means of averting the charge that inhabitants are handed over to a new sovereign against their will Thus Article 2 of the Peace Treaty of Frankfort, 1871, which ended the Franco-Prussian War, stipulated that the French inhabitants of the ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege of transferring their domicile from the ceded territory to French soil [3]

[1] On the provisions concerning option in the treaties concluded by Germany between 1939 and 1942 in the matter of the evacuation of German minorities from Soviet Russia, Italy, and some other countries see Schechtmann in *A J*, 38 (1944), pp 363 374 In July 1945 the Russian Government and the Polish Government recognised by it concluded an agreement providing for abandoning Soviet citizenship by persons of Polish and Jewish nationality living in Soviet Russia and their evacuation to Poland, and for a similar right of nationals of Soviet Russia and their evacuation to Poland The Agreement provided that the abandoning of citizenship and evacuation shall be effected on a voluntary basis

[2] As to the compulsory exchange of populations see Convention VI attached to the Treaty of Lausanne of 1923, and Advisory Opinion of the Permanent Court, Series B, No 10, and Ténékidès in *R G*, 31 (1924), pp 72 88. See also the Convention of November 27, 1919, between Bulgaria and Greece *L N T S*, 1, p 68, Streit, *Der Lausanner Vertrag und der griechisch türkische Bevolkerungsaustausch* (1929), Wurfbain, *L'échange Gréco Bulgare des Minorités ethniques* (1930), Kiosséglou, *L'échange forcée des minorités* (1930), Devedji, *L'échange obligatoire des minorités* (1930), Ladas, *The Exchange of Minorities Bulgaria, Greece and Turkey* (1932), Hoxter, *Bevölkerungsaustausch als Institution des Völkerrechts* (1932), Schechtman *European Population Transfers* (1946), Ghali, *op cit*, pp 303 320, Ténékides in *R G*, 31 (1924), pp 72 88, Scelle, II pp 174 186, Seferiadès in *Hague Recueil*, vol 24 (1928), (IV), pp 311-439, Leontiadès in *Z o V*, 5 (1935), pp 546 576 (with a bibliography), Politis in *L'Esprit International*, No 54 (1940), pp 163-186 On the work of the Greek Refugee Settlement Commission see Simpson in *International Affairs*, 8 (1929), pp 583 601

[3] The question whether subjects of the ceding State who are born on the ceded territory but have their domicile abroad become *ipso facto* by the cession subjects of the acquiring State, must be answered in the negative, unless special treaty arrangements stipulate the contrary Therefore, Frenchmen born in Alsace but domiciled at the time of the cession in Great Britain, would not have lost their French citizenship through the cession to Germany but for Article 1, part 2, of the Treaty of December 11, 1871, additional to the Peace Treaty of Frankfort (Martens, *N R G*, 20, p 847) See Fauchille, § 427, Cogordan, *La nationalité*, etc (1890), p 361, Dicey, p 174, n (t), and Kunz, *Die volkerrechtliche Option*, I (1925), pp 100 110 See also *Murray* v *Parkes* [1942] 2 K B 123, Mann in *Modern Law Review*, 5 (1942), pp 218 224, and Graupner in *L Q R*, 61 (1945), pp 161 178 And see Kaeckenbeeck, *Le règlement conventionnel des conséquences de remaniements territoriaux* (1940), pp 11 30 See also below, p 587, n 1

In many cases an option of nationality was accorded in the Treaties of Peace following the conclusion of the two World Wars to the inhabitants of territories ceded under them The terms of the option vary in each particular case In general, persons over eighteen years of age may opt for their old nationality But while in the Peace Treaties of 1919 the option of the husband covered his wife, the Treaty with Italy of 1947 lays down that the option of the husband shall not constitute an option on the part of the wife [1] The person exercising the right of option may be required, usually within one year of the exercise of the option, to move to the country for the nationality of which he has opted

XIV

OCCUPATION

Hall, §§ 32 34—Westlake, I pp 98 113, 121-135—Lawrence, § 74—Phillimore, I §§ 226 250—Twiss, I §§ 118-126—Hershey, §§ 179-187—Taylor, §§ 221 224—Walker, § 9—Wharton, I § 2—Moore, I §§ 80, 81—Wheaton, §§ 165 174—Hyde, I §§ 99 104—Bluntschli, §§ 278 283—Hackworth, I §§ 58, 59—Heffter, § 70—Holtzendorff in *Holtzendorff*, II pp 255 266—Gareis, § 70—Liszt, § 18—Ullmann, §§ 93 96—Hatschek, pp 169 171—Verdross, pp 179 181—Fauchille, §§ 534 556—Despagnet, §§ 392 399—Mérignhac, II pp 419-487—Pradier Fodéré, II §§ 784 802—Rivier, I pp 188 197—Nys, II pp 58 122—Calvo, I §§ 266-282—Fiore, II §§ 841-849, and *Code*, §§ 1059 1072—Martens, I § 90—De Louter, I pp 345 361—Heilborn in *Strupp Wort*, I pp 343 346—Cruchaga, §§ 484-496—Lindley, pp 124-159, 181 246—Suarez, §§ 30, 30 (*a*)—Fenwick, pp 250 258—Smith, II pp 1 75—Tartarin, *Traité de l'occupation* (1873)—Westlake, *Chapters*, pp 155 187—Heimburger, *Der Erwerb der Gebiets hoheit* (1888), pp 103-155—Salomon, *L'occupation des territoires sans maître* (1889)—Jèze, *Étude théorique et pratique sur l'occupation*, etc (1896)—Siebert, *Begriff und Arten der Okkupation im Volkerrecht* (1920)—Goebel, *The Struggle for the Falkland Islands* (1927), pp 47 119—Bleiber, *Die Entdeckung im Volkerrecht* (1933)—Ago, *Il requisito dell' effettività dell' occupazione in diritto internazionale* (1934)—Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic*

[1] Article 19 Moreover, in that Treaty the right to opt for Italian nationality is restricted to persons whose customary language is Italian The Treaty also departs from the previous practice inasmuch as the inhabitants of the ceded Italian territory do not acquire the new nationality automatically The Treaty lays down that they shall become citizens of the State to which the territory is transferred in accordance with the legislation of that State to be enacted within three months from the coming into force of the Treaty They lose Italian nationality only on becoming citizens of the State concerned

Acts, 1400 1800 (1938)—Hill, *Claims to Territory in International Law and Relations* (1944)—Macdonell in *J C L*, New Ser, 1 (1899), pp 276 286—Waultrin in *R G*, 15 (1908), pp 78, 185, 401—Jessup in *A J*, 22 (1928), pp 737 747—Genet in *R I*, 3rd ser, 14 (1934), pp 285 324, 416 450—Heydte in *A J*, 29 (1935), pp 448 471—Ottolenghi in *Rivista*, 15 (1936), pp 2 33, 361 403—Simsarian in *Political Science Quarterly*, 53 (1938), pp 111 128—Orent and Reinsch in *A J*, 35 (1941), pp 443 461

Concep tion of Occupa- tion

§ 220 Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State Occupation as a mode of acquisition differs from subjugation [1] chiefly in that the subjugated territory previously belonged to another State Again, occupation differs from cession in that through cession the acquiring State receives sovereignty over the territory concerned from the former owner-State Cession, therefore, is a derivative mode of acquisition, whereas occupation is an original mode And it must be emphasised that occupation can only take place by and for a State [2], it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance

Object of Occupa tion

§ 221 Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, for instance, an island, or inhabited by natives whose community is not to be considered as a State [3] Natives may live on a territory under a tribal organisation which need not be regarded as a State, and even civilised individuals may live and have private property on a territory without forming themselves into a State proper which exercises sovereignty over such territory [4] But the territory of any

[1] See below, § 236

[2] See above, § 209 For a decision of the Supreme Court of Norway affirming the proprietary right of a private individual in a part of Jan Mayen Island occupied by him at a time when it was *terra nullius* see *Jacobsen* v *Norwegian Government*, *Annual Digest*, 1933 1934, Case No 42 And see *United States* v *Fullard Leo*, decided by a United States Circuit Court of Appeals (1943) 133 F (2*d*) 743

[3] For the Treaty between nine States recognising the sovereignty of Norway over Spitsbergen signed on February 9, 1920, see Treaty Series (1924), No 18, and *A J*, 18 (1924), Suppl, pp 199 208, Heilborn in *Strupp, Wort*, II pp 569, 570, Piccioni in *R G*, 30 (1923), pp 104-115 Russia protested against the treaty (see *Bulletin de l'Institut Intermédiaire International*, 8 (1923), p 341)

[4] As to the legal position of *terra nullius* see Giese in *Archiv des öffentlichen Rechts*, 29 (1938), pp 310-360

State, even though it is entirely outside the Family of Nations, is not a possible object of occupation, and it can only be acquired through cession [1] or subjugation. On the other hand, a territory which once belonged to a State, but has been afterwards abandoned, is a possible object for occupation by another State [2]

Since the open sea is free, no part of it can be the object of occupation, nor can rocks or banks in the open sea, although lighthouses may be built on them.[3] Likewise the bed of the sea cannot be an object of occupation,[4] but the subsoil [5] of the bed of the open sea may become the object of occupation through driving mines and piercing tunnels from the coast [6]

[1] See above, § 214

[2] See below, §§ 228 and 247.

[3] See above, § 190*a* As to territorial waters see Cansacchi, *L'occupazione dei mari costieri* (1936)

[4] See below, § 281

[5] See below, §§ 287*c* and 287*d*, and as to the maritime belt, above, § 190*b*

[6] When, in 1909, Admiral Peary reached the North Pole and hoisted the flag of the United States, the question was discussed whether the North Pole could be the object of occupation The question must, it is believed, be answered in the negative since there is no land at the North Pole See Scott in *A J*, 3 (1909), pp 928 941, Balch in *A J*, 4 (1910), pp 265 275, and Clute in *Canadian Law Review*, 5 (1927), pp 19-26 As regards the South Pole see the *Law Magazine and Review*, 37 (1912), pp 326 328 Higgins in Hall, § 30 (n), considers both the North and South Polar regions to be incapable of acquisition by occupation because they are incapable of settlement Lindley (p 6) sees no reason why the North and South Polar regions should not be susceptible of acquisition by occupation, as to the Arctic and Antarctic regions generally see Lindley, pp 4 6, and Fauchille, § 531 (40) See also Lakhtine in *A J*, 24 (1930), pp 703-717, who regards it as a rule of positive law that they belong in principle to the Polar State within whose 'region of attraction' they are situated States asserting sovereignty in Arctic and Antarctic regions by reference to the sector principle claim territories defined by the coast-line and the meridians drawn from the extreme points of that line In the Order in Council of February 14, 1933, Great Britain has asserted sovereignty over 'all the islands and territories other than Adelie Land situated south of the 60th degree of South Latitude and lying between the 160th degree of East Longitude and the 45th degree of East Longitude' See also *Proceedings of the Imperial Conference*, 1936 *Summary of Proceedings*, p 33 The so called Ross sector, created by the Order in Council of July 30, 1923, established a similar claim between longitude 160° W and 150° W See Reeves in *A J*, 28 (1934), pp 117-119 But see Treaty Series, No 25 (1931), Cmd 3875, for an Exchange of Notes of August and November 1930, between Norway and Great Britain in which the former, while formally recognising Canadian sovereignty over the Sverdrup Islands, stated expressly that the recognition 'is in no way based on any sanction whatever of what is named "the sector principle"' The Soviet Union Decree of April 15, 1926, says that 'as being territory of the Soviet Union are declared all lands and islands discovered, as well as those which may be discovered in future, and which at the time of the publica-

How Occupation is effected.

§ 222 Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for, the acquiring State Occupation thus effected is *real* occupation, and, in contradistinction to *fictitious* occupation, is named *effective* occupation Possession and administration are the two essential facts that constitute an effective occupation

(1) *Possession* —The territory must really be taken into possession by the occupying State For this purpose it is necessary that it should take the territory under its sway (*corpus*) with the intention of acquiring sovereignty over it (*animus*) This can only be done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty It usually consists either of a proclamation or of the hoisting of a flag But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag On the other hand, it is immaterial whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State Any such agreement is usually neither understood nor appreciated

tion of this decree have not been recognised by the Government of the Soviet Union as the territory of a third State' Smedal, *op cit*, below, p 58 By a Royal Proclamation of January 14, 1939, Norway declared to be under Norwegian sovereignty the part of the mainland coast of the Antarctic between the limits of the Falkland Islands Dependencies in the west and the limits of the Australian Antarctic Dependency in the east For the text of the Proclamation see *A J*, 34 (1940), Suppl, p 83 In the same year Germany made a similar claim based largely on discoveries and mappings of a German aerial expedition As to all these claims see Reeves in *A J*, 33 (1939), pp 519 521 And see generally on the question of acquisition of sovereignty over Polar regions Smedal, *Acquisition of Sovereignty over Polar Areas* (1931), Smith, *Le statut juridique des terres polaires* (1934), Taracouzio, *Soviets in the Arctic* (1938), Hackworth, 1 §§ 67 71 (a valuable survey), Hunter Miller in *Foreign Affairs*, 4 (1925), p 56 Schoenborn in *Hague Recueil*, vol 30 (1929) (v), pp 162 166, Charteris in *J C L*, 3rd ser, 11 (1929), pp 226 232 (as to Australian claims), Johnston in *Canadian Historical Review*, 14 (1933), pp 24 41, Hyde in *Iowa Law Review*, 19 (1933 1934), pp 286 294, Schmitz and Friede in *Z o V*, 9 (1939), pp 219 263, McKitterick in *Journal of Comparative Legislation*, 22 (3rd ser, 1940), pp 89 97, Jessup in *A J*, 41 (1947), pp 117-119 On transpolar aviation and jurisdiction over Arctic airspace see Pischke in *American Political Science Review* 37 (1943), pp 999-1013.

by them, and even if the natives really do understand its meaning it has a moral value only [1]

(2) *Administration* —After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If, within a reasonable time after the act of taking possession, the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any State over the territory

Inchoate Title of Discovery

§ 223 In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation Although even in the age of the discoveries States did not maintain that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations, the taking of possession was frequently in the nature of a mere symbolic act [2] Later on a real *taking possession* was considered necessary However, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation,[3] or until the nineteenth century that the practice of the States accorded with this postulate But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance It is agreed that discovery gives to the State in whose service it was made an *inchoate* title , it ' acts as a temporary bar to occupation by another State ' [4] for such a period as is reasonably sufficient for effectively occupying the discovered territory. If the period lapses without any attempt by the discovering State to turn its *inchoate* title

[1] If an agreement with natives were legally important, the territory would be acquired by cession, and not by occupation But although it is nowadays quite usual to obtain a cession from a native chief, this is, nevertheless, not cession in the technical sense of the term in International Law , see above, § 214

[2] See Vattel, 1 § 208

[3] For an interesting and scholarly survey see Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic Acts*, 1400-1800 (1938)

[4] Thus Hall, § 32, p 127.

into a *real* title of occupation, the inchoate title perishes, and any other State can now acquire the territory by means of an effective occupation [1]

Notification of Occupation to other Powers

§ 224 No rule of the Law of Nations exists which makes notification of occupation to other Powers a necessary condition of its validity As regards all future occupations on the African coast the parties to the General Act of the Berlin Congo Conference of 1885 stipulated [2] that occupation should be notified to one another [3] But this act has been abrogated so far as the signatories of the Convention of St Germain of September 10, 1919, are concerned [4]

Extent of Occupation

§ 225 Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to cover so much territory as is effectively occupied In practice, however, the interested States have neither acted in the past, nor do they at present act, in conformity with any such rule, on the contrary, they have always tried to attribute to their occupation a much wider area [5] Thus it has been maintained that an effective occupation of the land at the mouth of a river is sufficient to bring under the sovereignty of the occupying State the whole territory through which such river and its tributaries run, up to the very crest of the watershed [6] Again, it has been

[1] See Lindley, pp 51 53 See Award of April 4 1928, in the Arbitration between Holland and the United States of America regarding sovereignty over the Island of Palmas, at pp 27, 28 of the Award as published by the Permanent Court of Arbitration, *A J*, 22 (1928), pp 867 912, Scott, *Hague Court Reports* (2nd ser, 1932), pp 84 131, and see vol II p 42, n 12 See also the *Clipperton Island* case between Mexico and France decided in January 1931, by an award of the King of Italy *A J*, 26 (1932), p 390, *Annual Digest*, 1931-1932, Case No 50 And see comment thereon by Dickinson, *A J*, 27 (1933), pp 130-133 See also the award in the Guatemala Honduras Boundary Arbitration, *Annual Digest*, 1933 1934, Case No 46 (at pp 118 121)

[2] Article 34 See Courcel, *L'influence de la Conférence de Berlin de 1885 sur le droit colonial international* (1936)

[3] The duty of notification does not apply to other States or regions See *Island of Palmas* award *Annual Digest*, 1927 1928, Case No 71, and the award in the *Clipperton Island* case of January 28, 1931 *A J*, 26 (1932), p 394

[4] Treaty Series, No 18 (1919), Cmd 477, *L N T S*, 8, p 27 See however, Article 10 of this Convention

[5] As to the doctrine of 'hinterland' as the basis of a claim to occupy territory see Lindley, pp 234, 235, Fauchille, § 531 (40)

[6] Claim of the United States in the Oregon Boundary Dispute (1827) with Great Britain See Twiss, I §§ 126, 127, and his *The Oregon Question Examined* (1846), Phillimore, I § 250, Hall, § 33

maintained that, when a coast-line has been effectively occupied, the extent of the occupation reaches up to the watershed of all such rivers as empty into the coast-line [1] And thirdly, it has been asserted that effective occupation of a territory makes the sovereignty of the possessor extend also over neighbouring territories as far as is necessary for the integrity, security, and defence of the land actually occupied [2] But all these and other fanciful assertions have no basis [3] In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective How far it is effective is a question in each particular case It is obvious that when the agent of a State takes possession of a territory and makes a settlement on a certain spot of it, he intends thereby to acquire a vast area by his occupation But everything depends, not upon his intention, but upon how far round the settlement or settlements the responsible authority governing the territory in the name of the possessor succeeds by degrees in establishing its sovereignty The payment of a tribute on the part of tribes settled far away, the fact that flying columns of the military or the police sweep, when necessary, remote spots, the conclusion of treaties relating to the territory in question, and many other facts, can show how far round the settlements the possessor is really able to assert his established authority Finally, in determining the degree of effectiveness of occupation necessary to confer sovereignty, regard must be had to the extent of competing claims of other States Thus in the dispute between Denmark and Norway concerning the status of Eastern Greenland, decided by the Permanent Court of International Justice on April 5, 1933, the Court attached considerable importance to the fact that up to 1931 there had been no claim by

[1] Claim of the United States in their dispute with Spain concerning the boundary of Louisiana (1805), approved of by Twiss, 1 § 125

[2] This is the so-called 'right of contiguity,' approved of by Twiss, 1 §§ 124 and 131 See also Wright in *A J*, 12 (1918), pp 519 521 For an express rejection of the doctrine of contiguity with respect to islands situated outside territorial waters see the award in the *Island of Palmas* case *Annual Digest*, 1927-1928, Case No 72.

[3] See, however, favourable comment upon the watershed doctrine, mentioned above, by the Privy Council in the *Labrador Boundary Case* (1927) 43 T L R at p 294

any Power other than Denmark to sovereignty over Greenland [1]

Protectorate as Precursor of Occupation

§ 226 In the second half of the nineteenth century, the desire of States to acquire as colonies vast territories which they were not able to occupy effectively at once, led to agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs committed themselves to the 'protectorate' of States that are members of the Family of Nations These so-called protectorates are certainly not protectorates in the technical sense of the term, which denotes that relationship between a strong State and a weak State where by a treaty the weak State has put itself under the protection of the strong and transferred to the latter the management of its more important international relations [2]

Spheres of Influence

§ 227 The uncertainty of the extent of an occupation, and the tendency of every colonising State to extend its occupation constantly and gradually into the interior, or 'hinterland,' [3] of an occupied territory, led several States with colonies in Africa to secure for themselves 'spheres of influence' by international treaties with other interested Powers 'Sphere of influence' was therefore the description of territory exclusively reserved for future occupation by a Power which had effectively occupied adjoining territories [4] In this way disputes could be avoided for the future, and the interested Powers could gradually extend their sovereignty over vast territories without coming into conflict with

[1] Series A/B, No 53, pp 45, 46 This is one of the most important cases on the questions of occupation and discovery For the literature see below, vol II p 72, to which add Castberg in *R I*, 3rd ser, 5 (1924), pp 252 269

[2] See above, §§ 92, 93

[3] As to the doctrine of 'hinterland' as the basis of a claim to occupy territory see above, § 225, p 511, n 5

[4] Lindley, p 206, distinguishes three kinds of spheres of influence, of which the first is that described in this section, the second, a sphere of influence or interest enjoyed by two States by agreement between themselves in the territory of a third and weaker State—for instance, the agreement between Great Britain and Russia of August 31, 1907, as to Persia, and the third an interest enjoyed by one State in the territory of another, and usually weaker, State by agreement between them—for instance, as to non-alienation of territory As to the agreement of December 1925 between Great Britain and Italy concerning their interests in Abyssinia and the Abyssinian protest to the League of Nations see Toynbee, *Survey*, 1929, pp 208 232, (1927) Cmd 2792, *Off J*, November 1926

other Powers Thus, to give some examples, Great Britain concluded treaties regarding spheres of influence with Portugal [1] in 1890, with Italy [2] in 1891, with Germany [3] in 1886 and 1890, and with France [4] in 1898 [5] But the establishment of a sphere of influence did not in itself vest territorial rights of a legal nature in the State exercising the influence

Consequences of Occupation

§ 228 As soon as a territory has been occupied by a member of the Family of Nations, it comes within the sphere of the Law of Nations, because it constitutes a portion of the territory of a subject of International Law No other Power can acquire it thereafter through occupation, unless the occupying State has either intentionally withdrawn from it or has been successfully driven away by the natives without attempting or being able to reoccupy it [6] On the other hand, the Power which assumes sovereignty over the occupied territory is thereafter responsible for all events of international importance on the territory It must, in particular, maintain a certain order among the native tribes, so as to restrain them from acts of violence against neighbouring territories, and must punish them for such acts if committed

XV

ACCRETION

Grotius, II c 8, §§ 8-16—Hall, § 37—Lawrence, § 75—Phillimore, I §§ 240, 241—Twiss, I §§ 131 and 154—Moore, I § 82—Hershey, § 169—Hyde, I § 105—Bluntschli, §§ 294, 295—Hartmann, § 61—Hackworth, I § 60—Heffter, § 69—Holtzendorff in *Holtzendorff*, II pp 266 268—Gareis, § 22

[1] See Martens, *N R G*, 2nd ser, 18, p 154

[2] See Martens, *N R G*, 2nd ser, 18, p 175

[3] See Martens, *N R G*, 2nd ser, 12, p 298, and 16, p 894

[4] See Martens, *N R G*, 2nd ser, 29, p 116

[5] Protectorates and spheres of influence are exhaustively treated in Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 92 105, but Hall fails to distinguish between protectorates over Eastern States and protectorates over native tribes See also Lindley, pp 181 236, Kohler, § 33, Heilborn in *Strupp, Wört*, I pp 550 552, Rutherford in *A J*, 20 (1926), pp 300 325, Schoenborn in *Haque Recueil*, vol 30 (1929) (v), pp 169-177, and, for a suggested distinction between a 'sphere of influence' and a 'sphere of interest,' Rutherford, *op cit*, p 311, n 64 The term 'sphere of action' is also used As to agreements not to alienate territory see Lindley, pp 225 227 See also Hold-Ferneck, II pp 93 95, Langhaus-Ratzeburg in *Z V*, 14 (1928), pp 356 *et seq*

[6] See below, § 247

—Ullmann, § 92—Fauchille, §§ 533 533 (2)—Despagnet, § 379—Pradier-Fodéré, II §§ 803 816—Rivier, I pp 179, 180—Nys, II pp 4-10—Calvo, I § 266—Fiore, II § 852, and *Code*, §§ 1073-1075—Martens, I § 90—Lindley, p 69—De Louter, I pp 343 345—Heimburger, *Der Erwerb der Gebietshoheit* (1888), p 106

Conception of Accretion

§ 229 Accretion is the name for the increase of land through new formations Such new formations may be only a modification of the existing State territory, as, for instance, where an island rises within a river, or a part of a river, which is totally within the territory of one and the same State, and in such case there is no increase of territory to correspond with the increase of land On the other hand, many new formations occur which really do enlarge the territory of the State to which they accrue, as, for instance, where an island rises within the maritime belt And it is a customary rule of the Law of Nations that enlargement of territory, if any, created through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty Accretion must, therefore, be considered as a mode of acquiring territory

Different Kinds of Accretion

§ 230 New formations through accretion may be artificial or natural They are artificial if they are the outcome of human work They are natural if they are produced through operation of nature And within the circle of natural formations different kinds must again be distinguished—namely, alluvions, deltas, new-born islands, and abandoned river-beds [1]

Artificial Formations

§ 231 Artificial formations are embankments, break-waters, dykes, and the like, built along the river or the coast-line of the sea As such artificial new formations along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage [2] of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighbouring

[1] As to accretion and avulsion in the case of rivers, and the effect on boundaries, see above, § 199

[2] See above, § 127.

State But every State may construct such artificial formations as far into the sea beyond the low-water mark as it likes, and thereby gain considerably in land and also in territory, since the maritime belt (which is at least three miles wide) is now to be measured from the extended shore.

Alluvions

§ 232 Alluvion is the name for an accession of land washed up on the seashore or on a river-bank by the waters Such accession is as a rule produced by a slow and gradual process, but sometimes also through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*) Through alluvions the territory of a State may be considerably enlarged [1] For if the alluvion takes place on the shore, the extent of the territorial maritime belt is now to be measured from the extended shore And if the alluvion takes place on the one bank of a boundary river, and the course of the river is thereby naturally so altered that the waters in consequence cover a part of the other bank, the boundary line, which runs through the middle or through the mid-channel,[2] may thereby be extended into former territory of the other riparian State

Deltas

§ 233. Similar to alluvions are deltas Delta is the name for a tract of land at the mouth of a river, shaped like the Greek letter Δ, and owing its existence to a gradual deposit by the river of sand, stones, and earth on one particular place at its mouth As the deltas are continually increasing, the accession of land they produce may be very considerable, and, according to the Law of Nations, is to be considered an accretion to the territory of the State to which the mouth of the river belongs, although the delta may be formed outside the territorial maritime belt

New born Islands

§ 234 The natural processes which create alluvions on the shore and banks, and deltas at the mouths of rivers, together with other processes, lead to the birth of new islands If they rise on the high seas outside the territorial

[1] *See* below, § 245

[2] See above, § 199 (1) And see *Louisiana* v *Mississippi* (1931) 282 U S 458, *Hogue* v *Stricker Land and Timber Co* (1934) 69 F (2*d*) 167, *Annual Digest*, 1933-1934, Case No. 49

maritime belt, they are no State's land, and may be acquired through occupation on the part of any State But if they rise in rivers, lakes, or within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land [1] New islands in boundary rivers which rise within the boundary line of one of the riparian States accrue to the land of such State, and islands which rise upon the boundary line are divided by it into parts which accrue to the land of the riparian States concerned. If an island rises within the territorial maritime belt, it accrues to the land of the littoral State, and the extent of the maritime belt is now to be measured from the shore of the new-born island [2]

An illustrative example is the case [3] of *The Anna* In 1805, during war between Great Britain and Spain, the British privateer *Minerva* captured the Spanish vessel *Anna* near [4] the mouth of the river Mississippi When brought before the British Prize Court, the United States claimed the captured vessel on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud islands composed of earth and trees which had drifted down into the sea

Abandoned Riverbeds

§ 235 It happens sometimes that a river suddenly abandons its bed entirely or dries up altogether If it was a navigable boundary river, the boundary line continues to run along the middle of the old *Thalweg* in the abandoned bed [5] But often this cannot be ascertained, and in such cases [6] the boundary line is considered to run through the

[1] See, for instance, Article 6 of the Treaty of Lausanne of 1923

[2] See Gidel, III pp 664-726

[3] See 5 C Rob 373, and below, vol II § 362 See also *The Secretary of State for India* v *Sri Raja Chellikani Rama Rao* (1916) 32 T L R 652

[4] It is not clear from the judgment whether the mud islands arose within the maritime belt, nor does it seem to have been considered relevant by Lord Stowell The point was that 'they are the natural appendages of the coast on which they border, and from which, indeed, they are formed', see Lindley, pp 7, 8

[5] See above, § 199

[6] As in the case of non-navigable rivers

middle of the abandoned bed, although the territory of one riparian State may become thereby enlarged, and that of the other diminished

XVI

SUBJUGATION

Vattel, III §§ 199 203—Hall, §§ 204, 205,—Lawrence § 77—Halleck, II pp 501 534—Taylor, § 220—Walker, § 11—Hershey, § 171—Wheaton, § 165—Moore, I § 87—Hyde, I § 106, II § 907—Bluntschli, §§ 287 289, 701, 702—Heffter, § 178—Ullmann, §§ 92, 97—Fauchille, §§ 557 (10) 557 (12)—Hackworth, I § 62—Despagnet, §§ 387 390—Rivier, I pp 181, 182, II pp 436 441—Nys, II pp 44 57—Calvo, V §§ 3117, 3118—Fiore, II § 863, III § 1693, and *Code*, § 1083 1086—Martens, I § 91—De Louter, I pp 371-373—Lindley, pp 160 165—Holtzendorff, *Eroberung und Eroberungsrecht* (1871)—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp 121 132—Westlake in *L Q R*, 17 (1901), p 392, reprinted in Westlake, *Papers*, pp 475-489—Phillipson, *Termination of War and Treaties of Peace* (1916), pp 9 51—Schätzel, *Die Annexion im Volkerrecht* (1921)—Fabbri, *Effetti giuridici delle annessioni territoriali* (1931)—McMahon, *Conquest and Modern International Law* (1940)—Fischer Williams in *B Y*, 1926, pp 24 42—Udina in *Rivista*, 22 (1930), pp 301 341

Conception of Conquest and of Subjugation.

§ 236 Conquest is the taking possession of enemy territory through military force in time of war Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory, although such territory comes through conquest for the time under the sway of the conqueror Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory [1] Such annexation makes the enemy State cease to exist, and thereby brings the war to an end And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title, and is a mode of acquiring territory [2] It is, however, quite usual to speak of title by

[1] See, however, *In re Southern Rhodesia* [1919] A C at pp 239, 240, but more particularly as to the position between the annexing State and its own subjects, and also *Sobhuza II* v *Miller* [1926] A C 518 For a clear statement to the effect that unilateral annexation of part of territory without the consent of the State concerned is invalid and produces no legal results, see the interesting decision of the Belgian Court of Cassation of June 16, 1947, in *In re Bindels* (*Journal des Tribunaux*, 62 (1947), p 511)

[2] See below, vol II § 264

conquest, and everybody knows that subjugation after conquest is thereby meant But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession [1]

Subjugation in contradistinction to Occupation

§ 237 Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror [2] Annexation turns the conquest into subjugation It is the very annexation which *uno actu* makes the vanquished State cease to exist, and brings the territory under the conqueror's sovereignty Thus the subjugated territory has not for one moment been no State's land, but passes from the enemy to the conqueror, not through cession, but through annexation [3]

The Status of Germany after the Second World War

§ 237a The legal status of Germany subsequent to her defeat and unconditional surrender at the end of the Second World War illustrates the distinction between conquest and subjugation After the unconditional surrender of the German forces and the abolition of what purported to be the German Government, Great Britain, the United States of America, Russia, and France, in a joint declaration issued on June 5, 1945, assumed supreme authority with respect to Germany, including all the powers possessed by the

[1] See above, § 216 Annexation by a State of territory hitherto under its administration, or leased to it, or granted to it for its 'use, occupation, and control' (see above, § 171 (2) (4)), is not subjugation, because the annexing State was already exercising sovereignty over the territory in question Examples of annexations of this kind are the annexation by Austria in 1908 of the Turkish provinces of Bosnia and Herzegovina, and of the Turkish island Ada Kalé in the Danube in 1913 (these territories having been under her administration since 1878), and the annexation by Great Britain immediately after the outbreak of war with Turkey in 1914 of the island of Cyprus, which had been under British administration since 1878 Such annexations without the consent of the State which in law owns the territory are certainly unlawful in time of peace, and of doubtful legality in war However this may be, they are not a regular mode of acquiring territory (Turkey by the Treaty of Lausanne of 1923, Article 20, recognised 'the annexation of Cyprus proclaimed by the British Government on the 5th November 1914')

[2] See below, vol II § 166

[3] Some cases of annexation by unilateral act, *i e* without cession, are discussed by Hurst in *B Y*, 1924, pp 163 178

German Government and 'any state, municipal, or local government or authority'[1] It was expressly stated that the assumption of these powers did not effect the annexation of Germany and that her future boundaries and status would be determined by the four States issuing the Declaration But for that disclaimer of the intention of annexation the assumption of full authority over Germany would have been indistinguishable from subjugation[2] As to the result of the Declaration, as well as of the various measures taken to implement it,[3] the international personality of Germany must be deemed to be suspended until the setting up of an independent German Government freely exercising the right to conclude treaties and to maintain diplomatic relations[4] Pending the restitution of German sovereignty the exercise of the internal and external prerogatives and rights of the German State is vested, with full effect in International Law, either jointly with the four Powers or with any one of them in respect of the part of German territory placed under its administration[5]

[1] *Unconditional Surrender of Germany Declaration and other Documents* Cmd 6648 (1945)

[2] But see Kelsen in *A J*, 39 (1945), pp 518 526, for the view that such disclaimer is of political rather than of legal significance and that as the result of the assumption of sovereignty over Germany—the Declaration refers only to the assumption of authority—Germany has ceased to exist as a sovereign State In April 1946, in connection with a case on appeal arising out of the continued detention of a German national, the British Foreign Office stated that Germany continued to exist as a State and that the war with her had not come to an end *Rex* v *Bottrill, ex parte Kuechenmeister*, All England Reports, I (1946), p 635 (Divisional Court), Weekly Notes, 1946, p 177 (Court of Appeal) For lucid comment see *B Y*, 23 (1947), p 381 See also *Netz* v *Ede*, Solicitors' Journal, March 20, 1946, p 187

[3] See, for instance, Law No 1 of September 20, 1945, issued by the Control Council and repealing a series of Laws of a political and discriminatory nature upon which the National-Socialist régime rested *Official Gazette of the Control Council for Germany*, No 1, October 29, 1945, p 3

[4] See *e g* Proclamation No 2 of September 20, 1945, which contains certain additional requirements imposed upon Germany *ibid*, p 8, *A J*, 40 (1946), Suppl, p 21 Section III of the Proclamation lays down that the Allied Representatives will regulate all matters affecting Germany's relations with other countries —such regulation to include directions concerning the abrogation, bringing into force, or revival of treaties to which Germany is a party The same Section provides that in virtue and as from the date of the surrender of Germany her diplomatic, consular, commercial and other relations with foreign States have ceased to exist and that German diplomatic and consular representatives abroad are recalled The control and disposal of the buildings, property, and archives of German diplomatic and other agencies abroad is to be prescribed by Allied Representatives

[5] It would appear that by virtue of the Declaration of June 5, 1945 (see above, p 520, n 1) authority over Germany is vested in three bodies

Justification of Subjugation as a Mode of Acquisition

§ 238 Prior to the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War (the effect of which is considered below, § 241*a*), States, as well as the vast majority of writers, recognised subjugation as a mode of acquiring territory. Its justification lay in the fact that war was a contention, not condemned by law, between States for the purpose of overpowering one another States which went to war knew beforehand that they risked more or less their very existence, and that it might be a necessity for the victor to annex the conquered enemy territory, be it in the interest of national unity or of safety against further attacks, or for other reasons

Subjugation of the Whole or of a Part of Enemy Territory

§ 239 Subjugation is, as a rule, a mode of acquiring the entire enemy territory But it is possible for a State to conquer and annex *a part* of enemy territory, either when the war ends by a treaty of peace in which the vanquished State, without ceding the conquered territory, submits silently [1] to the annexation, or by simple cessation of hostilities [2]

It must, however, be emphasised that such a mode of acquiring a part of enemy territory is totally different from forcibly taking possession of a part thereof during the continuance of war Such a conquest, although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title so long as the war has not terminated either through simple cessation of hostilities or by a treaty of peace Therefore, the practice, which sometimes prevails, of annexing during a war a conquered

(*a*) in the British, United States, Russian and French Commanders in-Chief, each with respect to his own zone of occupation, (*b*) in the Control Council, composed of the four Commanders-in Chief, in matters affecting Germany as a whole, (*c*) an Inter Allied Governing Authority for the area of 'Greater Berlin' operating under the general direction of the Control Council and consisting of four Commandants each of whom serves in rotation as Chief Commandant See Nobleman in *A J*, 41 (1947), pp 650-655, and, in particular, Jennings in *B Y*, 23 (1946), pp 112 141 See also Gros in *R G*, 50 (1946) pp 67-78, Mann in *International Law Quarterly*, 1 (1947), pp 314 335, Friedmann, *The Allied Military Government of Germany* (1947), Sauser Hall in *Annuaire Suisse de droit international*, 3 (1946), pp 9-63 As to the Government of Berlin see Monier in *R G*, 51 (1947), pp 48-64 See also the decision of the Obergericht of the Canton of Zürich of December 1, 1945, printed in *Annuaire Suisse de droit international*, 3 (1946), pp 204 210)

[1] See below, vol II § 273

[2] See below, vol II § 263

part of enemy territory cannot be approved For annexation of conquered enemy territory, whether of the whole or of part, confers a title only after a *firmly established* conquest, and so long as war continues conquest is not firmly established [1] For this reason [2] the annexation of the Orange Free State in May 1900, and of the South African Republic in September 1900, by Great Britain during the Boer War, was premature So also was the annexation of Tripoli and Cyrenaica by Italy during the Turco-Italian War in November 1911 and, again, the annexation of Ethiopia by Italy in 1936 [3]

Consequences of Subjugation

§ 240 Although subjugation is an original mode of acquisition, since the sovereignty of the acquiring State is not derived from that of the State formerly owning the territory, the new owner-State is nevertheless the successor of the former owner-State as regards many points which have been discussed above (§ 82) It must be specially mentioned that, as far as the Law of Nations [4] is concerned, the subjugating State does not acquire the private property of the inhabitants of the annexed territory Being now their sovereign, it may indeed impose any burdens it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects—but subjugation itself does not by International Law touch or affect private property

As regards the national status of the subjects of the subjugated State, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto* [5] by the subjugation [6] subjects of the subjugating State But the national status of such enemy subjects as are domiciled

[1] See below, vol II § 60

[2] See below, vol II § 167

[3] See below, vol II §§ 167 and 273, and Lindley, pp 161 164 As to the purported annexation of Abyssinia by Italy on May 9, 1936, see Strupp in *R G*, 44 (1937), pp 44 46 See also Serem in *Rivista*, 15 (1936), pp 404 433, and *Z ö R*, 17 (1937), pp 287 313, Nostitz Wallwitz in *Z o V*, 7 (1937), pp 38 46, Rousseau in *R G*, 44 (1937), pp 5 42, 162-198

[4] *United States* v *Percheman* (1833) 7 Peters 51, and Sayre in *A J*, 12 (1918), pp 475 497

[5] See above, § 219

[6] See *Campbell* v *Hall* (1774) 1 Cowper 208, and *United States* v *Repentigny* (1866) 5 Wallace 211 The case is similar to that of cession see above, § 219, Keith, *The Theory of State Succession* (1907), pp 45 and 48, Moore, in § 379, Edwards in *J C L*, New Ser, 15 (1915), pp 108-111 As to the meaning of the term 'established' in a treaty for the

abroad and do not return, and further of such as leave the country before the annexation or immediately afterwards, is matter of dispute [1] Some writers maintain that these individuals do in spite of their absence become subjects of the subjugating State, others emphatically deny it Whereas the practice of the United States of America seems to be in conformity with the latter opinion,[2] the practice of Prussia in 1866 was in conformity with the former [3] Probably a distinction must be made between those individuals who leave the country *before* and those who leave it *after* annexation The former are not under the sway of the subjugating State at the time of annexation, and, since the personal supremacy of their home State terminates with its extinction through annexation, they would seem to be outside the sovereignty of the subjugating State [4] But those individuals who leave the country *after* annexation leave it at a time when they have become subjects of the new sovereign, and they therefore remain such subjects even after they have left the country,[5] for there is no rule of the Law of Nations in existence which obliges a subjugating State to grant the privilege of emigration [6] to the inhabitants of the conquered territory

exchange of populations see Advisory Opinion of the Permanent Court (*Exchange of Greek and Turkish Populations*), Publications of the Court, Series B, No 10 As to the meaning of domicile see award of Kaeckenbeeck noted by Garner in *A J*, 20 (1926), pp 130 135 As to the meaning of the terms 'resident' and 'ordinarily resident' in a British Order in Council defining the national status of the inhabitants of Cyprus after the British annexation in 1914 see *Gout* v *Cimitian* [1922] 1 A C 105

[1] As to the treatment of such persons by the Treaty of Lausanne of 1923 see Bentwich in *B Y*, 1926, pp 97-109

[2] See Halleck, II p 510

[3] Thus in the case of Count Platen-Hallermund, a Cabinet Minister of King George v of Hanover, who left Hanover with his King before the annexation in 1866, and was in 1868 prosecuted for high treason before the Supreme Prussian Court at Berlin, this Court decided that the accused had become a Prussian subject through the annexation of Hanover See Halleck, II p 510, on the one hand, and, on the other, Rivier, II p 436 Valuable opinions of Zachariae and Neumann, who deny that Count Platen was a Prusssian subject, are printed in the *Deutsche Strafrechts Zeitung* (1868), pp 304 320 See also Schoenborn in *Strupp, Wort*, II p 271, and Borchard in *A J*, 37 (1943), pp 634 640, *Murray* v *Parkes* [1942] 2 K B 123 And see above, § 219*a*, with regard to cession

[4] See the authorities collected in Dicey, p 174, n (*t*)

[5] Supposing their original home State is extinguished as the result of the war (as in the case of the Orange Free State and the South African Republic), do they become stateless ?

[6] See above, § 219*a*, as to this option in cases of cession

Different from the fact that enemy subjects become through annexation subjects of the subjugating State is the question what position they acquire within it This question is one of Municipal and not of International Law The subjugating State can, if it likes, allow them to emigrate and to renounce their newly acquired citizenship, and its Municipal Law can put them in any position it likes, and can in particular grant or refuse them the same rights as those which its citizens by birth enjoy.

Veto of Third Powers

§ 241 In International Law as it obtained prior to the Covenant of the League, the Charter of the United Nations, and the General Treaty for the Renunciation of War the legal position with regard to the veto of third Powers could be summarised as follows .

Although subjugation is an original mode of acquiring territory, and no third Power has as a rule[1] a right of intervention, the conqueror has not in fact an unlimited possibility of annexation of the territory of the vanquished State When the balance of power is endangered, or when other vital interests are at stake, third Powers can and will intervene, and history records many instances of such interventions But the validity of the title of the subjugating State does not depend upon recognition on the part of other Powers Nor is a mere protest of a third Power of any legal weight

The position, it is believed, has now changed as the result of the developments in International Law mentioned above. Recognition on the part of third Powers was unnecessary so long as conquest resulted from war which International Law admitted as a legitimate means of changing international rights This is no longer the case.[2]

Renunciation of War and Title by Conquest

§ 241*a*. The recognition of title by conquest was, prior to the Covenant of the League, the Charter of the United Nations, and the General Treaty for the Renunciation of War, the necessary result of the admissibility of the right of war as an instrument both for enforcing the law and for

[1] But this rule had exceptions, as *in the case of a State whose independence and integrity have been* guaranteed by one or more Powers

[2] *See below, vol II § 52j* And *see above, § 75c, as to non-recognition.*

changing existing rights The right to terminate the existence of another member of the community is a legal anomaly which can be understood only by reference to other anomalies of the legal system in question Under general International Law conquest is not the result of an illegal act, on the contrary, it is the consequence of use of force permitted by International Law The position has, it is submitted, undergone change as the result of the Covenant of the League, the Charter of the United Nations, and, in particular, of the General Treaty for the Renunciation of War. In so far as these instruments prohibit war, they probably render invalid conquest on the part of the State which has resorted to war contrary to its obligations [1] An unlawful act cannot normally produce results beneficial to the law-breaker As has been pointed out above,[2] the so-called doctrine of non-recognition does not render such conquest illegal, it is an announcement of the intention or the assumption of an obligation not to validate by an act of recognition claims to territorial title which originates in an illegal act and which is, accordingly, itself invalid [3]

On the other hand, the title by conquest remains a valid title in those cases in which the conquering State is not bound by the Charter of the United Nations or by the General Treaty for the Renunciation of War or when, although so bound, the resort to war on its part is not, in the particular case, unlawful

XVII

PRESCRIPTION

Grotius, II c 4—Vattel, II §§ 140 151—Hall, § 36—Westlake, I pp 94 96—Lawrence, § 78—Phillimore, I §§ 251-261—Twiss, I § 129—Taylor, §§ 218, 219—Walker, § 13—Wheaton, § 164—Hershey, § 170—Moore,

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[1] See § 75i

[2] As to the pronouncements of the Permanent Court of International Justice pointing to the acceptance of the maxim *ex injuria jus non oritur* see above, p 136, n 6

[3] In the absence of a judicial or other authoritative pronouncement on this question, the view expressed in the text must be regarded as representing merely the opinion of the Editor of this edition For a different view, so far as the effect of the Covenant is concerned, see § 241a of the previous edition See also Hyde in *A J*, 30 (1936), pp 471-476, Garner, *ibid*, pp 679-688.

1 § 88—Hyde, 1 § 116—Bluntschli, § 290—Hartmann, § 61—Heffter, § 12—Holtzendorff in *Holtzendorff*, II p 255—Ullmann, § 92—Liszt, § 30, III (1)—Fauchille, §§ 557 (5) 557 (9)—Hackworth, I § 442—Mérignhac II pp 415 418—Despagnet, § 380—Pradier Fodéré, II §§ 820 829—Rivier, I pp 182 184—Nys, II pp 38-44—Calvo, I §§ 264 265—Fiore, II §§ 850, 851, and *Code*, §§ 1079-1082—Martens, I § 90—G F Martens, §§ 70, 71—Lindley, pp 178 180—De Louter, I pp 341 343—Ralston, §§ 573-574*a*—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp 140-155—Bleiber, *Die Entdeckung im Volkerrecht* (1933), pp 41 48—Verykios, *La prescription en droit international public* (1934), pp 11 109—Audinet in *R G*, 3 (1896) pp 313 325—Ralston in *A J*, 4 (1910), pp 133 144—Sibley in *J C L* 3rd ser, 7 (1925), pp 17-22—Cavaglieri in *Rivista*, 18 (1926), pp 169 204—Scerensen in *Nordisk T A*, 3 (1932), pp 145 160

Conception of Prescription [1]

§ 242 Since the existence of a science of the Law of Nations, there has always been opposition to prescription as a mode of acquiring territory Grotius rejected the usucaption of the Roman Law, yet adopted from the same law *immemorial* prescription [2] for the Law of Nations But whereas a good many writers [3] still defend that standpoint, others [4] reject prescription altogether Again, others [5] go beyond Grotius and his followers, and do not require possession from time *immemorial*, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time [6]

This opinion would indeed seem to be correct, because it recognises theoretically what actually goes on in practice There is no doubt that, in the practice of the members of the Family of Nations, a State is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided that the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction that the present condition of things is in conformity with international order Such prescription cannot be com-

[1] Prescription was originally placed on the agenda of the League Codification Committee, but the subject was then not proceeded with

[2] See Grotius, II c 4, §§ 1, 7, 9

[3] See, for instance, Heffter, § 12, Martens, I § 90, De Louter, I p 343

[4] G F Martens, § 71, Klüber, §§ 6 and 125, Holtzendorff, II p 255, Ullmann, § 92, Liszt, § 30, III (1)

[5] Vattel, II § 147, Wheaton, § 165, Phillimore, I § 259, Hall, § 36, Bluntschli, § 290, Pradier Fodéré, II § 825, and many others

[6] As to Extinctive Prescription barring the prosecution of claims by lapse of time see above, § 155c

pared with the usucaption of Roman Law, because the latter required *bona fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona fide* possession and in cases where it is not The basis of prescription in International Law is nothing else than general recognition[1] of a fact, however unlawful in its origin, on the part of the members of the Family of Nations And prescription in International Law may therefore be defined as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order* Thus, prescription in International Law has the same rational basis as prescription in Municipal Law—namely, the creation of stability of order[2]

How Prescription is effected

§ 243 From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription Everything depends upon the merits of the individual case As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order[3] But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with

[1] See Heimburger, pp 151 155

[2] Upon the principle of *uti possidetis* adopted by the Spanish American Republics see above, § 201 For an affirmation of the principle of prescription in its application to State members of the American Union and for a survey of previous decisions see *Arkansas* v *Tennessee* (1940) 310 U S 563, *A J*, 35 (1940), p 154, *Annual Digest*, 1938 1940, Case No 43

[3] The question whether the consent of the dispossessed State, which for a long time has not been in effective possession, is invariably required to render lawful a change of sovereignty was discussed in the course of the dispute of Great Britain with Persia concerning the Bahrein Islands see Smith, II pp 62 76, *Off J*, 1928, pp 605 and 1360, *ibid*, 1934, p 969, Toynbee, *Survey*, 1934, pp 221-224 As to the Persian protest after the British Treaty with Saudi Arabia of November 1935 (Cmd 5168) see *Journal des Nations* of June 20, 1936, *Off J*, 1936, p 926 See also *Z o V*, 6 (1936), pp 599, 600

international order The question, at what time and in what circumstances such a condition of things arises, is not one of law, but of fact. When, to give an example, a State which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among the members of the Family of Nations that the present condition of things is in conformity with international order Or, to give another example, when an incorrectly drawn boundary line, which wrongly allots to one of the States concerned a tract of territory, has for a long time been regarded as correct, the conviction will prevail that the present condition of things is in conformity with international order, even if afterwards the wronged State raises a protest and demands that the boundary line should be redrawn.[1] These examples show why a certain number of years [2] cannot, once for all, be fixed to create the title by prescription There are indeed immeasurable and imponderable circumstances and influences at work besides the mere lapse of time [3] to create the conviction that in the interest of stability of order the present possessor should be considered the rightful owner of a territory And these circumstances and influences, which are of a political and historical character, differ so much in the different cases

[1] See *Maryland* v *West Virginia* (1909) 217 U S 22 See also the interim injunction granted by the German Staatsgerichtshof on February 23, 1925, in the dispute between Lübeck and Mecklenburg regarding jurisdictional rights in the bay of Lübeck, printed in Wenzel, *Die Hoheitsrechte in der Lübecker Bucht* (1926), pp 9-21, and reported in *Annual Digest*, 1925-1926, Case No 85

[2] See Vattel, II § 151, and Field, *Outlines of an International Code*, § 52 For the purposes of the Boundary Arbitration between Great Britain and Venezuela in 1899 (the United States of America acting on behalf of Venezuela) it was agreed by a treaty between Great Britain and Venezuela of February 2, 1897, that 'Adverse holding or prescription during a period of fifty years shall make a good title' see Lindley, p 153 As to the interpretation of that provision during the arbitration proceedings see Lauterpacht, *Analogies*, pp 229 231

[3] Heffter's (§ 12) dictum, 'Hundert Jahre Unrecht ist noch kein Tag Recht,' is met by the fact that it is not the operation of time alone, but the co operation of other circumstances and influences, which creates the title by prescription

that the length of time necessary for prescription must likewise differ [1]

XVIII

LOSS OF STATE TERRITORY

Grotius, II c 9—Hall, § 34—Phillimore, I §§ 284 295—Moore, I §§ 89, 90—Hershey, §§ 188 190—Hyde, I §§ 115, 117 119—Holtzendorff in *Holtzendorff*, II pp 274 276—Gareis, § 70—Ullmann, § 100—Pradier Fodéré, II §§ 850 852—Fauchille, § 544—Rivier, I § 13—Fiore, II § 865—Martens, I § 92—Gemma, pp 202, 203—Lindley, pp 48 53—Smith, II pp 45-76—Henrich, *Theorie des Staatsgebietes* (1922), pp 125 132—Bleiber, *Die Entdeckung im Volkerrecht* (1933), pp 24 40

Six Modes of losing State Territory

§ 244 To the five modes of acquiring sovereignty over territory correspond five modes of losing it—namely, cession, dereliction,[2] operations of nature, subjugation, prescription. But there is a sixth mode of losing territory—namely, revolt No special details are necessary with regard to loss of territory through subjugation, prescription, and cession, except that it is of some importance to repeat here that the historical cases of pledging, leasing, and giving territory to another State to administer are in fact, although not in strict law, nothing else than cessions [3] of territory But the operations of nature, revolt, and dereliction must be specially discussed

Operations of Nature

§ 245 Operations of nature as a mode of losing territory correspond to accretion as a mode of acquiring it Just as through accretion a State may be enlarged, so it may be diminished through the disappearance of land and other operations of nature And the loss of territory through

[1] For three recent instances of the recognition of prescription see the *Chamizal* arbitration between the United States of America and Mexico (Award of June 15, 1911, in *A J*, 5 (1911), pp 785 812), the *Grisbadarna* arbitration between Sweden and Norway (Permanent Court of Arbitration, Award of October 23, 1909, Scott, *Hague Court Reports* (1916), pp 121 133), and the *Island of Palmas* arbitration between the United States and Holland, Award of April 4, 1928, *Annual Digest*, 1927-1928, Cases Nos 68, 75, *A J*, 12 (1928), pp 907 912, Scott, *The Hague Court Reports* (2nd ser, 1932), p 84

[2] The forfeiture of an inchoate title described above (§ 223) is not the same as the dereliction of territory which has been definitely acquired, whether by occupation or otherwise

[3] See above, §§ 171 and 216

operations of nature takes place *ipso facto* by such operations Thus, if an island near the shore disappears through volcanic action, the extent of the maritime territorial belt of the respective littoral State is thereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and now covers part of the land on the bank from which such piece became detached, the territory of one of the riparian States may be decreased through the boundary line being *ipso facto* transferred to the new middle or mid-channel of the river [1]

Revolt

§ 246 Revolt followed by secession is a mode of losing territory to which there is no corresponding mode of acquisition [2] But as history teaches, it has frequently been a cause of loss of territory [3] The question at what time a loss of territory through revolt is consummated cannot be answered once for all, since no hard and fast rule can be laid down regarding the time when a State which has broken off from another can be said to have established itself safely and permanently [4] It may well happen that, although such a seceded State has already been recognised by a third Power the mother country does not consider the territory to be lost, and succeeds in reconquering it

Derelic-tion

§ 247 Derelict on as a mode of losing territory corresponds to occupation as a mode of acquiring it Derelict on frees a territory from the sovereignty of the present owner-State It is effected through the owner-State completely abandoning territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it

[1] See above, § 232

[2] The possible case where a province revolts, secedes from the mother country, and, after having successfully defended itself against the attempts of the latter to re conquer it, unites itself with the territory of another State, is a case of merger by cession of the whole territory

[3] Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the United States of America from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810, Greece from Turkey in 1830, Cuba from Spain in 1898, Panama from Colombia in 1903, and there were a number of other instances in Europe during, and at the end of, the First World War

[4] See above, § 74

Just as occupation [1] requires, first, the actual taking into possession (*corpus*) of territory, and, secondly, the intention (*animus*) of acquiring sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention of giving up sovereignty over it Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory Thus, for instance, if the rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able, and makes efforts, to retake possession It is only when a territory is really derelict that any State may acquire it through occupation [2] History knows of several such cases [3] But very often, when such occupation of derelict territory occurs, the former owner protests, and tries to prevent the new occupier from acquiring it The cases of the island of Santa Lucia and of Delagoa Bay may be quoted as illustrations

(*a*) In 1639 Santa Lucia, one of the Antilles Islands, was occupied by England, but in the following year the English settlers were massacred by the natives No attempt was made by England to retake the island, and France, considering it no man's land, took possession of it in 1650 In 1664 an English force under Lord Willoughby attacked the French, drove them into the mountains, and held the island until 1667, when the English withdrew, and the French returned from the mountains No further step was made by England to retake the island, but she nevertheless asserted for many years to come that she had not abandoned it *sine spe redeundi*, and that, therefore, France in 1650 had no right to consider it no man's land Finally, however, she resigned her claims by the Peace Treaty of Paris of 1763 [4]

(*b*) In 1823 England occupied, in consequence of a so-called cession from native chiefs, a piece of territory at Delagoa Bay which Portugal claimed as part of the territory owned by her at the bay, maintaining that the chiefs concerned were rebels The

[1] See above, § 222

[2] See above, § 228

[3] For a discussion of the alleged abandonment by Great Britain of the Falkland Islands in 1774 see Goebel, *The Struggle for the Falkland Islands* (1927), pp 411 459, and Smith, II pp 45 62 See also Judgment of the Permanent Court of International Justice in the *Eastern Greenland* case of April 5, 1933, Series A/B, No 53, p 47

[4] See Hall, § 34, and Moore, I § 89.

dispute was not settled until 1875, when the case was submitted to the arbitration of the President of France The award was given in favour of Portugal, since the interruption of the Portuguese occupation in 1823 was not to be considered as abandonment of a territory over which Portugal had exercised sovereignty for nearly three hundred years [1]

[1] See Hall, § 34 The text of the award is printed in Moore, *Arbitrations*, v p 4984

CHAPTER II

THE OPEN SEA

I

RISE OF THE FREEDOM OF THE OPEN SEA

Grotius, II c 2, § 3—Pufendorf, IV c 5, § 5—Vattel, I §§ 279 286—Hall, § 40—Westlake, I pp 164 167—Phillimore, I §§ 172 179—Taylor, §§ 242-246—Walker, *Science*, pp 163 171—Wheaton, §§ 186, 187—Gidel, I pp 125 200—Hershey, § 202—Hartmann, § 64—Heffter, § 73—Stoerk in *Holtzendorff*, II pp 483 492—Kohler, § 48—Fauchille, §§ 483 (8), 483 (9), 483 (15)—Despagnet, § 401—Pradier Foderé, II §§ 871 874—Nys, II pp 171 177—Mérignhac, II pp 498 505—Calvo, I §§ 347 352—Fiore, II §§ 718 727—Martens, I § 97—Perels, § 4—De Louter, I pp 375 385—Cruchaga, § 432—Lindley, pp 54 58—Higgins and Colombos, §§ 48-66—Azuni, *Diritto marittimo* (1796), I c 1, Article 3—Reddie, *Researches in Maritime International Law*, I (1844) pp 79 111—Cauchy, *Le droit maritime international considéré dans ses origines*, 2 vols (1862)—Nys, *Les origines du droit international* (1894), pp 379 387—Castel, *Du principe de la liberté des mers* (1900), pp 1-15—Fulton, *The Sovereignty of the Seas* (1911), pp 1 56—Stier Somlo, *Die Freiheit der Meere und das Volkerrecht* (1917), pp 34 59—Ibarra, *La libertad de los mares* (1919)—Piggott, *The Freedom of the Seas, historically treated*, Oxford (1919), and Foreign Office Peace Handbook, No 148 (1920)—Boroughs, *Sovereignty of the British Seas* (1651), edited by Wade (1920)—Potter, *The Freedom of the Seas in History, Law, and Politics* (1924)—Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927)—Dupuis in 46 *Clunet* (1919), pp 603 614—Wade in *B Y*, 1921-1922, pp 99 108—Senior in *L Q R*, 38 (1921), pp 323 336—Fenn in *A J*, 19 (1925), pp 716-727, and *ibid* 20 (1926), pp 465 483

Former Claims to Control over the Sea

§ 248 In antiquity and the first half of the Middle Ages, navigation on the open sea was free to everybody According to Ulpian,[1] the sea is open to everybody by nature, and, according to Celsus,[2] the sea, like the air, is common to all mankind Since no Law of Nations in the modern sense of the term existed during antiquity and the greater part of the Middle Ages, no importance is to be attached

[1] L 13, pr D VIII 4 Mare quod natura omnibus patet
[2] L 3, D XLIII 8 Maris communem usum omnibus hominibus ut aeris

to the following passage in the Digest 'The Emperor Antoninus said "I am master of the earth, but the law is mistress of the sea"'[1] Nor is it of importance that the Emperors of the old German Empire, who were considered to be the successors of the Roman Emperors, styled themselves among other titles 'King of the Ocean.' Real claims to sovereignty over parts of the open sea begin, however, to be made in the second half of the Middle Ages And there is no doubt whatever that, at the time when the modern Law of Nations gradually arose, it was the conviction of the States that they could extend their sovereignty over certain parts of the open sea Thus the Republic of Venice was recognised as the sovereign over the Adriatic Sea, and the Republic of Genoa as the sovereign of the Ligurian Sea Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, and Spain over the Pacific and the Gulf of Mexico, both basing their claims on two Papal Bulls promulgated by Alexander VI in 1493, which divided the New World between these Powers Sweden and Denmark claimed sovereignty over the Baltic, and Great Britain over the Narrow Seas,[2] the North Sea, and the Atlantic from the North Cape to Cape Finisterre

These claims were more or less successfully asserted for several hundreds of years They were favoured by a number of different circumstances, as for instance the maintenance of an effective protection against piracy, and numerous examples can be adduced which show that they were more or less recognised Thus Frederick III, Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of coin from Apulia through the Adriatic Sea[3] Again, Great Britain, in the seventeenth century, compelled foreigners to take out an English licence for fishing in the North Sea, and when in 1636 the Dutch attempted to fish without such licence, they were attacked, and compelled to pay £30,000 as the price for the indulgence[4]

[1] *Digest*, 14 2 de lege Rhodia, 9
[2] See above, § 194
[3] See Walker, *History*, 1 p 163
[4] This and the two following examples are quoted by Hall, § 40

Again, when Philip II of Spain was in 1554 on his way to England to marry Queen Mary, the British admiral, who met him in the 'British Seas,' fired on his ship for flying the Spanish flag And the King of Denmark, when returning from a visit to James I in 1606, was forced by a British captain, who met him off the mouth of the Thames, to strike the Danish flag

Practical Expression of Claims to Maritime Sovereignty

§ 249 Maritime sovereignty found expression in maritime ceremonials at least A State which claimed sovereignty over a part of the open sea required foreign vessels navigating that part to honour its flag [1] as a symbol of recognition of its sovereignty [2] But apart from maritime ceremonials, maritime sovereignty also found expression in the levying of tolls from foreign ships, in the interdiction of fisheries to foreigners, and in the control, or even the prohibition, of foreign navigation Thus Portugal and Spain attempted, after the discovery of America, to keep foreign vessels altogether out of the seas over which they claimed sovereignty. The magnitude of this claim created an opposition to the very existence of such rights English, French, and Dutch explorers and traders navigated on the Indian Ocean and the Pacific, in spite of the Spanish and Portuguese interdictions And when, in 1580, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature nor regard for the public use permits any possession of the ocean [3]

Grotius' Attack on Maritime Sovereignty

§ 250 Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the open sea

[1] See Fulton, *op cit*, pp 39 and 204 208

[2] So late as 1805 the British Admiralty Regulations contained an order (quoted by Hall, § 40) to the effect that 'when any of His Majesty's ships shall meet with the ships of any foreign Power within His Majesty's seas (which extend to Cape Finisterre), it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas, and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto and not suffer any dishonour to be done to His Majesty'

[3] See Walker, *History*, I p 161

Twenty-nine years after her answer to Mendoza, there appeared, in 1609, Grotius' short treatise,[1] *Mare liberum* His intention was to show that the Dutch had a right of navigation and commerce with the Indies, in spite of the Portuguese interdictions He contended that the sea cannot be State property, because it cannot really be taken into possession through occupation,[2] and that consequently the sea is by nature free from the sovereignty of any State [3] The attack of Grotius was met by several authors of different nations. Gentilis defended Spanish and English claims in his *Advocatio Hispanica*,[4] which appeared, after his death, in 1613 Likewise, in 1613, William Welwood defended the English claims in his book, *De dominio maris* John Selden wrote his *Mare clausum sive de Dominio Maris* in 1618, but it was not printed until 1635 [5] Sir John Boroughs wrote in 1633 his book, *The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom*, but it was not published until 1651 In defence of the claims of the Republic of Venice, Paolo Sarpi published in 1676 his book, *Del Dominio del Mare Adriatico* The most important of these books defending maritime sovereignty is that of Selden King Charles I., by whose command Selden's *Mare clausum* was printed in 1635, was so much impressed by it that, through his ambassador in the Netherlands, he complained of the audacity of Grotius and requested that the author of the *Mare liberum* should be punished [6]

The general opposition to the bold attack of Grotius on maritime sovereignty prevented his immediate victory Too

[1] Its full title is *Mare liberum seu de jure quod Batavis competit ad indicana commercia dissertatio*, and it is now proved that this short treatise is only chapter 12 of another work of Grotius, *De jure praedae*, which was found in manuscript in 1864 and published in 1868 See above, § 53 An English translation of the *Mare liberum* by Magoffin was published in 1916 For some account of the *De justo imperio Lusitanorum asiatico* by Seraphin de Freitas published in 1625, a reply to Grotius' *Mare liberum*, see Knight in *Grotius Society*, 11 (1926), pp 1-9

[2] See below, § 259

[3] Grotius was by no means the first author who defended the freedom of the sea See Nys, *op cit*, pp 381 and 382

[4] See Abbott in *A J*, 10 (1916), pp 737 748

[5] An English translation by Marchamont Nedham was published in 1652

[6] See Phillimore, I § 182

firmly established were the claims then recognised to sovereignty over certain parts of the open sea for the novel principle of the freedom of the sea to supplant them Progress was made regarding one point only—namely, freedom of *navigation* of the sea England had never pushed her claims so far as to attempt the prohibition of free navigation on the so-called British Seas And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the open sea was practically free for vessels of all nations But with regard to other points, claims to maritime sovereignty continued to be kept up Thus the Netherlands had by Article 4 of the Treaty of Westminster, 1674, to acknowledge that their vessels had to salute the British flag within the 'British Seas' as a recognition of British maritime sovereignty [1]

Gradual Recognition of the Freedom of the Open Sea

§ 251 In spite of opposition, the work of Grotius was not to be undone All prominent writers of the eighteenth century took up again the case of the freedom of the open sea, making a distinction between the maritime belt, which is to be considered under the sway of the littoral States, and the high seas, which are under no State's sovereignty The leading author was Bynkershoek, whose standard work, *De Dominio Maris*,[2] appeared in 1702 Vattel, G F de Martens, Azuni, and others followed the lead And although Great Britain upheld her claim to the salute due to her flag within the 'British Seas' throughout the eighteenth and at the beginning of the nineteenth century, the principle of the freedom of the open sea became more and more vigorous with the growth of the navies of other States, and at the end of the first quarter of the nineteenth century it became universally recognised in theory and practice Great Britain silently dropped her claim to the salute, and with it her claim to maritime sovereignty, and she became now a champion of the freedom of the open sea When, in 1821, Russia, which then still owned Alaska in North

[1] See Hall, § 40, p 184

[2] Translated by Magoffin with Introduction by J. B Scott (Classics of International Law) (1923)

America, attempted to prohibit all foreign ships from approaching within one hundred miles of the shore of Alaska, Great Britain and the United States protested in the interest of the freedom of the open sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825 Moreover, when, after Russia had sold Alaska in 1867 to the United States, the latter made regulations regarding the killing of seals within the Behring Sea, claiming thereby jurisdiction and control over a part of the open sea, a conflict arose in 1886 with Great Britain, which was settled by arbitration [1] in 1893 in favour of the freedom of the open sea

CONCEPTION OF THE OPEN SEA

Field, § 53—Westlake, I p 164—Moore, II § 308—Rivier, I pp 234, 235—Pradier Fodéré, II § 868—Ullmann, § 101—Stoerk in *Holtzendorff*, II p 483—Hatschek, pp 199 203—Verdross, pp 215 220—Gidel, I pp 44 62, 125 127, 213 233—Higgins and Colombos, §§ 48 50, 67-70—Higgins in *Hague Recueil*, vol 30 (1929) (5), pp 5 12—Kelsen, *ibid*, vol 42 (1932) (4), pp 221 226

Discrimination between the Open Sea and Territorial Waters

§ 252. The open sea or the high seas [2] is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs, and bays, which are part of the sea, but not parts of the open sea Wherever there is a salt-water sea on the globe, it is part of the open sea, provided it is not isolated from, but coherent with, the general body of salt water extending over the globe, and provided that the salt-water approach to it is navigable and open to vessels of all nations The enclosure of a sea by the land of one and the same State does not matter, provided a navigable connection of salt water, open to vessels of all nations, exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more littoral States Whereas, therefore, the Aral Sea is Russian territory, the Sea of Marmora is part

[1] See below, § 284

[2] See Field, § 53.

of the open sea, although surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are open to merchantmen of all nations [1]

Clear Instances of Parts of the Open Sea

§ 253. It is not necessary or possible to particularise every portion of the open sea It is sufficient to give instances which clearly indicate its extent To the open sea belong, of course, all the so-called oceans—namely, the Atlantic, Pacific, Indian, Arctic, and Antarctic. But the branches of the oceans, which go under special names, and further, the branches of these branches, which again go under special names, belong likewise to the open sea [2]

It will be remembered that it is doubtful as regards many gulfs and bays whether they belong to the open sea or are territorial [3]

III

THE FREEDOM OF THE OPEN SEA

Hall, § 75—Westlake, I pp 164 170—Lawrence, § 100—Twiss, I §§ 172, 173 —Moore, II §§ 309, 310—Hackworth, II § 198—Taylor, § 242—Wheaton, § 187—Hershey, §§ 203 206—Bluntschli, §§ 304 308—Heffter, § 74—Stoerk in *Holtzendorff*, II pp 483-498—Ullmann, § 101—Hatschek, pp 203 207 —Verdross, pp 215 220—Fauchille, §§ 483 483 (7), 483 (11) 483 (14),

[1] See above, § 197 As to the Sea of Azoff see Rivier, I p 235, and Martens, I § 97, but Stoerk in *Holtzendorff*, II p 513, declared that the Sea of Azoff was part of the open sea The character of the Inland Sea of Japan is doubtful Its three entrances, which are less than three miles wide, are indeed in practice open to merchantmen of all nations, but it is not known whether this practice is based upon comity only, or upon a customary rule of International Law Moreover, geographically considered, this sea is more like a vast bay The claim of Japan to its territorial character would therefore, perhaps, not be disputed by other States (see *The Imperial Japanese Government* v *Peninsular and Oriental Steam Navigation Co* [1895] A C 644, Piggott, *Nationality*, p 29, and Fauchille, § 504 (1))

[2] Examples of these branches are the North Sea, the English Channel, and the Irish Sea, the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea (the assertion of some Russian writers that the Kara Sea is Russian territory is refuted by Martens, I § 97, and Fauchille, § 497 (1)), and the White Sea, the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora, and Black Seas, the Gulf of Guinea, the Mozambique Channel, the Arabian Sea and the Red Sea, the Bay of Bengal, the China Sea, the Gulf of Siam, and the Gulf of Tonking, the Eastern Sea, the Yellow Sea, and the Sea of Okhotsk, the Behring Sea, the Gulf of Mexico and the Caribbean Sea, Baffin's Bay See Jessup, *op cit*, ch VIII, for information upon many of these seas and gulfs and bays

[3] See above, § 191

483 (16), 483 (17), 602—Pradier Fodéré, II §§ 874-881—Rivier, I § 17—Nys, II pp 178 205—Calvo, I § 346—Fiore, II §§ 724, 727, and *Code*, §§ 933 935—Martens, I § 97—Perels, § 4—Testa, pp 63 66—Cruchaga, pp 433-435, 441—Keith's Wheaton, pp 355 360—Fenwick, pp 317 325—Gidel, I pp 201 212—Higgins and Colombos, §§ 71 72—Ortolan, *Diplomatie de la mer* (1856), I pp 119-149—De Burgh, *Elements of Maritime International Law* (1868), pp 1-24—Castel, *Du principe de la liberté des mers* (1900), pp 37 80—Strupp, *Éléments*, § 9A—Hirst in *Grotius Society*, 4 (1919), pp 26 34—Hostie in *R I*, 3rd ser, 8 (1927), pp 33 57—Lachs in *Z o R*, 15 (1935), pp 94-119—Wehberg in *Friedenswarte*, 42 (1942), pp 161-170

Meaning of the Term 'Freedom of the Open Sea'

§ 254. The term 'Freedom of the Open Sea' indicates the rule of the Law of Nations that the open sea is not, and never can be, under the sovereignty of any State whatever[1] Since, therefore, the open sea is not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction,[2] or police[3] over parts of the open sea. Since, further, the open sea can never be under the sovereignty of any State, no State has a right to acquire parts of the open sea through occupation,[4] for, as far as the acquisition of territory is concerned, the open sea is what Roman Law calls *res extra commercium*[5] But although the open sea is not the territory of any State, it is nevertheless an object of the Law of Nations The

[1] As to the meaning of the term when used by certain German and American writers see Stier Somlo, *Die Freiheit der Meere und das Volkerrecht* (1917), Meurer, *Das Programm der Meeresfreiheit* (1918), Erzberger, *A League of Nations* (1918) (translated into English, 1919, pp 210 222), Nippold, *Development of International Law after the War* (1917) (English translation, 1923, pp 149-186), Crecraft, *Freedom of the Seas* (1935), Hershey in *A J*, 13 (1919), pp 207-225, Dupuis in 46 *Clunet* (1919), pp 603 614, Seymour, *The Intimate Papers of Colonel House* (1926), I ch XIII and *passim*, House in *Contemporary Review*, April 1928, pp 416-421. And see vol II, § 178

[2] As regards jurisdiction in cases of collision and salvage on the open sea, see below, §§ 265 and 271

[3] See, however above, §§ 190 (1), 190 (II)

[4] Following Grotius (II c 3, § 13) and Bynkershoek (*De Dominio Maris*, c 3), some writers (for instance, Phillimore, I § 203) maintain that any part of the open sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State And some French writers go even beyond that and claim a certain zone round the respective vessel as temporary territory of the flag State But this is an absolutely superfluous fiction (See Stoerk in *Holtzendorff*, II p 494, Rivier, I p 238, Perels, pp 37 39) As to Grotius see Crichton in *The Juridical Review*, 53 (1941), pp 226 241

[5] But the subsoil of the bed of the open sea can, through the driving of mines and piercing of tunnels from the coast, be acquired by a littoral State See above, § 221, and below, §§ 287*c* and 287*d*

mere fact that there is a rule exempting the open sea from the sovereignty of any State whatever[1] shows this But there are other reasons. For if the Law of Nations were to content itself with the rule which excludes the open sea from possible State property, the consequence would be a condition of lawlessness and anarchy on the open sea To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the open sea, in spite of the fact that it is not the territory of any State, and important international conventions have been concluded with the same object

Legal Provisions for the Open Sea

§ 255 Apart from the rules contained in the conventions regarding salvage, assistance, collisions and safety of life at sea, which are discussed below,[2] this legal order is created through the co-operation of the Law of Nations and the Municipal Laws of such States as possess a maritime flag. The following rules of the Law of Nations are universally recognised, namely first, that every State which has a maritime flag must lay down rules according to which vessels can claim to sail under its flag, and must furnish such vessels with some official voucher authorising them to make use of its flag, secondly, that every State has a right to punish all such foreign vessels as sail under its flag without being authorised to do so, thirdly, that all vessels with their persons and goods are, whilst on the open sea, considered under the sway of the flag State, fourthly, that every State has a right to punish piracy on the open sea even if committed by foreigners, and that, with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flag

These customary rules of International Law are, so to say, supplemented by Municipal Laws of the maritime States comprising provisions, first, regarding the conditions to be fulfilled by vessels for the purpose of being authorised to sail under their flags, secondly, regarding the details of jurisdiction over persons and goods on board vessels

[1] The assertion of Stier-Somlo, *op cit*, p 59, that this rule is not one of customary International Law, but only a rule of comity, is unfounded

[2] See §§ 265, 271

sailing under their flags, thirdly, concerning the order on board ship and the relations between the master, the crew, and the passengers, fourthly, concerning punishment of ships sailing without authorisation under their flags

Freedom of the Open Sea and War

§ 256 Although the open sea is free, and is not the territory of any State, it may nevertheless, in its whole extent, become a theatre of war, since the region of war is not only the territories of the belligerents, but likewise the open sea, provided that one of the belligerents at least is a Power with a maritime flag [1] However, certain parts of the open sea can become neutralised, and thereby be excluded from the region of war Thus the Black Sea became neutralised in 1856 through Article 11 of the Peace Treaty of Paris [2] Yet this neutralisation of the Black Sea was abolished [3] in 1871 by Article 1 of the Treaty of London, and no other part of the open sea is at present neutralised [4]

Navigation and Ceremonials on the Open Sea

§ 257. The freedom of the open sea involves perfect freedom of navigation for vessels of all nations, whether men-of-war, other public vessels, or merchantmen It involves, further, absence of compulsory maritime ceremonials on the open sea According to the Law of Nations, no rights of salute whatever exist between vessels meeting on the open sea All so-called maritime ceremonials on the open sea [5] are a matter either of courtesy and usage, or of special conventions and Municipal Laws of those States under whose flags vessels sail In particular, no State has any right to require a salute from foreign merchantmen for its men-of-war [6]

The freedom of the open sea involves likewise freedom of inoffensive passage [7] through the maritime belt for merchant-

[1] Concerning the distinction between theatre and region of war see below, vol II § 70

[2] Which provided that 'La Mer Noire est neutralisee ouverte à la marine marchande de toutes les nations, ses eaux et ses ports sont formellement et à perpétuité interdits au pavillon de guerre, soit des puissances riveraines, soit de toute autre puissance'

[3] See above, § 181

[4] Unless possibly parts of the open sea are included in the neutralised zone of the Aaland Islands see below, vol II § 72 (8)

[5] But not within the maritime belt or other territorial waters See above, §§ 122 and 187

[6] That men of war can on the open sea ask suspicious foreign merchantmen to show their flags has nothing to do with ceremonials, but with the supervision of the open sea in the interest of its safety. See below, § 266

[7] See above, § 188

men of all nations, and also for men-of-war of all nations, in so far as the part of the maritime belt concerned forms a part of the highways for international traffic.

Claim of States to Maritime Flag

§ 258. Since no State can exercise protection over vessels that do not sail under its flag, and since every vessel must, in the interest of the order and safety of the open sea, sail under the flag of a State, the question was discussed before the First World War whether not only maritime States, but also States with no sea-coast, could claim a maritime flag At that time no State without a seaboard actually had a maritime flag, and all vessels belonging to its subjects sailed under the flag of a maritime State At the Barcelona Conference of 1921 a Declaration [1] was signed which has been ratified or acceded to by a number of States (including Great Britain), whereby the signatory and acceding States 'recognise the flag flown by the vessels of any State having no sea-coast which are registered at some one specified place situated in its territory,' such place serving as the port of registry of the vessels [2]

States which have a maritime flag, as a rule have a war

[1] Dated April 20, 1921 Treaty Series, No 29 (1923), Cmd 1924, *L N T S*, 7, p 74, *A J*, 18 (1924), Suppl, pp 167 168 This Declaration seems to apply both to public ships, including warships, and to private ships

[2] The question was discussed, in particular, in Switzerland In 1864, 1874, 1889, and 1891, Swiss merchants in foreign ports applied to the Swiss Bundesrath for permission for their vessels to sail under the Swiss flag, but the Swiss Government refused to have a maritime flag (see Huber, *Die rechtlichen Verhaltnisse einer Schweizerischen Meeresschiffahrt unter Schweizer Flagge* (1918), pp 3 5), because it was aware of the difficulties arising from the fact that, as Switzerland had no seaports of her own, vessels sailing under her flag would in many points have to depend upon the goodwill of the maritime Powers (see Calvo, 1 § 427, Twiss, 1 §§ 197, 198, Westlake, 1 p 169, and, in some detail, Huber, *op cit*, pp 5 21, see also Varadi, *La liberta del mare o lo stato chiuso moderno* (1922), Spiropoulos in *Z V*, 13 (1926), pp 103 111, Müller, *ibid*, pp 265 273, Wehberg in *Friedenswarte*, 42 (1942), pp 175 178) The freedom of the open sea involves a claim of any State to a maritime flag (see Huber, *op cit*, pp 5 11, but see Westlake, 1 p 169) In Article 273 of the Treaty of Peace (1919) with Germany, the Parties agreed to recognise the flag flown by the vessels of an Allied or Associated Power having no sea-coast, but registered at a place within its territory serving as a port of registry For the facilities granted to Czecho Slovakia in the ports of Hamburg and Stettin see Article 363 of the same Treaty, and in the port of Trieste see a treaty between that State and Italy of March 1921 in *L N T S*, 32, p 251 And see Article 43 of the Statute of the Free Territory of Trieste set up in 1946 and Annex VIII to the Treaty of Peace with Italy of that year (Instrument for the Free Port of Trieste) And see Haas in *Hague Recueil*, vol 21 (1928) (1), pp 375-423, Vali, *Servitudes of International Law* (1933), pp 128 136 And see above, § 205

flag different from their commercial flag; some States, however, have one and the same flag for both their navy and their mercantile marine But it must be mentioned that a State can by an international convention be restricted to a mercantile flag only, such State being prevented from having a navy This was formerly the position of Montenegro [1] according to Article 29 of the Treaty of Berlin of 1878.

The Dominions of Canada, Australia, New Zealand, Newfoundland, and South Africa have a maritime flag which is a modification of the British flag [2]

Rationale for the Freedom of the Open Sea

§ 259 Grotius and many writers who follow [3] him establish two facts as the reason for the freedom of the open sea They maintain, first, that a part of the open sea could not be effectively occupied by a navy, and could not therefore be brought under the actual sway of any State, secondly, that nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible and, therefore, sufficient for all [4] The last argument will nowadays be hardly accepted by those who deny the validity of the Law of Nature And the first argument is now without basis in face of the development of modern navies, since the number of public vessels which the different States possess at present would enable many a State to occupy effectively one part or another of the open sea The real reason for the freedom of the open sea is represented in the motive which led to the attack against maritime sovereignty, and in the purpose for which such attack was made—namely, the freedom of communication, and especially commerce, between the States which are severed by the sea [5] The sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever It is

[1] See *R G*, 17 (1910), pp 173-176

[2] See above, §§ 94*a*, 94*b*, Ewart in *A J*, 7 (1914), pp 780 783, and Keith, *Responsible Government in the Dominions* (2nd ed, 1928), vol II p 1030, and *The Constitutional Law of the British Dominions* (1933), p 124 The red ensign, defaced by an appropriate badge, may be flown by ships belonging to the subjects of the Indian Native States, of territories under British mandate, and of Cyprus

[3] See, for instance, Twiss, I § 172, and Westlake, I p 160

[4] See Grotius, II c 2, § 3

[5] See also Stier-Somlo, *op. cit*, pp 39 56

in the interest of free intercourse[1] between the States that the principle of the freedom of the open sea has become universally recognised and will always be upheld

IV

JURISDICTION ON THE OPEN SEA

Vattel, § 11 80—Hall, § 45—Westlake, 1 pp 170-180 -Lawrence, § 100—Halleck, 1 pp 229, 230—Taylor, §§ 262 267—Walker, § 20—Hershey, §§ 207-210—Wheaton, § 106—Moore, 11 §§ 309, 310—Hackworth, 11 §§ 199, 205 215—Hyde, 1 §§ 227-230, 235 237—Bluntschli, §§ 317-352—Heffter, §§ 78 80—Stoerk in *Holtzendorff*, 11 pp 518 550 -Liszt, § 36—Fauchille, §§ 483 (39) 483 (48), 597 606, 607 613—Despagnet, §§ 422 430—Mérignhac, 11 pp 536 553—Pradier Fodéré, v §§ 2376 2470—Rivier, 1 § 18—Nys, 11 pp 178-215—Calvo, 1 §§ 385 473—Fiore, 11 §§ 730-742, and *Code*, §§ 1006-1032—Martens, 11 §§ 55, 56—Perels, § 12—Testa, pp 98 112—De Louter, 1 pp 400 410—Cruchaga, §§ 466 479—Keith's Wheaton, pp 255 263—Smith, pp 97 118—Gidel, 1 pp 235 300, 357 436—Higgins and Colombos, §§ 243 350—Ortolan, *Diplomatie de la mer* (1856), 1 254 325—Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 106 109—Travers, §§ 238 279, 1657 1689—Alessandri, *Introduction à l'étude du droit de la mer* (1924)—Quadri, *Le navi private nel diritto internazionale* (1939)—Cleminson in *B Y*, 1925, pp 144 158—Franck in *L Q R*, 42 (1926), pp 25 36—Muller in *Z V*, 13 (1926), pp 233 265, 353 397—Sibert in *R G*, 34 (1927), pp 20 44—Higgins in *Hague Recueil*, vol 30 (1929) (5), pp 19 76—Diena, *ibid*, vol 51 (1935) (1), pp 409-479—Strandgaard in *Nordisk T A*, 6 (1935), pp 85 95—Colombos in *B Y*, 21 (1944), pp 96 110.

Jurisdiction on the Open Sea mainly connected with Flag

§ 260 Jurisdiction on the open sea is in the main connected with the maritime flag under which vessels sail This is the consequence of the fact, stated above,[2] that a certain legal order is created on the open sea through the co-operation of rules of the Law of Nations with rules of the Municipal Laws of such States as possess a maritime flag But two points must be emphasised The one is that this jurisdiction is not jurisdiction over the open sea as such, but only over vessels, persons, and goods on the open sea The other is that jurisdiction on the open sea is mainly but not exclusively connected with the flag under which vessels sail, because men-of-war of all nations have, as will be seen,[3] certain powers over merchantmen of all nations The points which must therefore be here discussed singly are the claim of

[1] See above, § 142 [2] See above, § 255 [3] See below, § 266

vessels to sail under a certain flag, ship's papers, the names of vessels, the connection of vessels with the territory of the flag State, the safety of traffic on the open sea, the powers of men-of-war over merchantmen of all nations, and, lastly, shipwreck

Claim of Vessels to sail under a certain Flag

§ 261 The Law of Nations does not include any rules regarding the claim of vessels [1] to sail under a certain maritime flag, but imposes the duty upon every State having a maritime flag to stipulate by its own Municipal Laws the conditions to be fulfilled by those vessels which wish to sail under its flag In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State But a State is absolutely independent in framing the rules concerning the claim of vessels to its flag It can in particular authorise such vessels to sail under its flag as are the property of foreign subjects, but such foreign vessels sailing under its flag fall thereby under its jurisdiction The different States have made different rules concerning the sailing of vessels under their flags [2] Some, like Great Britain,[3] allow only such vessels to sail under their flags as are the exclusive property of their citizens or of corporations established on their territory Others allow vessels which are the property of foreigners Others again, like France,[4] allow to sail under their flags vessels which are only in part the property of their citizens [5]

But no State may allow a vessel to sail under its flag which already sails under the flag of another State A vessel sailing under the flags of two different States, like a vessel not sailing under the flag of any State, does not

[1] As to what constitutes a vessel see the learned discussion by Gidel, 1 pp 64 71

[2] See Calvo, 1 §§ 393 423, where the respective Municipal Laws of most countries are given, and Muller, *op cit*, pp 363-382

[3] See § 1 of the Merchant Shipping Act, 1894, and §§ 51 and 80 of the Merchant Shipping Act, 1906, and Temperley, *Merchant Shipping Acts*, 3rd ed (1921), by Temperley and W L McNair, pp 1 3 and 495, 496 See also Rienow *The Test of the Nationality of a Merchant Vessel* (1937)

[4] By a Law of the 9th June, 1845, which provides that at least one half of the property must belong to French citizens

[5] See *Annuaire*, 15 (1896), p. 201, for the 'Règles relatives à l'usage du pavillon national pour les navires de commerce,' adopted by the Institute of International Law

enjoy any protection whatever.[1] Nor is protection enjoyed by a vessel sailing under the flag of a State which has no maritime flag.[2] Vessels belonging to subjects of such a State must obtain authority to sail under the flag of another State, if they wish to enjoy protection on the open sea.[2] And any vessel, although the property of foreigners, which sails without authority under the flag of a State, may be captured by the men-of-war of such State, prosecuted, punished, and confiscated.[3]

Ship's Papers

§ 262. All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship's papers, which serve the purpose of identification on the open sea. But neither the number, nor the kind, of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject.[4] They do, however, agree upon the need for the following papers:

(1) An official voucher authorising the vessel to sail under its flag, which consists of a *Certificate of Registry*, in case the flag State possesses, like Great Britain and Germany, for instance, a register of its mercantile marine, in other cases the voucher consists of a *Passport*, *Sea-letter*, *Sea-brief*, or of some other document serving the purpose of showing the vessel's nationality.

(2) *The Muster Roll*, which is a list of all the members of the crew, their nationality, and the like.

(3) *The Log Book*, which is a full record of the voyage, with all nautical details.

(4) *The Manifest of Cargo*, which is a list of the cargo of a vessel, with details concerning the number and the marking of each package, the names of the shippers and the consignees, and the like.

(5) *The Bills of Lading*, which are duplicates of the documents which the master of the vessel hands over to the shipper of the goods on shipment.

(6) If the vessel is chartered, the *Charter Party*, which is the contract between the owner of the ship, who lets it wholly or in part, and the charterer, who hires it.

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[1] See, however, Müller, *op. cit.*, at p. 259.

[2] But see above, § 258.

[3] See the case of *The Steamship Maori King* [1899] A.C. 562, and §§ 69 and 76 of the Merchant Shipping Act 1894.

[4] See Holland, *Manual of Naval Prize Law*, §§ 178-194, where the papers required by the different maritime States in 1888 are enumerated. See also Hackworth, II. §§ 210, 211.

Names of Vessels

§ 263 Every State must register the names of all private vessels sailing under its flag, and it must make them bear their names visibly, so that every vessel may be identified from a distance No vessel may be allowed to change her name without permission and fresh registration [1]

Territorial Quality of Vessels on the Open Sea

§ 264 It is a customary rule of the Law of Nations that men-of-war and other public vessels of any State are, whilst on the open sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States [2] Private vessels are considered as though they were floating portions of the flag State only in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction and protection of the flag State Thus the birth of a child,[3] a will or business contract made, or a crime [4] committed on board ship, and the like, are considered as happening on the territory, and therefore under the territorial supremacy, of the flag [5] State [6] But private vessels are not for all purposes considered as floating portions of the flag State, for in time of war belligerent

[1] As regards Great Britain see §§ 47 and 48 of the Merchant Shipping Act, 1894, and §§ 50 and 53 of the Merchant Shipping Act, 1906

[2] See above, § 172*a*, and below, §§ 447-451*a*, and *Letters of Historicus* (1863), pp 201 212 ('The Territoriality of the Merchant Vessel')

[3] *Marshall* v *Murgatroyd* (1870) L R 6 Q B 31, and the British Nationality and Status of Aliens Act, 1914, § 1 (1) *c*

[4] See Jordan in *R I*, 2nd ser, 10 (1908), pp 341 362 and 481 500, *R* v *Lesley* (1860) Bell C C 220, Beckett in *B Y*, 1927, pp 108-128, Sack in *New York University Law Quarterly Review*, 12 (1935), p 628, and in *R I F*, 1 (1936), pp 129 148, 310 340, and see *The United States of America* v *Santos Flores*, 289, U S 137, *A J*, 27 (1933), pp 569 579 (an important case concerning crimes committed on a national vessel in foreign territorial waters), and the *Lotus* case, above, § 147*a*

[5] Since, however, individuals abroad remain under the personal supremacy of their home State, nothing can prevent a State from legislating as regards such of its citizens as sail on the open sea on board a foreign vessel With the development of aircraft the question has arisen as to the status of floating islands or seadromes One view is that the sovereignty and responsibility for them should rest with the State to which the owners belong, the other view is that they must be internationalised See Giannini, *Saggi di diritto aeronautico* (1932), who suggests an ultimate control in the League of Nations, Schäfer, *Die Fluginsel* (1932), Dahmen, *Die volkerrechtliche Stellung der Fluginseln* (1935), Pignochet, *La commission internationale de navigation aérienne* (1936), pp 179 191, and Gidel, 1 pp 64 70

[6] On the other hand, in *R* v *Finlayson* (1941) 57 T L R 270, it was held that a British ship on the high seas was not part of the United Kingdom within § 41 of the Army Act, 1881

men-of-war can visit, search, and capture neutral private vessels on the open sea for breach of blockade, contraband, and the like, and in time of peace men-of-war of all nations have certain powers[1] over merchantmen of all nations[2]

Safety of Traffic on the Open Sea

§ 265. The safety of navigation clearly involves common action on the part of the leading maritime States, for if, for instance, the vessels of one State followed one set of rules for the avoiding of collisions and the vessels of another State followed a different set of rules, the result would be chaos This common action has been achieved mainly by the enactment by the different maritime States of similar or identical regulations, and only to a slight extent by the making of international conventions Thus until 1910 no rules of International Law existed for the purpose of preventing collisions, saving lives after collisions, and the like, but States possessing maritime flags had individually enacted laws concerning signalling, piloting, courses, collisions, and the like, which were applicable to vessels sailing under their flag on the open sea Although every State could then legislate on these matters independently, there was a tendency during the second half of the nineteenth century to follow the lead given by Great Britain in the Merchant Shipping Amendment Act of 1862, with its 'Regulations for preventing Collisions at Sea,' and the Merchant Shipping Acts of 1873 and 1894 Moreover, the *Commercial Code of Signals for the Use of all Nations*, published by Great Britain in 1857, was adopted by all maritime States In 1889 a conference of eighteen maritime States took place at Washington, which recommended a body of rules for preventing collisions at sea to be adopted by each State,[3] and a revision of the *Code of Signals* These regulations were revised in 1890 and 1900 in England, and,[4] after some direct negotiations between the Governments, most mari-

[1] See below, § 266 The question of the territoriality of vessels is ably discussed by Hall, §§ 76-79 See also *Harvard Research* (1935), pp 508 519, 539 542, and above, p 548, n 4

[2] See also p 297 above, on the doctrine of the territoriality of the merchant vessel in relation to confiscatory and requisition decrees affecting vessels on the high seas

[3] See Martens, *N R G*, 2nd ser, 16, p 416

[4] See Martens, *N R G* 2nd ser, 22, p 113

time States made corresponding regulations [1] In pursuance of a recommendation of the Washington Radiotelegraph Conference of 1927 a new edition of the *International Code of Signals*, to be effective since 1934, was prepared, and an international standing committee was established under the British Board of Trade charged with the task of keeping the Code up to date In addition to that Code attempts have been made to unify rules concerning buoyage, and on May 13, 1936, the Council of the League of Nations opened for signature an Agreement for a uniform system of maritime buoyage [2] Finally, on October 23, 1930, there was concluded the Convention concerning Manned Lightships not on their Stations [3] (*i e* lightships dragged or broken adrift from their moorings or proceeding towards their stations or towards a port) The Convention provides in particular that such lightships must hoist a special signal and must not show their characteristic lights

As a result of the disaster to the liner *Titanic* in 1912, an international 'Convention for the Safety of Life at Sea' was signed in London on January 20, 1914, and the Merchant Shipping (Convention) Act, 1914,[4] was passed to give effect to it That Convention was replaced, for the States which ratified it,[5] by a Convention bearing the same name and signed on May 31, 1929 [6] The latter Convention provides

[1] As to the British regulations now in force see Marsden, *Collisions at Sea* (8th ed , 1923, by Gibb), pp 294, 295, 483-495, and Temperley, *Merchant Shipping Acts*, 3rd ed (1921), p 246 And see the various Orders in Council issued in 1932 and referred to below, n 6

[2] See Hudson, *Legislation*, vii p 308. The Agreement has been ratified by a number of countries, including Great Britain

[3] The Convention has now been ratified by over twenty five States, including Great Britain For the text see Treaty Series, No 13 (1931), Cmd. 3791 , *L N T S* , 112, p 21 , Hudson, *Legislation*, v p 801 For the Records of the Conference see C 163 M 58 1931 VIII On December 16, 1930, there was concluded a convention concerning the maintenance of certain lights in the Red Sea Misc No 1 (1931), Cmd 3755 , Hudson, *Legislation*, v p 833 See also *ibid* , vi pp 419 and 446, for Regional Arrangements concerning maritime radio beacons As to the Cape Spartel Lighthouse see Gidel, 1 pp 379 386, and Stuart, *The International City of Tangier* (1931), pp 39 49 And see Marchegiano in *A J* , 25 (1931), pp 339 347, for an interesting opinion on the juristic character of the International Commission of Cape Spartel Lighthouse

[4] The Convention is printed as a schedule to the Act See also Wheeler in *A J* , 8 (1914), pp 758-768 , Temperley, *Merchant Shipping Acts* (3rd ed , 1921), pp 573 588

[5] And which include Great Britain

[6] Treaty Series, No 34 (1932), Cmd 4198 , Hudson, *Legislation*, iv p 2724 And see the Merchant Shipping (Safety and Load Line Conven-

for uniform rules relating to the construction of passenger ships on international voyages whose keels are laid down on and after July 1, 1931, with regard to watertight subdivision, pumping arrangements, etc It lays down rules concerning their equipment with life-saving appliances, the fitting of which is rendered compulsory, with radio-telegraph installation, the operation of meteorological messages, and the continuance of the Ice Patrol Service maintained by the Government of the United States and supported financially by other maritime Powers On July 5, 1930, the Load Line Convention [1] was concluded with a view to promoting safety of life and property at sea by establishing rules with regard to the limits to which ships on international voyages may be loaded It provided for the surveying and marking of ships proceeding to sea on an international voyage and the issue of International Load Line Certificates

Collision at Sea

§ 265a In 1910, at a conference held at Brussels, to which all the maritime States of Europe,[2] the United States of America, and most of the South American States sent representatives, two Conventions were signed on

tions) Act, 1932 (22 Geo 5, c 9), giving effect thereto, and a number of Orders in Council enumerated in *Annual Survey of English Law, 1932*, pp 362, 363 See also the 'Simla Rules, 1931,' being an agreement concluded on June 11, 1931, between the Governments of Ceylon, Hong Kong, India, the Netherlands, the Netherlands East Indies and the Straits Settlements in order to replace certain provisions of the Convention of 1929 as being impracticable of enforcement with regard to ships carrying large numbers of unberthed Mohammedan pilgrims and similar categories of passengers Hudson, *Legislation*, v p 1003 See also Gidel, i pp 371 374

[1] Treaty Series, No 35 (1932), Cmd 4199, *L N T S*, 135, p 303, Hudson, *Legislation*, v p 634 The Convention has been ratified by more than forty States, including all the Great Powers See Bruhn, *Some Considerations regarding International Load Line Regulations* (1929), Elsner, *Das internationale Übereinkommen über den Freibord der Kauffahrteischiffe* (1933) And see Merchant Shipping (Safety and Load Line Conventions) Act, 1932, referred to above, p 550, n 6 See also, as to both Conventions, Gutteridge in *J C L*, 3rd ser, 16 (1934), pp 246 251, and Kuhn in *A J*, 24 (1930), pp 133 135 On the question of the measures against the pollution of the sea—a question which still awaits solution—see Gidel, i pp 480 484 On the international regulation of shipping see Higgins and Colombos, §§ 327 350 See also Rivault, *Les conventions des Londres de 1929 et de 1930 sur la securité en mer* (1930), and Mance, *International Sea Transport* (1945) And see the Agreement of October 30, 1946, for the Establishment of a Provisional Maritime Consultative Council, adopted by the United Maritime Consultative Council *Treaty Series*, No 36 (1947), Cmd 7137

[2] See *Crichton* v *Samos Navigation Company and Others* in which the Mixed Tribunal of Port Said considered that Convention to be applicable even to non signatory States *Annual Digest*, 1925-1926, Case No 1

September 23, one 'for the unification of certain rules of law with respect to collisions between vessels,' and the other 'for the unification of certain rules of law respecting assistance and salvage at sea'[1] To carry out these two Conventions the Maritime Conventions Act[2] was passed in 1911

Although certain rules of law which are to be applied in actions relating to collisions at sea have been settled by the first of the Conventions just mentioned, the question as to what courts have jurisdiction in such actions is still unsettled[3] That the damaged innocent vessel can bring an action against the guilty ship in the courts of the latter's flag State is beyond doubt, since jurisdiction on the open sea follows the flag If the rule that all vessels while on the open sea are considered under the sway of their flag State were one without exception, no other State could claim jurisdiction in cases of collision But in fact maritime States[4] do claim jurisdiction over vessels flying other flags, though their practice is not uniform Thus, for instance, France[5] claims jurisdiction if the damaged ship is French, although the guilty ship may be foreign, and also if both ships are foreign in case both consent, or certain special circumstances exist Thus, further, Italy[6] claims jurisdiction, even if both ships are foreign, in case an Italian port is the port nearest to the collision, or in case the damaged ship was forced by the collision to remain in an Italian port Great Britain goes farthest, for the Admiralty Court claims jurisdiction provided the guilty ship is in a British port at the time the action for damages is brought, even if the collision took place between two foreign ships

[1] Misc No 5 (1911), Cmd 5558, Treaty Series (1913), No 4, Martens, *N R G*, 3rd ser, vii p 711, Marsden, *op cit*, pp 547 550

[2] As to the second of these Conventions see below, § 271

[3] See Phillimore, iv § 815, Calvo, i § 444, Pradier Fodéré, v §§ 2362-2374, Gidel, i pp 365 370, Bar, *Private International Law* (2nd ed, translated by Gillespie), pp 720 and 928, Dicey, pp 62, 264, 279 284, Foote, *Private International Jurisprudence* (5th ed, 1925), pp 518, 528 531, Westlake, *Private International Law* (7th ed, 1925), pp 287-293, Marsden, *The Law of Collisions at Sea* (9th ed, 1934), Halsbury, *The Laws of England Collisions*, xxvi p 359, Roscoe, *Admiralty Jurisdiction and Practice* (4th ed, 1920), Servat, *De la responsabilité en matière d'abordage maritime* (1935), Coffey in *California Law Review*, January 1925, pp 93 112

[4] See above, § 146

[5] See Pradier-Fodéré, v § 2363.

[6] See Pradier Foderé, v § 2364

on the high seas[1] The position in the United States is the same[2] The court justifies this extended claim of jurisdiction[3] by maintaining that collision is a matter *communis juris*, and can therefore be adjudicated upon by the courts[4] of all maritime States[5] The very important decision of the Permanent Court in the *Lotus* case upon the question of jurisdiction over the penal consequences of collisions has already been mentioned[6]

Powers of Men-of-war over Merchantmen of all Nations

§ 266 Although the freedom of the open sea, and the fact that vessels on the open sea remain under the jurisdiction of the flag State, exclude, as a rule, the exercise of the authority of any State over foreign vessels, certain exemptions exist in the interest of all maritime nations They are

(1) *Blockade and Contraband* —In time of war belligerents can blockade not only enemy ports and territorial coast waters, but also parts of the open sea adjoining those ports and waters, and neutral merchantmen attempting to break such a blockade can be confiscated And, further, in time of war belligerent men-of-war can visit, search, and eventually seize neutral merchantmen for carriage of contraband, and the like

(2) *Verification of Flag* —It is a universally recognised customary rule of International Law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag[7] But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows a flag, she may further

[1] Or even in foreign territorial waters, see Roscoe, *op cit*, p 112

[2] In *The Harfry* et al the court assumed jurisdiction in the matter of a collision between British and Portuguese vessels in a French harbour *Annual Digest*, 1941 1942, Case No 43

[3] *The Johann Friederich* (1838) 1 W Rob 35, *The Chartered Mercantile Bank of India, London, and China* v *The Netherlands India Steam Navigation Co* (1883) 10 Q B D 537

[4] The practice of the United States of America coincides with that of Great Britain, see the case of *The Belgenland* (1885) 114 U S 355, and Wharton, 1 § 26

[5] See *Annuaire*, 10 (1889), p 152

[6] See above, § 147*a*

[7] So called 'Droit d'Enquête' or 'Vérification du Pavillon' This power vested in men of-war has given occasion to much dispute and discussion, but in fact nobody denies that in case of grave suspicion it does exist See Twiss, 1 § 193, Hall, § 81, Fiore, II §§ 732-736, Perels, § 17, Taylor, § 266, Fauchille § 438 (40)

be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag. It is, however, quite obvious that this power belonging to men-of-war must not be abused, and that the home State is responsible for damages in case a man-of-war stops and visits a foreign merchantman without sufficient ground of suspicion [1] The right of every State to punish piracy on the open sea will be treated below, §§ 272-280

(3) *So-called Right of Pursuit* —It is a universally recognised customary rule that men-of-war of a littoral State can pursue into the open sea, seize, and bring back into a port for trial, any foreign merchantman that has violated the law whilst in the territorial waters of that State But such pursuit into the open sea is permissible only if commenced while the merchantman is still within those territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of another State [2]

[1] For a discussion of the right of approach and as to the payment of damages for a seizure, erroneous but in pursuance of the exercise of an honest discretion, see *The Marianna Flora* (1826) 11 Wheaton 1, Scott, *Cases*, p 1009

[2] See Hall, § 80, Westlake, i p 177, Hackworth, ii § 205, Higgins and Colombos, §§ 132 139, Jessup, *Law of Territorial Waters* (1927), pp 106 110, Gidel, iii pp 339 360, *Annuaire*, 13 (1894), p 330, Hughes in *A J*, 18 (1924), at pp 231 232, cited by Dickinson in *H L R*, 40 (1926), at p 21, Sibert, *op cit*, p 33, Massin, *La Poursuite en Droit Maritime* (1937), Glanville Williams in *B Y*, 20 (1939), pp 83 98, and the authorities compiled by Dennis in *A J*, 23 (1929), p 354 and Beck in *Canadian Bar Review*, 9 (1931), pp 85, 176, 249, 341 (an exhaustive study) For the application of the doctrine of hot pursuit (*dum fervet opus*) in a different sphere see *The Anchab* [1919] P 329, at p 337, [1922] 1 A C 235, 3 B and C P C 611, 993 And for its application in land operations see Hershey in *A J*, 13 (1919), pp 557 569 For a case of seizure of a British vessel in 'hot pursuit' which took place thirteen miles from land in pursuance of an offence committed seven and a half miles from land and within one hour's sailing distance, and was held to be lawful, see *The Vinces*, 1927, United States District Court of South Carolina, 20 F (2*d*) 164, and comment in *Michigan Law Review*, 26 (1928), p 551 See also *The Pescawha* 45 F (2*d*) 221, *Annual Digest*, 1929-1930, Case No 86, *The Resolution*, 30 F (2*d*) 534, *Annual Digest*, 1929 1930, Case No 87, *The Katina* (decided by the Egyptian Mixed Court of Appeal) *ibid*, Case No 89, *R* v *Mason* [1935] 2 *D L R* 161 Various aspects of the question of the limits of hot pursuit arose and were discussed in connection with the *I'm Alone* incident in 1929 between Canada and the United States (see above, p 314, n 3, and below, p 555, n 3), but the Report of the Commissioners entrusted with the settlement of the dispute throws no light on the question See Garner in *B Y*, 16 (1935), p 173, Fitzmaurice, *ibid*, 17 (1936), pp 88, 95-100

(4) *Abuse of Flag* [1]—It is another universally recognised rule that men-of-war of every State may seize, and bring to a port of their own for punishment, any foreign vessel sailing under the flag of such State without authority [2]

How Verification of Flag is effected

§ 267 A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify them, hoists her own flag and fires a blank cartridge This is a signal for the other vessel to hoist her flag in reply If she takes no notice of the signal, the man-of-war fires a shot across her bows If the suspicious vessel, in spite of this warning, still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her and thereby verifying her nationality.

How Visit is effected

§ 268. The intention to visit may be communicated to a merchantman either by hailing, or by the 'informing gun' —that is, by firing either one or two blank cartridges If the vessel takes no notice of this communication, a shot may be fired across her bows as a signal to bring to, and, if this also has no effect, force may be resorted to [3] After the vessel has been brought to, either an officer is sent on board for the purpose of inspecting her papers, or her master is ordered to bring his ship papers for inspection on board the man-of-war If the inspection proves the papers to be in order, a memorandum of the visit is made in the log-book, and the vessel is allowed to proceed on her course

[1] In addition to the four reasons mentioned in the text which are based upon customary International Law, States sometimes grant to one another by treaty mutual rights of visit and search of private vessels by men of-war See, for instance, as to the slave trade, below, § 340*h*, as to control of fishing vessels and bumboats in the North Sea, §§ 282-283, as to the protection of cables, § 287 See also De Louter, i pp 413 420

[2] Except as a ruse, in time of war, to escape capture by a belligerent man of war The Merchant Shipping Act, 1894, § 69, enacted 'If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right' On visit and search for other reasons see Hackworth, ii § 199

[3] On the limits of the use of force and the incidental right of sinking an escaping vessel see the somewhat inconclusive Joint Interim Report of June 30, 1933, of the Commissioners in the *I'm Alone* case between the United States and Canada see *Annual Digest*, 1933 1934, Case No 86 (at p 205), Dennis in *A J*, 23 (1929), p 359, and Hyde in *ibid*, 29 (1935), p 299

How Search is effected

§ 269. Search is naturally a measure which must always be preceded by visit It is because the visit has given no satisfaction that search is instituted Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being compelled to render any assistance whatever, except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo If the search proves everything to be in order, the searching party must carefully replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course

How Arrest is effected

§ 270 Arrest of a vessel takes place either after visit and search have shown her liable thereto, or after she has committed some act which is sufficient in itself to justify her seizure Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel This officer is responsible for the vessel, and for her cargo, which must be kept safe and intact The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest [1]

Shipwreck and Distress on the Open Sea

§ 271 Goods and persons shipwrecked on the open sea do not thereby lose the protection of the flag State of the shipwrecked vessel [2] Even before 1910 no State might recognise appropriation by its subjects of abandoned foreign vessels and other derelicts on the open sea But every State could by its Municipal Law enact that those of its subjects who took possession of abandoned vessels and of shipwrecked goods need not restore them to their owners without salvage,[3] whether the act of taking possession

[1] But when a fishing-vessel or a bumboat is arrested in the North Sea, she is always to be brought into a harbour of her flag State and handed over to the authorities there See below, §§ 282 and 283

[2] On the question of a derelict vessel see the *Costa Rica Packet* case, referred to above, § 162

[3] See Phillimore, IV § 815, Dicey, pp 870, 871, Higgins and Colombos, §§ 289 290, and Halsbury, *The Laws of England Wreck*, XXVI p 548. See also §§ 545 and 565 of the Merchant Shipping Act, 1894

occurred on the open sea or within its territorial waters and on its shore

The Brussels Convention of 1910 'for the unification of certain rules of law respecting assistance and salvage at sea,'[1] recognises the right to salvage, and contains a uniform set of rules to be applied by municipal courts exercising jurisdiction in actions for salvage and claims arising out of assistance rendered to vessels in distress Such modification in English law as was needed to give effect to its provisions was carried out by the Maritime Conventions Act of 1911[2]

As regards vessels in distress,[3] the same Brussels Convention contains, in Article 11, a provision that every master is bound, so far as he can do so without serious danger to his vessel, her passengers and crew, to render assistance to every person, even though an enemy, found at sea in danger of being lost The owner of the vessel, however, incurs no liability through disobedience to this provision The Convention does not apply to ships of war, nor to Government ships exclusively appropriated to the public service[4] Most States, however, by their municipal regulations, order their men-of-war to render assistance to any vessel found in distress at sea

V

PIRACY

Hall, §§ 81-82—Westlake, I pp 181-186—Lawrence, § 102—Phillimore, I §§ 356 361—Twiss, I § 177, and II § 193—Halleck, I pp 476 483—Taylor, §§ 188, 189—Walker, § 21—Wheaton, §§ 122 124—Moore, II §§ 311 315—Hackworth, II §§ 203, 204—Hershey, §§ 213 215—Hyde, I §§ 231-234—Bluntschli, §§ 343-350—Heffter, § 104—Gareis in *Holtzendorff*, II pp 571-581—Gareis, § 58—Liszt, § 36, IV —Ullmann, § 104—Fauchille,

[1] See above, § 265.

[2] See above, § 265

[3] Wireless signals of distress are discussed below in §§ 287*a*, 287*b* It has been held by the Exchequer Court in Canada that although, normally, a ship which has been compelled through stress of weather, duress or other unavoidable cause to put into a foreign port is exempt, on the grounds of comity, from liabilities and penalties which she would have incurred if she had entered the port voluntarily, that principle does not apply to exemption from local laws, especially revenue laws *Cushin and Lewis* v *The King* [1935] Ex C R 103, *Annual Digest*, 1933-1934, Case No 87 See also, for a qualification of the notion of distress, *Rex* v *Flahaut*, decided in 1934 by the Supreme Court of New Brunswick *ibid*, 1938-1940, Case No 61

[4] See Article 14

§§ 483 (49) 483 (58)—Despagnet, §§ 431-433—Mérignhac, II pp 506 511—Pradier-Fodéré, V §§ 2491-2515—Rivier, I pp 248 251—Calvo, I §§ 485-512—Cruchaga, §§ 436 438—Fiore, I §§ 494, 495, and *Code*, §§ 300-305—Perels, §§ 16, 17—Testa, pp 90 97—Gidel, I pp 303 355—Higgins and Colombos, §§ 368-382—Holland, *Lectures*, pp 162-165—Fenwick, pp 230 234—*Harvard Research* (1932), pp 743-1013 (a valuable study with an annex containing a collection of piracy laws of various countries)—*Harvard Research* (1935), pp 563 592—Ortolan, *Diplomatie de la mer* (1856), I pp 231-253—Stiel, *Der Tatbestand der Piraterie* (1905)—Ormerod, *Piracy in the Ancient World* (1924)—Muller, *Die Piraterie im Volkerrecht* (1929)—Report by Matsuda and Wang Chung-hui for League Codification Committee in *A J*, 20 (1926), Special Suppl, pp 222 229, and comment by Dickinson in *A J*, 20 (1926), pp 750 752—Cybichowski in *Hague Recueil* 1926 (II), pp 349 358—Pella, *ibid* (V), pp 149 257—Gebert in *Z I*, 26 (1916), pp 8-70—Dickinson in *H L R*, 38 (1925), pp 334 360—Fairman in *A J*, 29 (1935), pp 508 512—Lewis in *J C L*, 3rd ser, 19 (1937), pp 77-89—Lauterpacht in *R G*, 46 (1939), pp 513 549—Cowles in *California Law Review*, 33 (1945), pp 177 218

Conception of Piracy

§ 272 Piracy, in its original and strict meaning,[1] is every unauthorised act of violence committed by a private vessel [2] on the open sea against another vessel with intent to plunder (*animo furandi*) The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship Again, if unauthorised acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical Therefore several writers,[3] correctly, it is believed, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder But yet no unanimity exists among them concerning a fit definition of

[1] See below, §§ 273 and 273*a* (with regard to acts of unrecognised insurgents)

[2] On the question whether it is possible for the maritime operations of a *State* to be 'piratical' in more than a rhetorical sense see below, § 273*a* On the Barbary corsairs in the seventeenth century see Clark in *Cambridge Historical Journal*, 8 (1944), pp 22 35

[3] Hall, § 81, Lawrence, § 102, Bluntschli, § 343, Liszt, § 36, IV, Calvo, § 485

piracy, and the matter is therefore very controversial If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel* [1]

Before a Law of Nations in the modern sense of the term was in existence, a pirate was already considered an outlaw, a 'hostis humani generis' According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character, and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called 'international crime' [2], the pirate is considered the enemy of every State, and can be brought to justice anywhere

Private Ships as Subjects of Piracy

§ 273 As a rule private vessels only can commit piracy It is widely believed [3] that a man-of-war or other public ship under the orders of a recognised government or belligerent, so long as she remains such, is not a pirate and that if she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander, and to pay damages where required In any case if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed by her are indeed piratical acts A *privateer* is not a pirate as long as her acts of violence are confined to enemy vessels, because such acts are authorised by the belligerent in whose services she is acting And it matters not that the privateer was originally a neutral vessel [4] But if a neutral vessel were to take letters of marque from both belligerents, she would be considered a pirate

[1] The conception of piracy is discussed in *The Republic of Bolivia* v *The Indemnity Mutual Marine Assurance Co* [1909] 1 K B 785

[2] See above, § 151

[3] See previous editions of this treatise See also Genet in *A J*, 32 (1938), pp 253-263, and in *R I F*, 3 (1937), pp 12 25, and 5 (1938), pp 280 284, and authorities there cited And see in *B Y*, 19 (1938), pp 198 208 But see below, § 273*a*

[4] See Hall, § 81 See also below, vol II §§ 83 and 330

Doubtful is the case where a privateer, in a civil war, has received her letters of marque from the insurgents, and, further, the case where, during a civil war, men-of-war join the insurgents before they have been recognised as a belligerent Power It is evident that the legitimate Government will treat such ships as pirates, but third Powers ought not to do so, so long as these vessels do not commit any act of violence against ships of these third Powers [1] Thus, in 1873, when an insurrection broke out in Spain, Spanish men-of-war stationed at Carthagena fell into the hands of the insurgents, and the Spanish Government proclaimed these vessels pirates, Great Britain, France, and Germany instructed the commanders of their men-of-war in the Mediterranean not to interfere as long as these insurgent vessels [2] abstained from acts of violence against the lives and property of their subjects [3] On the other

[1] In a Convention on the Duties and Rights of States in the Event of Civil Strife, adopted in February 1928 by the Sixth International American Conference, it is laid down that a declaration of piracy, emanating from a Government, against an insurgent vessel is not binding upon other States But the latter, if injured by the activities of the vessel, may, if she is a man-of-war, capture her and send her to her home State for trial, in the case of merchant vessels the injured State may punish the vessel according to its own laws *A J*, 22 (1928), Suppl, p 160 The same Convention provides that if the insurgent vessel arrives in the territory of a contracting party, the vessel must be handed over to the lawful authorities of the home State and that the members of the crew must be considered as political refugees In 1929 the United States refused to treat as piratical the *Falke*, a vessel registered in Germany which was boarded by Venezuelan rebels and taken to Venezuela with a cargo of munitions on board For a report of the incident see *R G*, 38 (1931), pp 341 344

[2] See Calvo, 1 §§ 497 501, Hall, § 82, Westlake, 1 pp 183-186, Keith's Wheaton, pp 278-284

[3] But in the American case of the *Ambrose Light* (25 Federal 408, see also Moore, II § 332, p 1098) the Court did not agree with this The *Ambrose Light* was a brigantine which, when on April 24, 1885, she was sighted by Commander Clark of the U S ship *Alliance* in the Caribbean Sea, was flying a strange flag showing a red cross on a white ground, but she afterwards hoisted the Colombian flag, when seized she was found to carry sixty armed soldiers, one cannon, and a considerable quantity of ammunition She bore a commission from Colombian insurgents, and was designed to assist in the blockade of the port of Carthagena by the rebels Commander Clark considered the vessel to be a pirate and sent her in for condemnation The Court held that in the absence of any recognition of the Colombian insurgents as a belligerent Power the *Ambrose Light* had been lawfully seized as a pirate The vessel was, however, nevertheless released because the American Secretary of State had recognised by implication a state of war between the insurgents and the legitimate Colombian Government For a survey of the practice of the Supreme Court see Lenoir in *Journal of Criminal Law*, 25 (1934), p 532 The Pan American Convention of February 1928 (see

hand, when in 1877 a revolutionary outbreak occurred at Callao in Peru, and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal without payment from one of these, and forcibly took two Peruvian officials from on board another where they were passengers, she was justly considered a pirate and was attacked by the British Admiral de Horsey, who was in command of the British squadron in the Pacific [1]

It must be emphasised that the motive and the purpose of such acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required. Thus, for instance, if a private neutral vessel without letters of marque during war, out of hatred of one of the belligerents, were to attack and to sink vessels of such belligerent without plundering at all, she would nevertheless be considered a pirate [2]

The case must also be mentioned of a privateer or man-of-war which, after the conclusion of peace, or the termination of war by subjugation and the like, continues to commit hostile acts If such vessel is not cognisant of the fact that the war has come to an end, she cannot be considered a pirate Thus the Confederate cruiser *Shenandoah*, which in 1865, for some months after the end of the American Civil War, attacked American vessels, was not considered a pirate [3] by the British Government when her commander gave her up to the port authorities at Liverpool in November 1865, because he asserted that he had not known till August of the termination of the war, and that he had

above, p 560, n 1) provides in effect that vessels which have risen in arms against their Government must not be treated as pirates even if they have committed depredations upon vessels of the State concerned (Article 2)

[1] See Pitt Cobbett, *Leading Cases on International Law*, 1 (5th ed, 1931, by Grey), p 299 However, it appears that no prosecution in England would take place in such cases The Attorney General in answering in the House of Commons a question by Sir William Harcourt said 'In strictness they were pirates, and might have been treated as such, but it is one thing to assert that they had been guilty of acts of piracy, and another to advise that they shall be tried for their lives and hanged at Newgate' *Hansard*, 3rd ser, vol 236, pp 787 *et seq* As regards the case of the Argentinian vessel *Portena* and the Spanish vessel *Montezuma*, afterwards called *Cespedes*, see Calvo, 1 §§ 502 and 503

[2] In spite of Article 46, No 1, of the unratified Declaration of London, see below, vol II § 410 (1)

[3] See Lawrence, § 102

abstained from hostilities as soon as he had obtained this information

Public Ships as Subjects of Piracy

§ 273a The case of the *Huascar*, discussed in the preceding section, shows that a vessel may be treated as piratical even if she is not a private vessel in the literal sense of the word, and even if her depredations are not effected with the intent to plunder for private gain. Vessels of unrecognised insurgents interfering with ships of third States may be treated as piratical, when such attacks show criminal ruthlessness resulting in loss of life, their crews may be subjected to the drastic penalties which International Law reserves for pirates *jure gentium* [1]

The same applies to vessels which, though acting under orders of a recognised Government, commit acts which are in gross breach of International Law and which show a criminal disregard of human life [2] In the course of the Spanish Civil War, Great Britain, Belgium, Egypt, France, Greece, Roumania, Turkey, and Soviet Russia concluded, on September 14, 1937, the Nyon Agreement which provided for collective measures 'against piratical acts by submarines' of unknown nationality These were described as 'acts contrary to the most elementary dictates of humanity which should be justly treated as acts of piracy' [3] The use of the term 'piracy' on that occasion, although it was subjected to some criticism,[4] cannot be regarded as improper

[1] For a survey of the practice of States in the matter see Lauterpacht in *R G*, 46 (1939) pp 513 549 And see *The Ambrose Light* (1885) 25 Fed 408, *The Three Friends* (1897) 166 U S 1 63

[2] See *e g* the instructions of the United States Secretary of State to the Minister in Spain in 1823 laying down that 'acts of piratical aggression and depredation may be committed by vessels having lawful commissions as privateers' Manning, *Diplomatic Correspondence of the United States concerning the Independence of Latin American Nations*, vol 1 (Parts 1 11, 1925), p 167 And see *ibid*, p 176 See also *The Magellan Pirates*, 1 Spink's Eccl and Adm Rep 81, where Dr Lushington said (*obiter*), 'Even an independent state may, in my opinion, be guilty of piratical acts

I am well aware that it has been said that a state cannot be piratical, but I am not disposed to assent to such a dictum as a universal proposition'

[3] Cmd 5568 (1937) The Treaty provided that any submarine attacking vessels, not belonging to one of the parties to the Spanish Civil War, in a manner contrary to International Law, shall, if encountered in the vicinity of the attack, be counter-attacked and, if necessary, destroyed by the forces of the Parties to the Agreement

[4] See *e g* Genet in *R I F*, 3 (1937), pp 12 25, and 5 (1938), pp 280 284, Mirwart in *R I*, 3rd ser 19 (1938), pp 341-352, Anon in *B Y*, 19 (1938), pp 198 208 But see Padelford in

Article 3 of the unratified Treaty of Washington of 1922 provided for the punishment 'as if for an act of piracy' of persons directly responsible for sinking merchant vessels in a manner contrary to International Law.[1] When, in September 1941, President Roosevelt issued orders to American naval forces to fire at sight upon German and Italian submarines and surface vessels, he described that measure as being one in defence against piratical attacks in violation of International Law.[2] There is substance in the view that, by continuous usage,[3] the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas[4] by whomsoever committed

Mutinous Crew and Passengers as Subjects of Piracy

§ 274 If the crew, or passengers, revolt on the open sea, and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is private or public.[5] But a simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, not at least as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.

Object of Piracy

§ 275 The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the open

A J, 32 (1938), pp. 271, 279 and Lauterpacht in *R G*, 46 (1939), pp. 513, 549. See also Finch in *A J*, 31 (1937), pp. 659, 665 and Schmitz in *Z ö V*, 8 (1938), pp. 641, 671. And see de Montmorency in *L Q R*, 35 (1919), pp. 133-142, and Pollock, *ibid*, p. 211, Hyde, 1 p. 231, Fauchille, § 483 (51).

[1] Cmd. 1627, *A J*, 16 (1922), Suppl., p. 67.

[2] See vol. II (6th revised ed.), § 292A*a*, p. 505.

[3] See, for instance, with regard to the Declaration that destruction of submarine cables shall be dealt with as an act of piracy, the Opinion of the British Law Officers of May 18, 1870, *United States*, No. 779. The use of the term 'piracy' in connection with slave traffic or acceptance of letters of marque in breach of treaties or of general International Law is a frequent occurrence in diplomatic practice. On robbery and brigandage as an international crime analogous to piracy see Cowles in *California Law Review*, 33 (1945), pp. 188-216.

[4] But see below, p. 565, n. 3.

[5] This statement is controversial, see Fauchille, § 483 (50), who cites authors and discusses incidents.

sea In the regular case of piracy the pirate wants to make booty, it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks her On the other hand, the cargo need not be the object of his act of violence If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy it is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo [1]

How Piracy is effected

§ 276 Piracy is effected by any unauthorised act of violence, be it direct application of force or intimidation through menace The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy as well as those who murder the master and steer the vessel themselves And a ship which forces another ship, by threatening to sink her if she should refuse to deliver up her cargo or a person on board, commits piracy just as much as the ship which attacks another vessel, kills her crew, and thereby gets hold of her cargo or a person on board

The act of violence need not be consummated [2] a mere attempt, such as attacking or even chasing a vessel for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence [3]

[1] That a possible object of piracy is not only another vessel, but also the very ship to which the persons guilty of piracy belong, is an inference from the statements above in § 274

[2] See *In re* a Reference under the Judicial Committee Act, 1833, *In re Piracy jure gentium* in which the Judicial Committee held that actual robbery is not an essential element in the crime of piracy *jure gentium* and that, therefore, a frustrated attempt to commit a piratical robbery is piracy *jure gentium* [1934] A C 586, *Annual Digest*, 1933 1934, Case No 89, *A J*, 29 (1935), p 140, Fairman, *ibid*, pp 508 512

[3] See Stephen, *Digest of the Criminal Law*, Article 104 In the case of the *Ambrose Light* — see above, § 273, p 560, n 3—the Court considered the vessel to be a pirate, although no attempt to commit a piratical act had been made by her.

§ 277 Piracy as an 'international crime' can be committed[1] on the open sea only Piracy in territorial waters has as little to do with International Law as other robberies within the territory of a State Some writers[2] maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea They maintain, therefore, that if 'a body of pirates land on an island unappropriated by a civilised Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy' It is doubtful whether this is so Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea[3] Where Piracy can be committed

§ 278 A pirate and his vessel lose *ipso facto* by an act of piracy the protection of their flag State and their national character Every maritime State has, by a customary rule of the Law of Nations, the right to punish pirates And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen,[4] can on the open sea[5] chase, attack, and seize the pirate, and bring him home for trial and punishment by the courts of their own country[6] Jurisdiction over Pirates, and their Punishment

This punishment may, by the Law of Nations, be capital But it need not be, the Municipal Law of the different States being competent to order any less severe punishment

[1] On the conception of 'inter national crimes' other than piracy, see Dumas in *R I*, 3rd ser, 13 (1932), pp 721 741

[2] Hall, § 81, Lawrence, § 102, Westlake, I p 181

[3] *Sed Quaere* See *People* v *Lol-Lo and Saraw*, decided in 1922 by the Supreme Court of the Philippine Islands *Annual Digest*, 1919-1922, Case No 112

[4] A few writers (Gareis in *Holtzendorff*, II p 575, Liszt, § 36, IV, Ullmann, § 104, Stiel, *op cit*, p 51) maintain, however, that only men-of war have the power to seize the pirate And see, for a compromise view, *Harvard Research* (1932), p 846, where it is suggested that the seizure may be made only on behalf of a State and only by a person authorised to act on behalf of it

[5] If a pirate is chased on the open sea and flees into the territorial maritime belt, the pursuers may follow, attack, and arrest the pirate there, but they must give him up to the authorities of the littoral State

[6] As to the right of verifying the flags of suspicious merchantmen of all nations, see above, § 266 (2)

Nor does the Law of Nations make it a duty for every maritime State to punish all pirates [1]

In former times it was said to be a customary rule of International Law that pirates could at once after seizure be hanged or drowned by the captor But this cannot now be upheld, although some writers assert that it is still the law It would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial, but Municipal Law may, of course, interdict such execution

Pirata non mutat dominium.

§ 279. The question as to the property in the seized piratical vessels, and the goods thereon, has been the subject of much controversy During the seventeenth century, the practice of several States conceded such vessel and goods to the captor as a premium But during the eighteenth century, the rule *pirata non mutat dominium* became more and more recognised Nowadays the conviction would seem to be general that ship and goods must be restored to their owners and may be conceded to the captor only when their real ownership cannot be ascertained [2]

Piracy according to Municipal Law

§ 280 Piracy according to the Law of Nations, which has been defined above (§ 272), must not be confused with the conception of piracy according to the different Municipal Laws [3] The several States may confine themselves to punishing as piracy fewer acts of violence than those which the Law of Nations defines as piracy On the other hand, they may punish their own subjects as pirates for a much wider range of acts Thus, for instance, according to the criminal law of England,[4] every British subject is, *inter alia*, deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war, or who trans-

[1] See Stephen's *Digest of the Criminal Law*, Article 104, Perels, § 17, as to the German Criminal Code, and Stiel, *op cit*, p 15, n 4, for the law of a number of States

[2] In the first case, however, a certain percentage of the value is very often conceded to the captor as a premium and an equivalent for his expenses (so called *droit de rescousse*) (see details in Pradier Fodere, v §§ 2496 2499) Thus according to English law (see § 5 of the Piracy Act, 1850), a salvage of 12½ per cent is to be paid to the crew of a British warship capturing the pirate

[3] See Calvo, §§ 488 492, Lawrence, § 103, Pradier Fodéré, v §§ 2501, 2502

[4] See Stephen, *Digest of the Criminal Law*, Articles 104 117

ports slaves on the high seas However, since a State cannot enforce its Municipal Laws on the open sea against others than its own subjects,[1] it cannot treat foreigners on the open sea as pirates, unless they are pirates according to the Law of Nations Thus, when in 1858, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States rightly complained [2]

VI

FISHERIES IN THE OPEN SEA

Grotius, II c 2, § 3—Vattel, I § 282—Hall, § 27—Lawrence, §§ 86, 91—Phillimore, I §§ 189 195—Twiss, I § 185—Taylor, §§ 249, 250—Wharton, III §§ 300 308—Wheaton, §§ 167 171—Moore, I §§ 169 173—Hackworth, I §§ 108-111—Hyde, I § 143 (n 2)—Bluntschli, § 307—Stoerk in *Holtzendorff*, II pp 504 507—Gareis, § 62—Liszt, § 46 A II —Ullmann, § 103—Fauchille, §§ 483 (20) 483 (28)—Despagnet, §§ 411 413 — Mérignhac, II p 531—Pradier Fodéré, V §§ 2446 2458—Rivier, I pp 243, 244—Nys, II pp 205 209—Calvo, I §§ 357 364—Fiore, II §§ 728, 729, and *Code*, §§ 1000-1004—Martens, I § 98—Perels, § 20—Gidel, I pp 437 463—Hall, *Foreign Powers and Jurisdiction* (1894), § 107—David, *La pêche maritime au point de vue international* (1897)—Fulton, *The Sovereignty of the Seas* (1911), pp 57 534—Raestad, *La chasse à la baleine a mer libre* (1928)—Bingham, *Report of the International Law of Pacific Coastal Fisheries* (1938)—Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942)—Tomasevitch, *International Agreements on Conservation of Marine Resources* (1943)—Leonard, *International Regulations of Fisheries* (1944)—Hurst in *B Y*, 1923 1924, pp 34 43—Jessup in *Hague Recueil*, 29 (1929) (IV), pp 401 514, and in *A J*, 33 (1939), pp 129-138

Fisheries in the Open Sea free to all Nations

§ 281 Whereas the fisheries in the territorial maritime belt can be reserved by the littoral State for its own subjects, it is an inference from the freedom of the open sea that the fisheries thereon are open [3] to vessels of all nations Since,

[1] See, however, the *Lotus* case discussed above, § 147*a*

[2] See Wharton, III § 327, pp 142, 143, Taylor, § 190, Moore, II § 310, pp 941-946 See also § 340*h*

[3] Denmark, silently, by fishing regulations of 1872, dropped her claim to an exclusive right of fisheries within twenty miles of the coast of Iceland see Hall, § 40 Russia promulgated, in 1911, a statute forbidding the fisheries to foreign vessels within twelve miles of the shore of the White Sea, but the Powers protested against this encroachment upon the freedom of the open sea The regulation of the fisheries off the coasts of Northern Russia formed an important part of the abortive 'Draft of Proposed General Treaty' between Great Britain and the Union of Soviet Socialist Republics in 1924 Russia, No 1 (1924), Cmd 2215 But in the Temporary Fisheries Agreement between Great Britain and Soviet Russia of May 22, 1930, the latter agreed that British fishing boats may fish at a

however, vessels remain whilst on the open sea under the jurisdiction of their flag State, every State possessing a

distance of from 3 to 12 geographical miles from the low-water mark, Treaty Series, No 22 (1930), Cmd 3583

A case of a particular kind would seem to be the pearl fishery off Ceylon, which extends to a distance of twenty miles from the shore, and for which regulations exist which are enforced against foreign as well as British subjects The claim on which these regulations are based is one 'to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction' see Hall, *Foreign Powers and Jurisdiction* (1894), p 243, n 1 See also Westlake, 1 p 190, who cites Vattel, 1 § 287 Westlake bases the British pearl fisheries off the coast of Ceylon and in the Persian Gulf upon occupation of the bed of the sea This opinion of Westlake coincides with the contention of Great Britain during the Behring Sea Arbitration, see *Parl Papers*, United States, No 4 (1893), Behring Sea Arbitration Archives of His Majesty's Government, pp 51, 59 But it is submitted that (subject to the qualification set out in § 287*bb*) the bed of the open sea is not a possible object of occupation The explanation of the pearl fisheries off Ceylon and in the Persian Gulf being exclusively British is to be found in the fact that the freedom of the open sea was not a rule of International Law when these fisheries were taken possession of See Oppenheim in *Z V*, II (1908) pp 6-10, Westlake, 1 p 203, Lindley, pp 68, 69, Vorwerk in *Strupp, Wort*, 1 pp 190-191, Gidel, 1 pp 488 501, and Hatschek, p 210, who has found an explanation in Islamic law The submission that the bed of the sea is not capable of occupation is contested by Hurst, *op cit* As to Bahrein in the Persian Gulf see Persia's claim to ownership made in a protest addressed to Great Britain against Article 6 of the Treaty of Jeddah between Great Britain and the Hedjaz of May 20, 1927, the protest was circulated by the Secretary General to the 1 bers of the League on December 28, 1927—see *Off J*, May 1928, pp 605-607 And see above, § 243 (n) The Treaty of 1923 between the United States of America and Canada for the Preservation of the Halibut Fishery has already been mentioned in another connection see above, § 94*b* And see the Convention between the United States and Canada of May 9, 1930, for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Behring Sea *A J*, 25 (1931), Suppl, p 188, Treaty Series, No 9 (1933), Cmd 4270 For a criticism of some interesting legislative attempts in the United States to assume jurisdiction over fisheries in the high seas see Jessup in *A J*, 33 (1939), pp 129 138 Thus in a statute passed in 1938 by the Senate of the United States it was recited that 'the shallow depths of the Behring Sea must be regarded as a slightly submerged margin of the American Continent' In another bill, introduced in 1937, it was asserted that the salmon spawned and hatched in the waters of Alaska is the property of the United States, with the result that it is illegal to catch it in the waters adjacent to the United States For a similar assertion put forward by the United States in the *Behring Sea Arbitration* see Lauterpacht, *Analogies*, § 99 In *Skiriotes* v *State of Florida* (1941) 61 S Ct 924, the Supreme Court of the United States upheld the validity of a statute of the State of Florida in so far as it prohibited citizens of the United States from using diving apparatus in the taking of sponges within nine nautical miles off the coast of Florida The Court did not pronounce upon the validity of the statute in so far as it affected persons other than citizens of the United States See Borchard in *A J*, 35 (1941), pp 515-519 See also Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938), Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), Leonard, *International Regulation of Fisheries* (1944), pp 145 151

maritime flag can legislate for the exercise of fisheries by its own vessels on the open sea, and it can by an international agreement renounce its fishing rights in certain parts of the open sea, and can accordingly interdict its vessels from fishing there So if it is advisable to restrict and regulate the fisheries in some parts of the open sea, the Powers can do this through international treaties Such treaties have been concluded—first, with regard to the fisheries in the North Sea and the suppression of the liquor trade among the fishing-vessels there, secondly, with regard to the seal fisheries in the North Pacific Ocean, thirdly, with regard to the fisheries around the Faröe Islands and Iceland [1]

Fisheries in the North Sea

§ 282 Fisheries in the North Sea are regulated by a Convention for the Regulation of the Police of the Fisheries in the North Sea outside Territorial Waters [2] which was signed on May 6, 1882, by Great Britain, Belgium, Denmark, France, Germany,[3] and Holland By its terms a mutual right of visit and search was conferred for the purpose of ensuring the observance of its provisions

Bumboat in the North Sea

§ 283 For the purpose of prohibiting the sale of spirituous drinks to persons on board fishing-vessels in the North Sea and of licensing and regulating the bumboats which sell provisions to them, a Convention concerning the Abolition of the Liquor Traffic among the Fishermen in the North Sea [4] was signed on November 16, 1887, by Great Britain,

[1] The question of the Exploitation of the Products of the Sea has recently been studied and reported upon by the League Codification Committee, see above, § 36 (n 1), and Report of Suarez in *A J*, 20 (1926), Special Suppl, pp 231-241, with list of treaties See Jessup in *Hague Recueil*, vol 29 (1929) (4), pp 405-511, Gidel, i pp 464 470

[2] Martens, *N R G*, 2nd ser, 9, p 556 The matter is exhaustively treated by Rykere, *Le régime légal de la pêche maritime dans la mer du Nord* (1901) To carry out the obligations undertaken by her in the North Sea Fisheries Convention, Great Britain enacted The North Sea Fisheries Act, 1883 (46 & 47 Vict c 22) See also the further Convention of February 1, 1889, Martens, *N R G*, 2nd ser, 15, p 568, and Tafel in *Z I*, 37 (1927), pp 161-206, 267 276

[3] See, however, as to Germany, Article 272 of the Treaty of Peace (1919) See also the Convention of December 31, 1932, for the preservation of plaice in the Skagerrak, Hudson, *Legislation*, vi p 277, of September 6, 1937, relating to preservation of plaice and dab in the Skaggerak, *ibid*, vii p 827, and the Convention of March 23, 1937, on the regulation of meshes of fishing nets and size limits of fish, *ibid*, vii p 642, Misc No 5 (1937), Cmd 5494

[4] See Martens, *N R G*, 2nd ser, 14, p 540, and 22, p 562, Treaty Series, No 13 (1894) The matter is treated by Guillaume in *R I*, 26 (1894), p 488, and by Tafel in *Z I*, 37 (1927), pp 222-249

Belgium, Denmark, France, Germany,[1] and Holland This convention also confers a right of mutual visit and search.

Fisheries in the North Pacific Ocean

§ 284 A dispute between Great Britain and the United States of America regarding the seizure by the latter State of British-Columbian vessels engaged in seal fishing in the Behring Sea outside American territorial waters was settled by a tribunal of arbitrators in Paris in favour of Great Britain,[2] and the parties were directed by the Tribunal to put in force certain regulations for the protection of the seal-fishing industry.[3] These regulations proving inefficient, a Convention respecting measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean[4] was signed on July 7, 1911, by Great Britain, the United States, Russia, and Japan.[5] The Convention was to remain in force for fifteen years from December 15, 1911, and thereafter until terminated by twelve months' written notice The British Parliament enacted the Seal Fisheries (North Pacific) Act, 1912, in order to carry out its provisions On May 9, 1930, the United States and Canada concluded a Convention for the preservation of the halibut fishery of the Northern Pacific Ocean and the Behring Sea.[6] The revised Convention of January 29, 1937,[7] prohibited the nationals and inhabitants of the United States and of

[1] See, however, as to Germany, Article 272 of the Treaty of Peace (1919) See also the Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors signed at Helsingfors on August 19, 1925 It has been ratified by all the Baltic States *L N T S*, 42, p 73, Hudson, *Legislation*, III p 1673, *Répertoire*, III pp 693 695

[2] See Martens, *N R G*, 2nd ser, 21, p 439 The award is discussed by Barclay in *R I*, 25 (1893), p 417, and Engelhardt in *R I*, 26 (1894), p 386, and *R G*, 5 (1898), pp 193 and 347 See also Tillier, *Les pêcheries de phoques de la Mer de Behring* (1906), Balch, *L'évolution de l'arbitrage international* (1908), pp 70-91, and Leonard, *op cit*, pp 55-78

[3] See the Behring Sea Award Act, 1894, and Seal Fisheries (North Pacific) Act, 1895

[4] See Martens, *N R G*, 3rd ser, 5, p 720, and Treaty Series (1912), No 2 Great Britain and the United States had already, on February 7, 1911, concluded a treaty concerning the same matter, see Martens, *N R G*, 3rd ser, 5, p 717, and Treaty Series (1911), No 25 And see Ireland in *A J*, 36 (1942), pp 400 406

[5] It was denounced by Japan in 1940

[6] *A J*, 25 (1931), Suppl, p 118

[7] *A J*, 32 (1928), Suppl, p 71 For the Regulations issued in 1941 by the International Fisheries Commission in pursuance of the Convention see *ibid*, 35 (1941), Suppl, p 184

Canada to fish for halibut in the territorial waters and in the high seas off the western coast of the United States (including Alaska) and Canada between November 1 and February 15 Officials of either party were authorised to seize and detain persons and boats of the nationals of the contracting parties fishing in violation of the Convention and to hand them over for prosecution by the authorities of their State Similar provisions were contained in the Treaty of May 26, 1930 (ratified on July 28, 1937) between these two countries for the protection of the sockeye salmon fisheries in the Fraser River system [1]

Fisheries around the Faroe Islands and Iceland

§ 285 For the purpose of regulating the fisheries outside territorial waters around the Faröe Islands and Iceland, Great Britain and Denmark signed on June 24, 1901, the Convention of London,[2] whose stipulations are for the most part literally the same as those of the North Sea Fisheries Convention, concluded at The Hague in 1882 [3] An additional article of this Convention of London stipulates that any other State whose subjects fish around the Faröe Islands and Iceland may accede to it [4]

Regulation of Whaling

§ 285a On September 24, 1931, a widely signed con-

[1] *A J*, 32 (1938), Suppl, p 65 See as to these treaties and other treaties for the protection of the North Pacific Fisheries Ireland in *A J*, 36 (1942), pp 406 424 And see generally on the Alaskan salmon fisheries Leonard, *op cit*, pp 121-136 In 1940 Canada and the United States concluded the Great Lakes Fishery Agreement U S Executive Agreements Series, No 182, Leonard, *op cit*, pp 115 120 See also Homer and Barnes, *North Pacific Fisheries* (1939)

[2] See Martens, *N R G*, 2nd ser, 33 (1906), p 268, Treaty Series No 5 (1903), Cmd 5494

[3] See above, § 282 And see Gidel 1 pp 422 432

[4] In 1943 an International Fisheries Conference met in London at the invitation of the British Government and adopted a Draft Convention (Misc No 5 (1943), Cmd 6496) relating to the policing of fisheries and measures for the protection of immature fish The Conference was attended by representatives of Belgium, Canada, Denmark, Eire, France, Iceland, the Netherlands, Newfoundland, Norway, Poland, Portugal, Spain, Sweden, and the United Kingdom The Draft Convention is intended to replace by a single Convention the Anglo French Convention of 1839 on the Oyster and Other Fishery on the Coasts of Great Britain and France (*British and Foreign State Papers*, 27, p 983, Leonard, *op cit*, pp 34 42), the North Sea Fisheries Convention (see above, § 282), the Faroe Islands and Iceland Convention of 1901 (see above, § 285), and the Agreement of 1937 for the regulation of meshes of fishing (see above, p 569, n 3) See also Final Act and Convention of the International Overfishing Conference, 1945. Cmd 6791

vention was concluded for the Regulation of Whaling [1] The Convention, which applies only to whalebone whales, prohibits the taking or killing of right whales, calves, or suckling whales, immature whales and female whales It provides for the fullest possible use of the carcases of whales taken It also lays down that licences are required for vessels engaged in whaling, and that the contracting parties are bound to supply relevant information to the International Bureau for Whaling Statistics at Oslo A further agreement for the regulation of whaling was signed on June 8, 1937,[2] and supplemented by Protocols signed in London on June 24, 1938,[3] and February 7, 1944 [4]

VII

TELEGRAPH CABLES IN THE OPEN SEA

Hyde, I § 211—Fauchille, §§ 483 (29) 483 (34)—Despagnet, § 401—Pradier-Fodéré, v § 2548—Mérignhac, II p 532—Hackworth, IV §§ 349-352—Nys, II pp 210-211—Rivier, I pp 244, 386—Fiore, II § 822, and *Code*, §§ 1139 1142—Stoerk in *Holtzendorff*, II pp 507, 508—Liszt, § 40 II (2)—Ullmann, §§ 103, 147—Lauterbach, *Die Beschadigung unterseeischer Telegraphenkabel* (1889)—Landois, *Zur Lehre vom volkerrechtlichen Schutz der submarinen Telegraphenkabel* (1894)—Jouhannaud, *Les câbles sous marins* (1904)—Renault in *R I*, 12 (1880), p 251, 15 (1883), p 17—Gidel, I pp 415 421—Higgins and Colombos, §§ 325 326—*Annuaire* 33 (1927), I pp 171 190, and (1927) III pp 296 299, and Resolution of the Institute of International Law in *A J*, 21 (1927), pp 728, 729, and *ibid*, 22 (1928), Special Suppl, p 338 See also the literature quoted below, vol II, at commencement of § 214

[1] *A J*, 30 (1936), Suppl, p 167 Treaty Series, No 33 (1934), Cmd 4751 The Convention was ratified by Great Britain in October 1934 It entered into force in January 1935 See Whaling Industry (Regulation) Act, 1934 (24 and 25 Geo 5, c 49), and the Whaling Industry (Ship) Regulations, 1934 (S R & O, No 961) And see Raestad in *R I* (*Paris*), 2 (1928), pp 595-642, Jessup in *Hague Recueil*, 29 (1929) (IV), pp 481-503, Wolgast in *Z V*, 21 (1937), pp 151 172, and 23 (1939), pp 1 22, Vallance in *A J*, 31 (1937), pp 112-119, Leonard in *A J*, 35 (1941), pp 90 113

[2] Cmd 5487 (1937), *A J*, 34 (1940), Suppl, p 108, Hudson, *Legislation*, VII p 754 It entered into force on May 7, 1938, after having been ratified by Great Britain, the United States, Germany, Eire, New Zealand, and Norway, Canada and Mexico acceded

[3] *A J*, 34 (1940), Suppl, p 115, Hudson, *Legislation*, VII p 762 The Convention of 1937 is of wider scope than that of 1931 and applies also to grey whales

[4] This Protocol is intended to regulate whaling for the first season in which whaling operations are resumed after the cessation of hostilities It provides that the 'number of baleen whales caught shall not exceed 16,000 blue whale units' *Parl Papers*, Misc No 1 (1944), Cmd 6510

Telegraph Cables in the Open Sea permitted

§ 286 It is a consequence of the freedom of the open sea that no State can prevent another from laying telegraph and telephone cables in any part of the open sea, whereas no State need allow this within its territorial maritime belt As in course of time numerous submarine cables were laid, the question as to their protection arose Already in 1869 the United States proposed an international convention for this purpose, but the matter was dropped in consequence of the outbreak of the Franco-Prussian war The Institute of International Law took up the matter in 1879[1] and recommended an international agreement In 1882 France invited the Powers to an international conference at Paris for the purpose of regulating the protection of submarine cables This conference met in October 1882, and again in October 1883, and produced the International Convention for the Protection of Submarine Telegraph Cables, which was signed at Paris on March 14, 1884,[2] by Great Britain, and twenty-five other States

International Protection of Submarine Telegraph Cables

§ 287 Its principal provisions are as follows

(1) Intentional or culpably negligent breaking or damaging of a cable in the open sea is to be punished by all the signatory Powers,[3] except in the case of such damage having been caused in the effort of self preservation (Article 2)

(2) Ships within sight of buoys indicating cables which are being laid, or which are damaged, must keep at least a quarter of a nautical mile distant (Article 6)

(3) For dealing with infractions of the interdictions and injunctions of the treaty the courts of the flag State of the infringing vessel are exclusively competent (Article 8)

(4) Men-of-war of all signatory Powers have a right to stop and verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty (Article 10)

(5) All stipulations are made for the time of peace only, and in no wise restrict the action of belligerents during time of war[4]

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[1] See *Annuaire*, III 351-394

[2] See Martens, *N R G*, 2nd ser, 11, p 281, and Tafel in *Z I*, 37 (1927), pp 210 222 For a suggestion of an international system of telegraph cables, see Catellani in *Rivista*, 2nd ser, 7 (1918), pp 161, 162 The Convention of 1884 was revived as regards Germany by Article 282 of the Treaty of Peace of 1919

[3] See the Submarine Telegraph Act, 1886

[4] See below, vol II §214, and see two awards of a British American Claims Commission upon incidents occurring in the Spanish-American War *A J*, 18 (1924), pp 835 845

VIII

WIRELESS COMMUNICATION ON THE OPEN SEA

Higgins in Hall, § 42*b*—Hyde, 1 §§ 192, 193—Fauchille, §§ 531 (22) 531 (35)—Despagnet, 433 *quater*—Ullmann, § 147—Gidel, 1 pp 515 519—Meili, *Die drahtlose Telegraphie*, etc (1908)—Schneeli, *Drahtlose Telegraphie und Volkerrecht* (1908)—Landsberg, *Die drahtlose Telegraphie* (1909)—Kausen, *Die drahtlose Telegraphie im Volkerrecht* (1910)—Thurn, *Die Funkentelegraphie im Recht* (1913)—Devaux, *La télégraphie sans fil* (1914)—Loewengard, *Die internationale Radiotelegraphie im internationalen Recht* (1915)—Rolland in *R G*, 13 (1906), pp 58 92—Fauchille in *Annuaire*, 21 (1906), pp 76 87—Meurer and Boidin in *R G*, 16 (1909), pp 76 and 261—Hazeltine, *Law of the Air* (1911), pp 97-102—Higgins and Colombos, §§ 320 324—Stewart in *A J*, 22 (1928), pp 28 49

Wireless Communication on the Open Sea [1]

§§ 287*a* and 287*b* As the result of international conferences in Berlin in 1906 and in London in 1912 three important International Radiotelegraphic Conventions [2] were signed and ratified by a large number of States, including Great Britain The Convention of 1912 provides for the reciprocal exchange of radiotelegrams between ship stations and between 'coast stations' and 'ship stations' controlled by the contracting parties and the linking up of the coast stations with the general inland telegraphic systems, without distinction based upon the radiotelegraphic system adopted Absolute priority is given to distress calls [3] The administrative work is undertaken by the International Telegraph Office at Berne In 1927 at a conference at Washington a new International Radiotelegraph Convention with a set of Annexed Supplementary Regulations

[1] As to communication over land see above, §§ 174 and 197*f*

[2] Martens, *N R G*, 3rd ser, 3, p 147, *ibid*, p 158, and, for the Convention of 1912, Martens, *N R G*, 3rd ser, 11, p 270, and Treaty Series, No 10 (1913) And see Article 284 of the Treaty of Peace with Germany, and Article 236 of the Austrian treaty

[3] For instance, it was possible before 1906 for the following case (see Hazeltine, *op cit*, p 101), to which the delegate of the United States drew the attention of the Berlin Conference, to occur again when a ship belonging to a State which had not signed the Additional Convention was involved The American steamer *Lebanon* had received orders to search the Atlantic for a wrecked vessel which offered great danger to navigation The *Lebanon* came within communicating reach of the liner *Vaderland*, and inquired by wireless telegraphy whether the *Vaderland* had seen the wreck The *Vaderland* refused to reply to this question, on the ground that she was not permitted to enter into communication with a ship provided with a wireless apparatus other than the Marconi

was concluded by the representatives of seventy-five Governments [1] It defines 'radio communication' as 'the transmission by radio of writing signs, signals, pictures, and sounds of all kinds by means of Hertzian waves,' and applies to all radio stations open to the international service of public correspondence, and thus greatly extends the scope of the earlier conventions [2]

IX

THE SURFACE OF THE BED OF THE OPEN SEA

Westlake, I pp 190, 191—Lindley, pp 68, 69—Fauchille, §§ 483 (6), 483 (7), 483 (35)—Verdross, pp 220, 221—Smith, II pp 118 123—Hurst in *B Y*, 1923 1924, pp 34 43 See also some of the literature cited above, § 281, and below, § 287*d*

The Surface of the Bed of the Open Sea

§ 287*bb* As natural resources become more and more exhausted and as scientific invention and engineering skill advance, it may be expected that mankind will devote increasing attention to the exploitation of the surface [3] of and the subsoil beneath the bed of the open sea The subsoil is considered in the following paragraph The question whether the former is capable of occupation is at present controversial There has been a tendency in the past to assume that the surface of the bed upon which the open sea rests must be likened in legal condition to the waters of the open sea themselves But when regard is had to the arguments which brought about the abandonment of the former claims to occupy the waters of the open sea, namely, the argument in the words of Grotius that *occupatio non procedit nisi in re terminata* (a theoretical reason), and the argument that the freedom of the waters of the open sea is essential to the freedom of intercourse between States (the main practical reason), it must surely be conceded that these reasons do not apply to the surface of the sea-bed or to its subsoil In fact there exist numerous

[1] *L N T S*, vol 84, p 97, Hudson, *Legislation*, III p 2197, *A J*, 23 (1929), Suppl, p 40 And see above, § 197*f*

[2] See Stewart in *A J*, 22 (1928), pp 28 49.

[3] Among the commodities at present obtained from the surface of the sea-bed may be mentioned oysters and other shell fish, pearls, sponges, coral, amber, chank

cases in which States habitually exploit through the activity of their nationals the resources of the surface of the sea-bed [1] Although it is traditional to base some of these cases on the ground of prescription, it is submitted that it would be not inconsistent with principle, and would be more in accord with practice, to recognise frankly that, as a matter of law, a State may by strictly local occupation acquire, for sedentary fisheries and for other purposes, sovereignty and property in the surface of the sea-bed, provided that in so doing it in no way interferes with freedom of navigation and, perhaps we should add, with the breeding of free-swimming fish.[2]

X

THE SUBSOIL BENEATH THE BED OF THE OPEN SEA

See most of the literature cited above, § 278*bb*—Lindley, pp 69 71—Gidel, 1 pp 507 514

Five Rules concerning the Subsoil beneath the Bed of the Open Sea

§ 287c The subsoil beneath the bed of the open sea requires special consideration, on account of coal or other mines, tunnels, and the like For the answer to the question whether mines and tunnels can be driven into that subsoil at all, and, if so, whether they can be under the territorial supremacy of a particular State, depends entirely upon the character in law of such subsoil If the subsoil beneath the bed of the open sea stood in the same relation to the open sea as the subsoil beneath the territory of a State stands to that territory,[3] all rules concerning the open sea would necessarily have to be applied to the subsoil beneath its bed, and no part of this subsoil could ever come under the territorial supremacy of any State It is, however, submitted [4] that it would not be rational to consider the subsoil beneath the bed of the open sea as an inseparable

[1] See Hurst, *op cit*

[2] See to the same effect Westlake, Fauchille, Hurst, *op cit*, and Ver dross, p 221, but see Lindley, *op cit* As to the Ceylon pearl fishery see above, p 568 (n) For an instance of the regulation of oyster fisheries in the open sea without any assertion of sovereignty, see the Declaration signed by Great Britain and France on September 29, 1923 Treaty Series, No 31 (1923), Cmd 1996, *L N T S*, 21, p 138 See also Smith, II pp 142 164

[3] See above, §§ 173, 175 As to the subsoil of territorial waters see Gidel, III pp 326 332

[4] See Oppenheim in *Z V*, 2 (1908), p 11, and Colombos, *Le tunnel sous la Manche* (1917), pp 101-108

appurtenance of the open sea, just as the subsoil beneath the territorial land and water is an appurtenance of such territory The rationale of the open sea being free and for ever excluded from occupation on the part of any State is that it is an international highway, which connects distant lands, and thereby secures freedom of communication, and especially of commerce, between States separated by the sea [1] There is no reason whatever for extending this freedom of the open sea to the subsoil beneath its bed On the contrary, there are practical reasons—taking into consideration the building of mines, tunnels, and the like—which compel recognition of the fact that this subsoil can be acquired through occupation The following five rules commend themselves

(1) The subsoil beneath the bed of the open sea is no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial maritime belt

(2) This occupation takes place *ipso facto* by a tunnel or a mine being driven from the shore through the subsoil of the maritime belt into the subsoil of the open sea

(3) This occupation of the subsoil of the open sea can be extended up to the boundary line of the subsoil of the territorial maritime belt of another State, for no State has an exclusive claim to occupy such part of the subsoil of the open sea as is adjacent to the subsoil of its territorial maritime belt

(4) An occupation of the subsoil beneath the bed of the open sea for a purpose which would endanger the freedom of the open sea is inadmissible

(5) It is likewise inadmissible to make such arrangements in a part of the subsoil beneath the open sea which has previously been occupied for a legitimate purpose as would indirectly endanger the freedom of the open sea

If these five rules are correct, there is nothing to prevent coal and other mines which are being exploited on the shore of a littoral State from being extended into the subsoil beneath the open sea up to the boundary line of the subsoil beneath the territorial maritime belt of another State For this reason it would appear that no impropriety attached

[1] See above, § 259

to the Proclamation of the President of the United States of September 28, 1945, extending the jurisdiction and control of the United States over the natural resources of the subsoil and sea bed of the so-called continental shelf beneath the high seas but contiguous to the United States [1] Further, a tunnel which might be built between two parts of the same State separated by the open sea—for instance, between Ireland and Scotland—would fall entirely under the territorial supremacy of the State concerned On the other hand, for a tunnel between two different States separated by the open sea—as, for instance, the proposed Gibraltar tunnel between the Spanish coast and either Tangier or Ceuta—special arrangements would have to be made by treaty concerning the territorial supremacy over that part of the tunnel which runs under the bed of the open sea [2]

[1] *A J*, 40 (1946), Suppl, p 47 It was stated in the Proclamation that where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by agreement in accordance with equitable principles See Borchard in *A J*, 40 (1946), pp 53-70, Vallat in *B Y*, 23 (1946), pp 333-338 In October 1946 Argentina issued a similar decree *A J*, 41 (1947), Suppl, p 11

[2] *The Proposed Channel Tunnel* — It is of interest to give some details concerning the project of a Channel Tunnel between Dover and Calais (see Oppenheim in *Z V*, 2 (1908), pp 1 16, Robin in *R G*, 15 (1908), pp 50-77, Hatschek, p 210, Verdross, p 221, Fauchille, §§ 483 (35) 483 (38), Lindley, p 70, Gain, *La question du tunnel sous la Manche* (1933) Already some years before the Franco-Prussian War the possibility of such a tunnel was discussed, but it was not until 1874 that the first preliminary steps were taken The subsoil of the Channel was geologically explored, plans were worked out, and a shaft of more than a mile long was tentatively bored from the English shore In 1876 an international commission, appointed by the British and French Governments, and comprising three French and three British members, made a report on the construction and working of the proposed tunnel (see *Parl Papers*, C 1576, Report of the Commissioners for the Channel Tunnel and Railway, 1876) The report enclosed a memorandum, recommended by the commissioners as a basis for a treaty between Great Britain and France for the tunnel In this elaborate preparation the project could not be realised, since public opinion in Great Britain was for political reasons opposed to it And although repeated attempts were made both before and after the First World War to revive popular interest in the project, no progress has been made (see Fell, *The Position of the Channel Tunnel Question in May 1914* (1914), and *The Channel Tunnel, its Position in October 1921* (1921)) The rapid development of aviation is radically changing the problem For an expression of British official opinion, see the Statement of the Prime Minister (Mr J Ramsay MacDonald) in the House of Commons on July 7, 1924, Hansard, Commons, 1924, vol 175, columns 1782 1786 And see for the Statement of Policy of the British Government of June 4, 1930, regarding the Channel Tunnel, (1930), Cmd 3591, *British and Foreign State Papers*, 134, p 1

CHAPTER III

INDIVIDUALS

POSITION OF INDIVIDUALS IN INTERNATIONAL LAW

Lawrence, § 42—Taylor, § 171—Hershey, § 222—Hyde, I § 342—Heffter, § 58—Stoerk in *Holtzendorff*, II pp 585 592—Gareis, § 53—Liszt, §§ 7 (1), 19 (I, IV)—Ullmann, § 107—Kohler, pp 52, 53—Verdross, § 35—Fauchille, §§ 397, 397 (1)—Despagnet, § 328—Merignhac, II pp 169-172—Pradier Fodéré, I §§ 43 49—Fiore, I §§ 684 712—Anzilotti, pp 65-68, 73 75—Gemma, pp 55, 56—Martens, I §§ 85, 86—De Louter, I pp 259-264—Cruchaga, §§ 338 345—Balladore Pallieri, pp 167-190, 277 279, 457 473, and the same, *La natura giuridica internazionale della potesta dello Stato sugli individui* (1932)—Jellinek, *System der subjectiven offentlichen Rechte* (1892), pp 310 314—Heilborn, *System*, pp 58 138—Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899)—Bunovino, *Diritto e personalità giuridica internazionale* (1910)—Borchard, §§ 7-10—Lord Phillimore in *Hague Recueil*, 1923, pp 63 67—Kosters in *Bibliotheca Visseriana*, IV (1925) pp 252 261—Meier, *Der Staatsangehorige und seine Rechte* (1927)—Spiropoulos, *L'individu et le droit international* (1928)—Segal, *L'individu en droit international positif* (1932)—Tenékidès, *L'individu dans l'ordre juridique international* (1933)—Jessup, *A Modern Law of Nations* (1948), pp 68 93—Rehm and Adler in *Z V*, I (1907) pp 53 55 and 614 618—Kohler in *Z V*, II (1908) pp 209 230—Diena in *R G*, 16 (1909), pp 57-76—Cavaglieri in *Rivista*, 17 (1925), pp 18 32, 169 187—Hamburger in *Z I*, 36 (1926), pp 117 196—Akzin in *R I (Paris)*, 4 (1929), pp 451 489—Bourquin in *Hague Recueil*, 35 (1931) (1), pp 33 47—Hostie, *ibid*, 40 (1932), II—Herz in *Théorie du droit*, 10 (1936), pp 100 111—Dumas in *Hague Recueil*, 59 (1937) (I), pp 7 93—Lauterpacht in *Grotius Society*, 29 (1943), pp 1 33—Idelson, *ibid*, 30 (1944), pp 51-66 And see the literature referred to above, § 13*a*, and below, §§ 340*k* and 340*l*, on the international protection of the rights of man

Importance of Individuals to the Law of Nations

§ 288 The individuals belonging to a State can, and do, come in various ways in contact with foreign States in time of peace as well as of war Moreover, apart from being nationals of their States, individuals are the ultimate objects of International Law—as they are, indeed, of all law These are the reasons why the individual is often the object of international regulation and protection.

Individuals as Subjects of the Law of Nations

§ 289 Since the Law of Nations is primarily a law between States, States are normally the only [1] subjects of the Law of Nations. How is it, then, that, although individuals are not normally subjects of the Law of Nations, they have certain rights and duties in conformity with, or according to, International Law? Have not monarchs and other heads of States, diplomatic envoys, and even simple citizens, certain rights according to the Law of Nations whilst on foreign territory? The answer to these questions is that what the Law of Nations really does concerning individuals is to impose upon all the members of the Family of Nations the duty to grant certain privileges to such foreign Heads of States and diplomatic envoys, and certain rights to such foreign citizens, as are on their territory And, corresponding to this duty, every State has by the Law of Nations a right to demand that its Head, its diplomatic envoys, and its citizens be granted certain rights by foreign States when on their territory Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, therefore, not international rights, but rights derived from Municipal Laws International Law is indeed the background of these rights, in so far as the duty to grant them is imposed upon the several States by International Law. It is therefore quite correct to say that the individuals have these rights in conformity with, or according to, International Law, if only it is remembered that, as a rule, these rights would not be enforceable before national courts had the several States not created them by their Municipal Law

The same applies as regards special rights of individuals in foreign countries according to special international treaties between two or more Powers Although such treaties generally speak of rights which individuals shall have as derived from the treaties themselves, this is, as a rule, nothing more than an inaccuracy of language In fact, such treaties do not normally create these rights, but they impose the duty upon the contracting States of calling these rights into

[1] See above, §§ 13 and 63.

existence by their Municipal Laws [1] Again, where States stipulate by international treaties certain benefits for individuals other than their own subjects, these individuals do not, as a rule, acquire any international rights under these treaties,[2] but the State whose subjects they are has an obligation towards the other States of granting such favours by its Municipal Law But although this is the normal and most convenient procedure, States may, and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights *stricto sensu*, *i e* rights which they acquire without the intervention of municipal legislation [3] and which they can enforce in their own name before international tribunals [4] Also, although as a rule the legal

[1] The whole matter is treated with great lucidity by Jellinek, *System der subjectiven offentlichen Rechte* (1892), pp 310 314, Heilborn, *System*, pp 58-138, and Anzilotti, pp 50 59, who stress this aspect of the matter But see Diena in *R G*, 16 (1909), pp 57-76, Rehm and Adler in *Z V*, 1 (1907), pp 53, 614, Liszt, § 7 (1), Kohler in *Z V*, 2 (1908), pp 209 230 See also the writers enumerated above

[2] As laying down the principle that in concluding treaties the Crown does not act as trustee of the subject and that therefore the latter has no legal right to any compensation provided for in a treaty see *The Civilian War Rights Association* v *The King* [1932] A C 14, 46 T L R 581, 47 T L R 102, *Administrator of German Property* v *Knoop* [1933] Ch 439, *Gschwind* v *Swiss Confederation* (decided by the Swiss Federal Court in 1932) *Annual Digest*, 1931-1932, Case No 120, *Receiver in Bankruptcy of the N V 'Zeilschip Nest'* v *The State of the Netherlands* (decided by the Hague Court of Appeal on January 14, 1937) *ibid*, 1935-1937, Case No 117 And see *B Y*, 13 (1932), pp 163, 164

[3] The Advisory Opinion of the Permanent Court in the matter of the Jurisdiction of Danzig Courts (see above, § 13*a*) is a striking illustration of that possibility.

[4] In *Steiner and Gross* v *Polish State* the Upper Silesian Arbitral Tribunal held, in March 1928, that, under the terms of the relevant convention, it had jurisdiction to entertain a claim by a Polish national against the Polish State—notwithstanding the Polish contention that under International Law an individual cannot invoke an international authority against his own State *Annual Digest*, 1927-1928, Case No 188 Moreover, in the same case the Tribunal held that a national of a third State, which was not a party to the Treaty in question, could exercise rights enforceable before the Tribunal *ibid*, Case No 287 The Mixed Arbitral Tribunals are probably also another instance of direct access of individuals to international tribunals See Verdross, p 160, Blühdorn in *Hague Recueil*, vol 41 (1932) (III), pp 144-146 But the question is controversial Thus Anzilotti, p 136, considers the jurisdiction of the Mixed Arbitral Tribunals to be the result of parallel municipal legislation, see also Kaufmann, cited below, who, without denying the theoretical significance of the innovation, explains it by reference to the exceptional circumstances of the Peace Treaties and stresses the circumstance that before these Tribunals Governments remained in part *domini litis* And see generally on the access of individuals to international tribunals Fleury, *Un nouveau progrès de la justice internationale L'accès de particuliers aux Tribunaux internationaux* (1932), Schulé, *Le droit d'accès des particuliers aux juridictions*

powers conferred by treaty upon international organs are not international rights but rights within the organisation concerned, this is not always so Such bodies as the International Danube Commission,[1] the International Institute of Agriculture,[2] the International Commission of the Cape Spartel Lighthouse,[3] and others have a distinct juridical personality independent of the Municipal Law of the State where they are situated As such they must be deemed to possess a species of international personality of their own

Individuals as Objects of the Law of Nations

§ 290 But what is the normal position of individuals in International Law, if they are not subjects thereof? The answer can only be that, generally speaking, they are *objects* of the Law of Nations They appear as such from many different points of view When, for instance, the Law of Nations is seen to recognise the personal supremacy of every State over its subjects at home and abroad, these individuals appear as objects of the Law of Nations just as does State territory in consequence of the recognised territorial supremacy of every State When, secondly, the recognised territorial supremacy of every State is seen to comprise certain powers over foreign subjects within its boundaries with the exercise of which their home State has no right to interfere, these individuals appear again as objects of the Law of Nations [4]

Nationality the Link between Individual and the Law of Nations

§ 291. If, as stated, individuals are as a rule not subjects

internationales (1934), *Annuaire*, 33 (1927) (II), pp 601-626, Rundstein in R I, 3rd ser, 10 (1929), pp 431-453, 763-783, Borchard in *A J*, 24 (1930), pp 359 365, Ténékidès in *R I*, 3rd ser, 13 (1932), pp 89 111, Baumgarten, *ibid*, pp 742 799, Seferiadès in *Hague Recueil*, vol 51 (1935) (I), pp 5-120, Kaufmann, *ibid*, 54 (1935) (IV), pp 420 427, Idelson in *Grotius Society*, 30 (1944), pp 50 66 As to the access of individuals to international authorities by way of petition see Richard, *Le droit de pétition* (1932), Feinberg in *Hague Recueil*, vol 40 (1932) (II), pp 529-640

[1] See above, § 178

[2] See below, p 776, n 5

[3] See p 550, n 3 (*in fine*) On the status of international associations and especially on the Belgian Law of October 25, 1919, granting to them a special status see Normandin in *Répertoire*, II pp 104 132

[4] Any State may seize and punish foreign pirates on the open sea, and belligerents may seize and punish neutral blockade runners and carriers of contraband on the open sea without their home State having a right to interfere See, however, Westlake, *Papers*, p 2, who maintains that in these cases individuals appear as *subjects* of International Law But see Lorimer, II p 131, and Holland, *Jurisprudence*, p 341 See also above, § 13*a*

but objects of the Law of Nations, then nationality is the link between them and the Law of Nations It is through the medium of their nationality that individuals can normally enjoy benefits from the existence of the Law of Nations This is a fact which has consequences over the whole area of International Law [1] Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, since there is no State which would be competent to take their case in hand As far as the Law of Nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty,[2] no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals [3] On the other hand, if individuals who possess nationality are wronged abroad, it is, as a rule, their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right [4] It is for this reason that the question of nationality is very important for the Law of Nations

International Law and the Rights of Mankind

§ 292 Writers have occasionally expressed the view that International Law guarantees to individuals, both at home and abroad and whether nationals of a State or stateless, certain fundamental rights usually referred to as rights of mankind [5] Such rights have been said to comprise the right of life, liberty, freedom of religion and conscience, and the like It is doubtful whether that view is expressive of the actual practice of States For it is generally recognised that a State is entitled to treat both its own nationals and stateless persons at discretion and that the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself Moreover, any recognition of the

[1] See below, § 294

[2] See below, §§ 310*a* and 313, from where it will be seen that stateless persons may become the object of protective international regulation In such cases any signatory State is entitled to invoke the provisions of the Treaty on behalf of the stateless person regardless of the rule as to the nationality of claims (see above, § 155*b*)

[3] See below, § 312

[4] That is, no *international* right As to the general duty of an injured foreigner to exhaust the local municipal remedies before invoking the protection of his home State see above, § 162*a*, Ralston, §§ 129 133, and Borchard, §§ 381 383

[5] Bluntschli, §§ 360-363, 370, Martens, 1 § 86, Fiore, 1 §§ 684-712, and *Code*, pp 619-674, Fauchille, § 397

fundamental rights of the individual as part of the law of nations is, to some extent,[1] inconsistent with the predominant view according to which States only are the subjects of International Law

At the same time it cannot be said that the doctrine of the 'rights of mankind' is altogether divorced from practice In the first instance, it is clear that the State is bound to respect certain fundamental rights of aliens resident within its territory[2]—although it is often said that the rights in question are not international rights of the aliens, but of their home State Secondly, the principle and the practice of humanitarian intervention in defence of human rights ruthlessly trampled upon by the State has been frequently asserted and occasionally acted upon[3] Thirdly, the various treaties—such as those concluded at the Berlin Conference in 1878[4] or on the termination of the First World War[5]—for the protection of religious and linguistic minorities signified the tendency to extend recognition, by means of international supervision and enforcement, to the elementary rights of at least some sections of the population of the State Finally, an imposing array of treaties of a humanitarian character such as those for the abolition of slavery, of slave trade, and of forced labour,[6] for the protection of stateless persons and refugees,[7] for safeguarding health and preventing abuses injurious to it,[8] for securing humane conditions of work,[9] and the like, have testified to the intimate connection between the interests of the individual and International Law And although none of these developments have had the legal effect of incorporating the fundamental rights of man as part of the positive law of nations, they are not without significance for this aspect of International Law

[1] But not altogether For the recognitions of the rights of man as part of International Law need not necessarily be combined with the conferment upon individuals of full procedural capacity before international courts and agencies—which capacity alone would make them full subjects of International Law See above, §§ 13 and 13*a*

[2] The somewhat paradoxical result of the existing position is that individuals, when residing as aliens in a foreign State, enjoy a measure of protection which International Law denies to the nationals of a State within its territory

[3] See above, § 137.
See § 340*b*
See below, §§ 340*b* 340*e*
See below, §§ 340*h* 340*i*
See below, § 313
See Appendix A (III)
See below, § 340*f*

It is possible that the Charter of the United Nations, with its repeated recognition of 'human rights and fundamental freedoms,' [1] has inaugurated a new and decisive departure with regard to this abiding problem of law and government

II

NATIONALITY

Vattel, I §§ 220 226—Hall, §§ 66, 87—Westlake, I pp 220, 238 240—Halleck, I pp 430, 431—Taylor, §§ 172-178—Hershey, § 223—Moore, III §§ 372 376—Hyde, I § 342—Bluntschli, §§ 364 380—Stoerk in *Holtzendorff*, II pp 630 650—Gareis, § 54—Liszt, § 19—Ullmann, §§ 108, 109—Hatschek, pp 213 216—Fauchille, §§ 410-416, 433 440—Despagnet, §§ 329 333—Pradier Fodéré, III § 1645—Rivier, I p 303—Nys, II pp 256-262—Cavlo, II §§ 539 540—Fiore, I §§ 644 658, 684 712, and *Code*, §§ 643-646—Martens, I §§ 85 87—De Louter, I pp 264 265—Suarez, §§ 142-144—Scelle, II pp 136-152—Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), § 14—Cogordan, *La nationalité au point de vue des rapports internationaux* (2nd ed, 1890)—Zeballos, *La nationalité au point de vue de la législation comparée*, etc, 5 vols (1914 1919)—Borchard, §§ 4, 5, 198-227—Wistrand, *La diplomatie et les conflits de nationalité* (1923)—Bourbousson, *Traité général de la nationalité* (1931)—*La nationalité dans la science sociale et dans le droit contemporain* (Paris, 1934, a collection of articles)—Quadri, *La suddittanza nel diritto internazionale* (1936)—Mervyn Jones, *British Nationality Law and Practice* (1947)—Isay in *Hague Recueil*, 1924, IV pp 429 471—Report for League Codification Committee by Rundstein, de Magalhaes, and Schücking in *A J*, 20 (1926), Special Suppl, pp 21 61, and comment by Hyde in *A J*, 20 (1926), pp 726-735—Gargas in *Z V*, 5 (1911), pp 278 316, 478 509—McNair in *L Q R*, 35 (1919), pp 213 225—Bles in *R I*, 3rd ser, 2 (1921), pp 513 531—Lloyd Jacob in *Grotius Society*, 10 (1925), pp 89 114—Flournoy in *A S Proceedings*, 1926, pp 59 66—Maury in *Répertoire*, IX pp 238 319—Rauchberg in *Z o R*, 8 (1929), pp 405 509—Rundstein in *Z V*, 16 (1931 1932), pp 26-45—Kelsen in *Hague Recueil*, vol 42 (1932) (IV), pp 242 248—Balladore Pallieri in *Rivista*, 28 (1936), pp 34 54—*Rechtsverfolgung im internationalen Verkehr*, vol VII *Das Recht der Staatsangehörigkeit der europaischen Staaten* (1940)—Hanna in *Columbia Law Review*, 45 (1945), pp 301 344—Koessler in *Yale Law Journal*, 56 (1947), pp 58-76

Conception of Nationality

§ 293 Nationality of an individual [2] is his quality of

[1] See below, §§ 340*k* and 340*l*

[2] The nationality of corporations is mainly a matter of Private International Law, and considerations of public policy have a decisive influence upon the attitude of every State with regard to it See Isay, *Die Staatsangehörigkeit der juristischen Personen* (1907), Young, *Foreign Companies and other Corporations* (1912), Borchard, §§ 23, 227 282 (exhaustive literature on the problem is to be found in Borchard's appendix) During the First World War the problem became of particular importance, as is apparent from the following monographs Pillet, *Des personnes morales en droit international privé*

being a subject of a certain State,[1] and therefore its citizen. It is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject.[2] But, as stated in Article 1 of the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws (see above, § 35), while it is for each State to determine under its own law who are its nationals, such law must be recognised by other States only 'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard

(1914), Schuster, *The Nationality and Domicile of Trading Corporations*, in *Grotius Society*, 2 (1917), pp 57 85, Mamelok, *Die Staatsangehörigkeit der juristischen Personen* (1918), Gross mann, *Wirtschaftspolitische Betrachtungen über die Staatsangehorigkeit der juristischen Personen* (1918), Ruegger, *Die Staatsangehörigkeit der juristischen Personen* (1918), Martin Achard, *La nationalité des sociétés anonymes* (1918), Pepy, *La nationalité des sociétés* (1920), Cuq, *La nationalité des sociétés* (1921), Gain, *La nationalité des sociétés avant et depuis la guerre* (1924), Marburg, *Staatsangehorigkeit und feindlicher Charakter juristischen Personen* (1927), Norris in *J C L*, 3rd ser, 3 (1921), pp 273-276, McNair in *B Y*, 1923 1924, pp 44 59, Neumeyer in *Z V*, 12 (1922 1923), pp 261 275, and in *Hague Recueil*, 1924, iii pp 5 62, Jemolo in *Rivista*, 3rd ser, 3, i (1921-1922), pp 81-109, Feilchenfeld in *J C L*, 3rd ser, 8 (1926), pp 81 106, 260-274, Sereni, *La cittadinanza degli enti morali nel diritto internazionale* (1934), and in *Rivista*, 26 (1934), pp 171 196, 321 349, Streit in *R I*, 3rd ser, 9 (1928), pp 494-521, and in *Annuaire*, 34 (1928), pp 187-222, Asser and Streit, *ibid*, 35 (i) (1929), pp 648-712, Norem in *A J*, 24 (1930), pp 310 336, Travers in *Hague Recueil*, vol 33 (1930) (iii), pp 5 109, Rundstein in *Z V*, 16 (1931 1932), pp 14 71, Ruhland in *Hague Recueil*, vol 45 (1933) (iii), pp 391 467, Vaughan Williams and Chrussachi in *Law Quarterly Review*, 49 (1933), pp 334-349, Farnsworth, *The Residence and Domicile of Corporations* (1939), and two Reports by Rundstein, Guggenheim and Schücking for the League Codification Committee on Recognition of Legal Personality of Foreign Commercial Corporations and Nationality of Commercial Corporations and their Diplomatic Protection in *A J*, 22 (1928), Special Suppl, pp 157 214, Mazeaud in 55 *Clunet* (1928), pp 30 66, and see below, vol ii § 88*a*, and Award in *Standard Oil Company's* Arbitration in *B Y*, 1927, pp 156 178, and *A J*, 22 (1928), pp 404 421

[1] As to the nationality of the inhabitants of mandated areas see above, § 94*e*, and as to protected States see Advisory Opinion of the Permanent Court upon the Nationality Decrees issued in Tunis and Morocco (French Zone), Series B, No 4, and also the relevant Acts and Documents, Ruzé in *R I*, 3rd ser, 4 (1923), pp 597 627, and Winkler, *La nationalité dans les protectorats de Tunisie et du Maroc* (1926) As to the meaning of *ressortissant* as used in the Treaty of St Germain and the Peace Treaties (1919) see *Kahane v Parisi and the Austrian State*, decided on March 19, 1929, by the Austro Roumanian Mixed Arbitral Tribunal *Annual Digest*, 1929 1930, Case No 131 See also Ralston, *The Law and Procedure of International Tribunals* (Suppl, 1936), pp 61 64 As to nationality in France and her dependencies see Maury in *Répertoire*, 9, pp 320 489, and Audinet, *ibid*, pp 490 505 And see *ibid*, pp 506 805, for a survey of the nationality laws of various countries

[2] See the same Advisory Opinion, Series B, No 4, at p 24

to nationality'[1] In general, it matters not, as far as the Law of Nations is concerned,[2] that Municipal Laws may distinguish between different kinds of subjects—for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens Thus the now abolished German Law of September 15, 1935, established a distinction between German citizenship, limited to persons of 'German or cognate blood,' who alone enjoyed full political rights, and German nationality[3] Nor does it matter that, according to Municipal Law, a person may be a subject of a part of a State, for instance of a dominion or a colony, but not a subject of the mother country, provided only that such person appears as a subject of the mother country as far as the international relations of the latter are concerned Thus, a person naturalised in a British dominion or colony is, for all international purposes, a British subject, although he may not have the rights of a British subject in all parts of the British Empire[4] For all international purposes, all distinctions made by Municipal Laws between subjects and citizens, and between different kinds of subjects, have neither theoretical nor practical value, and the terms

[1] See for comment thereon Rundstein in *Z V*, 16 (1931 1932), pp 26-45 Thus it is clear that a State is not entitled to impose its nationality upon aliens residing for a brief period in its territory or upon persons resident abroad See *e g* the statement of the United States in connection with the Hague Codification Conference of 1930 'The scope of municipal law governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and other States' (*Bases of Discussion*, vol 1, *Nationality*, 1929, p 16) It is not open to a State which has deprived a person of his nationality to re impose its nationality upon that person against his will, especially if he resides abroad It does not matter whether such re imposition of nationality is attempted by way of cancellation of the original deprivation of nationality or by other means

[2] Unless the State concerned has restricted its liberty of action with regard to these questions by treaty with another State (see below, §§ 320*b* 340*d*) See also two Advisory Opinions of the Permanent Court, Series B, No 4 (Nationality Decrees in Tunis and Morocco) and No 7 (Acquisition of Polish Nationality), and the ensuing arbitration between Germany and Poland noted by Garner in *A J*, 20 (1926), pp 130-135

[3] *Reichsgesetzblatt*, 1935, p 1146 As to 'non citizen nationals' in the United States see McGovney in *Legal Essays* (1935, edited by Radin and Kidd), pp 323 374

[4] *Rex* v *Francis, ex parte Markwald* [1918] 1 K B 617, and *Markwald* v *A G* [1920] 1 Ch 348 See Hall, *Foreign Powers and Jurisdiction*, § 20, and below, § 307 See also *Hanau* v *Hanau and others* before the Anglo German Mixed Arbitral Tribunal, *Annual Digest*, 1927-1928, Case No 23

'subject' and 'citizen' are, therefore, synonymous so far as International Law is concerned [1]

'Nationality,' in the sense of citizenship of a certain State, must not be confused with 'nationality' meaning membership of a certain nation in the sense of a race Thus, according to International Law, Englishmen, Scotsmen, and Irishmen are, despite their different nationality as regards their race, all of British nationality as regards their citizenship Thus further, although all Polish individuals are of Polish nationality *qua* race, for many generations there were no Poles *qua* citizenship

Function of Nationality

§ 294 Nationality is the principal link between individuals and the benefits of the Law of Nations [2] This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home State, especially on account of one particular right and one particular duty of every State towards all other States The right is that of protection over its citizens abroad which every State holds, and occasionally vigorously exercises towards other States, it will be discussed in detail below [3] The duty is that of receiving on its territory such of its citizens as are not allowed to remain [4] on the territory of other States Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries The home State of expelled persons cannot refuse to receive them on the home territory, the expelling States having a right to insist upon this [5]

So-called *Protégés* and *de facto* Subjects

§ 295 Although nationality alone is the regular means

[1] The Imperial Conference of 1937 formally put on record that in practice members of the Commonwealth make a distinction for some purposes, *i e* immigration and deportation, between British subjects in general and British subjects whom they regard as being members of their respective communities It was recognised that some uniformity of practice was necessary in order to avoid the contingency of a person being identified, in the latter sense, with two or more members of the Commonwealth *Summary of Proceedings*, Cmd 5842 (1937), pp 23 27

[2] See above, § 291.

[3] See below, § 319

[4] See below, § 326.

[5] See below, § 326 See also § 302 (2)

through which individuals can derive benefit from the Law of Nations, there are three exceptional cases [1] in which individuals may come under the international protection of a State of which they are not subjects

(1) A State undertakes by an international agreement the diplomatic protection of another State's citizens abroad, and in this case the protected foreign subjects are named *protégés* of the protecting States Such agreements may either be intended to be permanent, as when a small State, Switzerland for instance, has no diplomatic envoy in a certain foreign country where many of its subjects reside, or to be temporary, for instance, upon a rupture of diplomatic relations, or upon the outbreak of war, when a belligerent usually hands over to a neutral State the protection of its subjects in an enemy State

(2) A State promises diplomatic protection within the boundaries of certain Oriental countries to certain natives, who are usually connected with or employed by the legations and consulates of the protecting State Such protected natives are likewise named *protégés*, but they are also called '*de facto* subjects' of the protecting State Their position is quite anomalous, it is based on custom and treaties, and no special rules of the Law of Nations itself are in existence concerning them Every State which takes such *de facto* subjects under its protection can act according to its discretion, and there is no doubt that as soon as these Oriental States have reached a level of civilisation equal to that of

[1] See Borchard, §§ 203 206, 249 252 So also the existence of a protectorate, including a British colonial protectorate, does not give the subjects of the protected State the nationality of the protecting State see, *e g*, *R* v *Graham Campbell* [1921] 2 K B at p 475 See the British Protected Persons Order, 1934 (*S R & O* 1934, No 499) defining the status of British protected persons. On the question who are British protected persons see M Jones in *B Y*, 22 (1945), pp 122-129, who defines them as being British nationals who habitually and not by reason only of their status as British subjects receive British protection (The term 'British nationals' in its wider sense seems to include British subjects, British protected persons, and juridical persons incorporated under the laws of a British territory) The main classes of British protected persons derive that status from being subjects of a ruler of an Indian native State, or from their connection with a British protected State (see above, § 94), a British protectorate (see above, § 94), or a British mandated territory (see above, § 94*e*)

the Western States, the whole institution of *de facto* subjects will disappear [1]

(3) The inhabitants of a mandated area are under the diplomatic protection of the Mandatory, when abroad and not within the Mandatory's own territory [2]

Nationality and Emigration

§ 296 As emigration involves the voluntary removal of an individual from his home State with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, it is obvious that emigrants may well retain their nationality Emigration is in fact entirely a matter of internal legislation of the different States [3] Every State can fix for itself the conditions under which emigrants lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return to their former home, provided the emigrants have retained their former nationality The Law of Nations does not, as yet, grant a right of emigration to every individual, although it is frequently maintained [4] that it is a 'natural' right of every individual to emigrate from his own State It is a moral right which

[1] For illustrations of the status of *protégés* see Spanish Zone of Morocco Claims case, *Annual Digest*, 1923 1924, Case No 128, and Pablo Najera (of the *Lebanon*) case, decided on October 19, 1928, by the French Mexican Claims Commission, *Annual Digest*, 1927 1928, Case No 206 See also *National Bank of Egypt* v *Austro-Hungarian Bank* *ibid*, 1923-1924, Case No 10

[2] See above, § 94e

[3] See the 'Vœux relatifs à la matière de l'émigration' in *Annuaire*, 16 (1897), p 276 See also Gargas in *Z V*, 5 (1911), pp 278 316, 478-509, Schätzel, *Internationale Arbeiterwanderungen* (1919), Saavedra Lamas, *Traités internationaux de type social* (1924), pp 93 445, as to the immigration of workers into France, see Palewski in *R G*, 34 (1927), pp 58-84 See also the valuable survey in three volumes published by the International Labour Office and entitled *Migration Laws and Treaties* (1928), and see Thibert in *Répertoire*, vii pp 543 580 For the International Agreement concerning the preparation of a transit card for emigrants of June 14, 1929, concluded in order to simplify transit formalities for emigrants crossing the territories of the contracting parties, see Treaty Series, No 27 (1929), Cmd 3402 On the 'dictation test' in Australia see Charteris in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp 174-181 See below, §§ 314 316, as to the Reception of Aliens, and Fauchille, §§ 410 446, as to emigration

[4] Especially by American writers On the American standpoint concerning emigration see Borchard, §§ 315 331, and in *A J*, 25 (1931), pp 312 316, Hackworth, in § 242 See also Morrow in *A J*, 26 (1932), pp 552 564, and Fields, *ibid*, pp 671 699, I Mien Tsang, *The Question of Expatriation in America Prior to 1907* (1907) As to expatriation in Great Britain see Fraser in *Grotius Society*, 16 (1930), pp 73-89

would fittingly find a place in any international recognition of the Rights of Man [1]

The Right of Expatriation

§ 296a The right of expatriation, as distinguished from that of emigration, is the right of a person, who has emigrated and who has acquired or is in the position to acquire a new nationality, to renounce effectively the nationality of the State of his origin Such right of expatriation, although it, too, has been asserted as a natural right of man,[2] has not yet become part of the general practice The United States has insisted on it, uniformly and uncompromisingly, since 1868 [3] Great Britain recognised it in 1870 after having abandoned the common law doctrine of inalienability of allegiance [4] But many States still make expatriation dependent upon compliance with various conditions such as the fulfilment of the duties of military service [5] The full acknowledgment of the right of expatriation, the denial of which is offensive alike to individual freedom and to the dignity of the State insisting on the retention of a grudging allegiance, is probably a proper subject-matter for a general

[1] In accordance with Article 56 of the Treaty of Peace with Bulgaria (1919), and the decision of the Principal Allied and Associated Powers, Greece and Bulgaria signed, on November 27, 1919, a convention providing that the subjects of each party belonging to racial, religious, and linguistic minorities might freely emigrate to the territory of the other, Misc No 3 (1920), Cmd 589 See also an Advisory Opinion of the Permanent Court on the Exchange of Greek and Turkish Populations, Series B, No 10

[2] 'It [the right of expatriation] is a principle of the rights of man and of the liberty of the human race' Mr Hunter Miller (Delegate of the United States), *Acts of the Conference for the Codification of International Law*, Meetings of the Committee, vol II Nationality, p 80 See also *ibid*, p 69 (Mr Flournoy)

[3] The Joint Resolution of the Congress of the United States of that year began as follows 'Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness' (15 Stat 223) This, it will be noted, was an assertion of principle not uninfluenced by the requirements of a country of immigration

[4] Thus Coke laid down in his edition of Littleton's *Tenures* published in 1629 Nemo patriam, in qua natus est, exuere, nec legiantiae debitum ejurare possit See also Blackstone, *Commentaries*, Book I ch x Following upon the recommendations of the Royal Commission in 1868, the Naturalisation Act, 1870, and the British Nationality and Status of Aliens Act, 1914 (§ 13), fully admit the right of expatriation However, a person about to be naturalised in Great Britain is often expected to produce a certificate of release from his nationality of origin See Fraser in *Grotius Society*, 16 (1931), p 85

[5] For a survey of the practice of States see *League of Nations, Conference for the Codification of International Law, Bases of Discussion*, I (Nationality), pp 36 44 See also, for a valuable account, Hackworth, III § 242, Hall, § 71

international enactment It would do away with a frequent cause of international friction arising from the determination of the State of origin to treat as its nationals persons naturalised in a foreign country.[1] No important interest of States militates against the full recognition of the right of expatriation in time of peace The provisions of the Hague Convention of 1930 on certain questions relating to the Conflict of Nationality Laws touch only upon the fringe of the problem and, by contrast, tend to emphasise the shortcomings of the existing position [2]

III

MODES OF ACQUIRING AND LOSING NATIONALITY

Vattel, i §§ 212 219—Hall, §§ 67 72—Westlake, i pp 220 227—Lawrence, §§ 94, 95—Halleck, i pp 430-433—Fenwick, pp 165 175—Moore, iii §§ 372-473—Hackworth, iii §§ 221, 222, 243 253—Taylor, §§ 176-183—Walker, § 19—Bluntschli, §§ 364 373—Hartmann, § 81—Heffter, § 59—Stoerk in *Holtzendorff*, ii pp 592 630—Gareis, § 55—Liszt, § 19—Ullmann, §§ 110, 112—Fauchille, §§ 417 432—Despagnet, §§ 318 327—Pradier Fodéré, iii §§ 1646-1691—Rivier, i pp 303-306—Calvo, ii §§ 541-654, vi §§ 92-117—Martens, ii §§ 44-48—Fiore, *Code*, §§ 665-674—De Louter, i pp 265 268—Cruchaga, §§ 346-371— Keith's Wheaton, pp 296 306—Baty, pp 351 364—Harvard Draft Convention (and Comment), *A J*, 23 (1929), April, Special Number, 24 38—Foote, *Private International Law* (5th ed, 1925), pp 1 76—Dicey, pp 156 198—Westlake, *Private International Law* (7th ed, 1925), pp 365 378—Cockburn, *Nationality* (1869)—Martitz, *Das Recht der Staatsangehorigkeit im internationalen Verkehr* (1885)—Cogordan, *La nationalité*, etc (2nd ed, 1890), pp 21-113, 317-398—Lapradelle, *De la nationalité d'origine* (1893)—Berney, *La nationalité à l'Institut de Droit International* (1897)—Bisocchi, *Acquisto e perdita della nazionalita*, etc (1907)—Sieber, *Das Staatsbürgerecht im internationalem Verkehr*, 2 vols (1907)—Lehr, *La nationalité dans les principaux états du globe* (1909), and in *R I*, 2nd ser, 10 (1908), pp 285, 401, and

[1] For many instances see Moore, iii §§ 431-469 And see *ibid*, ii §§ 317-320 on the British claim to impress seamen naturalised in the United States and on the origins of the War of 1812

[2] Article 6 of the Convention lays down that, without prejudice to the faculty of States to accord wider rights of renunciation of nationality, a person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorisation of the State whose nationality he desires to surrender This, somewhat nominal, undertaking is rendered more substantial by the provision that the authorisation may not be refused in the case of a person who has his habitual and principal residence abroad, 'if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied' Article 7 of the Convention deals with expatriation permits with the view to avoiding statelessness if, after the expatriation permit has been granted, the intended new nationality does not materialise

525—Van Pittius, *Nationality within the British Commonwealth of Nations* (1930)—Lessing, *Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit* (1937)—Mervyn Jones, *British Nationality Law and Practice* (1947)—Borchard, §§ 263-273 and 315 336—Garner in *A J*, 19 (1925), pp 547-553—Holdsworth in *Revue d'histoire du droit*, vol iii (1921) pp 175-214—Leibholz in *Z o V*, i (1929), pp 99 103—Scott in *A J* 24 (1930), pp 58 64—Philipse in *Nordisk T A*, 2 (1931), pp 85-94 Summaries of the law relating to nationality and naturalisation will be found in the following official reports Cmd 7027 of 1893, Cmd 1771 of 1922, and Cmd 2852 of 1927, and (in tabular form) in Magnus, *Tabellen zum internationalen Recht*, ii, *Staatsangehörigkeitsrecht* (1926) And see in particular *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* Edited by Flournoy and Hudson (1929) As to the United States of America see particularly Hyde, i §§ 343 371, and Hershey, §§ 224 236 As to the new French Law of 1927 see Valery, *La nationalité française, commentaire de la loi du 10 août 1927* (1927), Allemès in *Law Quarterly Review*, 50 (1934), pp 243 259 As to Soviet Russia see Champcommunal in *Revue de droit international privé* (1924), pp 321 366, Makarov in *Ostrecht*, ii (1926), pp 3 34, and Sandifer in *A J*, 29 (1935), pp 261 278 And see the Reports of the Committee on Nationality presented to the Imperial Conference of 1926, Cmd 2769 Appendix VII and of 1937 Summary of Proceedings, Cmd 5482 (1937)

Five Modes of Acquisition of Nationality

§ 297 Although it is at present for Municipal Law to determine who is, and who is not, a subject of a State,[1] it is nevertheless of interest to the theory of the Law of Nations to ascertain how nationality can be acquired according to the Municipal Law of the different States The reason of the thing presents five possible modes of acquiring nationality, and, although no State is obliged to recognise all five, nevertheless all States practically do so. They are birth, naturalisation, reintegration, subjugation, and cession

Acquisition of Nationality by Birth

§ 298. The first and chief mode of acquiring nationality is by birth, indeed, the acquisition of nationality by another mode is exceptional, since the vast majority of mankind acquires nationality by birth, and does not change it afterwards But no uniform rules exist according to the Municipal Law of the different States concerning this matter[2] Some States, such as Germany, have adopted the rule that parentage alone is the decisive factor,[3] so that a

[1] Except in the cases mentioned in § 293

[2] For a comparative study of the laws of various countries see Sandifer in *A.J*, 29 (1935), pp 248 261

[3] *Jus sanguinis* The French Decree of October 19, 1945, recognises to a large extent the *jus soli* as an additional means of acquiring nationality see Plaisant in *R G*, 50 (1946), pp 48 66

child born of their subjects became *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother Other States, such as Argentina, have adopted the rule that the territory on which birth occurs is exclusively the decisive factor [1] According to this rule, every child born on the territory of such State, whether the parents be citizens or aliens, becomes a subject of such State, whereas a child born abroad is foreign, although the parents may be subjects Again, other States, such as Great Britain [2] and the United States, have adopted a

[1] *Jus soli*

[2] The Common Law of England concerning nationality has several times been altered by statute The first two sub sections of Section 1 of the British Nationality and Status of Aliens Act, 1914, as amended in 1918 and 1922, are as follows

1 —(1) The following persons shall be deemed to be natural born British subjects, namely (*a*) Any person born within His Majesty's dominions and allegiance, and (*b*) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either— (i) his father was born within His Majesty's allegiance, or (ii) his father was a person to whom a certificate of naturalisation had been granted, or (iii) his father had become a British subject by reason of any annexation of territory, or (iv) his father was at the time of that person's birth in the service of the Crown, or (v) his birth was registered at a British consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August, nineteen hundred and twenty two, and (*c*) Any person born on board a British ship whether in foreign territorial waters or not, Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject unless within one year after he attains the age of twenty one, or within such extended period as may be authorised in special cases by regulations made under this Act—(i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act, and (ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly

(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

The latter provision is in marked contrast with the law of the United States See Hackworth, iii p 10 The law of the United States differs also from English law in the important detail that a person born on a United States vessel of alien parents does not acquire the nationality of the United States *Lam Mow* v *Nagle*

mixed principle, since, according to their Municipal Law, not only children of their subjects born at home or abroad [1] become their subjects, but also such children of alien parents as are born on their territory

Acquisition of Nationality through Naturalisation

§ 299 The most important mode of acquiring nationality besides birth is that of naturalisation in the wider sense of the term Through naturalisation, an alien by birth acquires the nationality of the naturalising State According to the Municipal Law of the different States naturalisation may take place through six different acts—namely, (1) marriage,[2]

(1928) 24 F (2d) 316, Hackworth, in p 11 The British Nationality and Status of Aliens Act, 1943, introduced, among others, important changes with regard to registration in a Consulate of a birth abroad In particular, while Section 1 (2) (a) of the Act of 1943 provides for registration as of right within one year of the birth, paragraph (b) enables the Secretary of State to sanction registration after this period without any limitation of time For an analysis of this and other provisions of the Act see *B Y*, 21 (1944), pp 176-178 The Act of 1943 clarifies, in Section 2, the position with regard to the capacity of a British father to transmit British nationality Henceforth the child of a British father born in a British protectorate or mandated territory or in a country where at the time of birth His Majesty exercised extraterritorial jurisdiction over British subjects (as in China or Egypt) is placed in the same position from the point of view of his nationality and his capacity to transmit British nationality to his children as if he had been born on British territory

See Hall, *Foreign Powers and Jurisdiction* (1894), § 14, Edwards and Sargant in *J C L*, New Ser, 14 (1914), pp 314 336, Wilkinson in *Law Magazine and Review*, 40 (1915-1916), pp 187-195, Piggott in *Grotius Society*, 4 (1919), pp 35 42, McNair, *Legal Effects of War* (2nd ed, 1944), pp 12 17 The United States Nationality Act of 1940 provides, in Section 201 'The following shall be nationals and citizens of the United States at birth (a) A person born in the United States, and subject to the jurisdiction thereof . ' The weight of opinion seems to be that a person born on Ellis Island, while his parents await decision as to admission to the United States, acquires citizenship of the United States Hackworth, in p 10 See also Levy in *A J*, 39 (1945), pp 13 19, on acquisition of nationality in the Emergency Refugee Shelter established by the United States at Fort Ontario during the Second World War For a survey of the salient features of that Act see Hyde in *A J*, 35 (1941), pp 314 319

[1] But the illegitimate child, born out of His Majesty's dominions and not on board a British ship, of a British mother, does not become at birth a British subject, see note in *L Q R*, 44 (1928), pp 151 153 As to the effect of legitimation see below, § 299

[2] The Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws (see above, § 35) regulates in Articles 8 11 some aspects of the nationality of married women It provides in Article 8 that if by her law the wife loses her nationality on marriage with a foreigner, this result shall be conditional on her acquiring the nationality of the husband A similar provision is made, in Article 9, in case of loss of nationality of the wife in consequence of a change of nationality by her husband Article 10 lays down that naturalisation of the husband during marriage shall not involve a change of nationality of the wife except with her consent The Conference also recommended to States the study of the possibility of introducing into their law the principle of equality of the sexes, in particular from the point of view of leaving the

nationality of the wife unaffected by marriage or change of nationality of her husband, except with her own consent These provisions and recommendations were not regarded by various women's organisations as giving due recognition to the principle of equality of the sexes But the Thirteenth Assembly of the League recommended in 1932 the members of the League to sign the Convention or to introduce the necessary legislative changes in case they had signed it already See Hudson in *A J*, 27 (1933), pp 117-122, for a survey of the history of this question before the League In 1937 this Convention entered into force See above, p 59, n 3 Great Britain, in the British Nationality and Status of Aliens Act, 1933 (23 and 24 Geo 5, c 49), introduced important changes in her law giving effect to the principles of Articles 8, 9, and 10 of the Convention as outlined above. It is also provided that when a person is naturalised after 1933 his wife will not become a British subject unless within twelve months she makes a declaration to that effect Finally, where an alien is a national of a State at war with Great Britain, his wife, if British by birth, may make a declaration that she desires to become a British subject, and the Secretary of State may thereupon in his discretion grant her a certificate of naturalisation In 1936 Australia and New Zealand passed legislation under which a woman who prior to her marriage was a British subject, but ceased to be a British subject by reason of her marriage to an alien, may retain in those Dominions the political and other rights and liabilities of a British subject See Imperial Conference, 1937, *Summary of Proceedings*, Cmd 5482 (1937), pp 27, 28 In the United States, the 'Cable Act' of September 22, 1922, had already abolished the rule that an American woman who married an alien lost her American nationality (the exception relating to women marrying aliens ineligible for citizenship, for example persons of Japanese, Chinese, or Indian nationality, was abolished by an Act of March 3, 1931) See also the Convention on the Nationality of Women adopted by the Seventh Pan-American Conference in December 1933, and consisting in effect of a single Article providing that as regards nationality there shall be no distinction based on sex in the legislation or practice of the contracting parties *A J*, 28 (1934), Suppl, pp. 61, 62

As to the nationality of married women generally see the following Schuster in *International Law Association's Thirty-second Report* (1924), pp 9 25, Report and discussion in the Association's *Thirty third Report* (1925), pp 26 53, Crane in *J C L*, 3rd ser, 5 (1923), pp 47-51, and 7 (1925), pp 53 60 (as to the American 'Cable Act' of 1922), G G Phillimore, *ibid*, 5 (1923), pp 299 302, Macmillan, *ibid*, 7 (1925), pp 142 154, Garner in *B Y*, 1923-1924, pp 169-172, Reeves in *A J*, 17 (1923), pp 97-100, Hill, *ibid*, 18 (1924), pp 720 736, Hazard in *A S Proceedings*, 1926, pp 84 89, Thao, *De l'influence du mariage sur la nationalité de la femme* (1929), Calbairec, *Traité de la nationalité de la femme mariée* (1929), Muller Sprenger, *Die Staatsangehörigkeit der verheirateten Frau* (1930), Sauser Hall, *La nationalité de la femme mariée* (1933), Waltz, *The Nationality of Married Women* (1936), Llewellyn Jones in *Grotius Society*, 15 (1929), pp 121-136, Harrison in *New York University Law Quarterly Review*, 9 (1931-1932), pp 445 462, Scott and Lapradelle in *Annuaire*, 37 (1932), pp 1-25, Bicknell in *Grotius Society*, 20 (1934), pp 106 122, Makarov in *Hague Recueil*, vol 60 (1937) (II), pp 113 234 In *Casbender* v *Attorney General* [1922] 1 Ch 232, 2 Ch 850, it was held that an Englishwoman marrying an alien enemy in time of war became an alien enemy

By the United States 'Cable Act' of 1922 an alien woman who after the Act came into force marries an American citizen, or whose husband becomes an American citizen by naturalisation, does not thereby acquire American citizenship, but she may be naturalised after residence in the United States for one year instead of the usual five years The Nationality Act of 1940 provides for an expeditious method of naturalisation for a person marrying a citizen of the United States 'if such person shall have resided in the United States

(ii) legitimation,[1] (iii) option, (iv) acquisition of domicile, (v) appointment as Government official, (vi) grant on application This last kind of naturalisation is naturalisation in the narrower sense of the term, it is the most important for the Law of Nations, and, whenever one speaks of naturalisation pure and simple, such naturalisation through direct grant on application is meant; it will be discussed in detail below, §§ 303-307.

Acquisition of Nationality through Redintegration

§ 300. The third mode of acquiring nationality is by so-called redintegration or resumption Such individuals as have been natural-born subjects of a State but have lost their original nationality through naturalisation abroad or for some other cause, may recover their original nationality on fulfilling certain conditions This is called redintegration or resumption, in contradistinction to naturalisation, the favoured person being redintegrated and resumed into his original nationality [2]

in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalisation upon compliance with all requirements of the naturalisation Law' Section 311, 54 Stat 1145 See Garner in *B Y*, 1923-1924, pp 169-172, Hershey, pp 361 362, Hyde in *A J*, 24 (1930), pp 742 745, Hover, *ibid*, 26 (1932), pp 700-719, Hackworth, in pp 84 88 As to the French Law of 1927 on this subject see Garner in *A J*, 22 (1928), pp 381, 382, and Valery, *La nationalité française, commentaire de la loi du 10 août 1927* (1927), pp 13 *et seq*

[1] It is believed that the Legitimacy Act, 1926, has not had the effect of adopting this rule into English law and naturalising *ipso facto* the alien illegitimate child born abroad of a British father (whether, it seems—see above, § 298 (n 2)—the mother was a British subject or an alien) upon that child's subsequent legitimation It is unlikely that an Act which, like the Legitimacy Act, 1926, is confined in its operation to England and Wales could thus enlarge an enactment such as the British Nationality and Status of Aliens Act, 1914 (as amended in 1918 and 1922), which has imperial scope, and could naturalise an alien as it were by a side wind A decision of the House of Lords on appeal from the Court of Session in Scotland (where legitimation has prevailed from early times), *Shedden* v *Patrick* (1854) 1 Macqueen 535, tends strongly to confirm the view submitted, see note (*e*) on p 166 of Dicey See also *Abraham* v *Attorney General* [1934] P 17, *Annual Digest*, 1933-1934, Case No 105, and Mann in *L Q R*, 57 (1941), pp 112 141 It may perhaps be open to an alien who has obtained a certificate of British naturalisation to apply under Section 5 (1) of the British Nationality, etc, Act, 1914, for the inclusion in his certificate of a child born of him abroad out of wedlock and legitimated by the marriage of the father, while domiciled in England or Wales, to the mother

[2] Thus, according to § 12 (2) of the British Nationality and Status of Aliens Act, 1914, any child who, under § 12 (1) of that Act, has ceased to be a British subject through its father ceasing to be a British subject, may, within one year after attaining its majority, by a declaration resume its original British nationality Again, according to § 2 (5), a woman who was a British subject previously to her marriage

Acquisition of Nationality through Subjugation and Cession

§ 301. The fourth and fifth modes of acquiring nationality are by subjugation after conquest and by cession of territory, the inhabitants of the subjugated and the ceded territory acquiring *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory These modes of acquisition of nationality are modes settled by the customary Law of Nations, details have been given above, §§ 219 and 240

Five Modes of losing Nationality

§ 302 Although it is at present left in the discretion [1] of the different States [2] to determine the grounds on which individuals lose their nationality, it is nevertheless of interest to the theory of the Law of Nations to take notice of these grounds Five modes of losing nationality must be stated to exist according to the reason of the thing, although all five are by no means recognised by all the States. These modes are release, deprivation, expiration, renunciation,[3] and substitution

(1) *Release* —Some States, such as Germany, give their citizens the right to ask to be released from their nationality. Such release, if granted, denationalises the released individual

(2) *Deprivation* —For example, according to the Municipal Law of some States, as, for instance, Italy, the fact that a citizen enters into foreign civil or military service without permission of his sovereign deprives him of his nationality After the First World War Soviet Russia, Italy, Turkey, Germany, and some other countries [4] passed decrees which had the effect of denationalising considerable numbers of their subjects on the ground of uninterrupted residence abroad, disaffection, or for other reasons [5]

to an alien, and whose husband has died or whose marriage has been dissolved, may immediately upon the happening of such an event apply for a certificate of naturalisation re-admitting her to British nationality

[1] See, however, below p 614, n 5

[2] For a comparative study of the laws of various countries see Sandifer in *A J*, 29 (1935), pp 261 278

[3] The term 'renunciation' has been substituted for 'option'

[4] Such as Poland in 1938, Roumania in 1938 and 1941, and France in 1940

[5] Trachtenberg in *Répertoire*, v pp 338 350, Fischer Williams in *B Y*, 8 (1927), pp 45 61, Stauffenberg in *Z o V*, 4 (1934), pp 261 276, Scelle in *Revue critique de droit international*, 29 (1936), pp 63 76, Preuss in *Georgetown Law Review*, vol 22, 1934, pp 250 276, Abel in *Modern Law Review*, 6 (1942), pp 57 68 On the question whether these decrees release the State in question from the international duty of receiving back its own subjects when expelled by other States see below, § 326 As to revocation of British naturalisation see below, § 307

(3) *Expiration* —Some States have provided by legislation that citizenship expires in the case of such of their subjects as have left the country and stayed abroad a certain length of time [1]

(4) *Renunciation* —For example, some States—Great Britain for instance [2]—which declare a child born of foreign parents on their territory to be their natural-born subject, although he becomes at the same time, according to the Municipal Law of the home State of the parents, a subject of such State, give the right to such child to make, after coming of age, a declaration that he desires to cease to be a citizen [3] Such declaration of alienage creates *ipso facto* the loss of nationality

(5) *Substitution* —According to the law of many States, as, for instance, Great Britain, the nationality of their subjects is extinguished *ipso facto* by their naturalisation abroad, be it through marriage,[4] grant on application, or otherwise, provided that, in the case of a British subject, he is in the country of which he acquires the nationality, that he is not under any disability, and that the acquisition is voluntary [5] Some States, however, do not object to their citizens acquiring another nationality besides that which they already possess

[1] For instance, the since repealed German Nationality Law of June 1, 1870 The effect of § 2 of the United States of America Act of March 2, 1907, is far from clear see Hyde, 1 § 384, and Hershey, § 235 As to denationalisation for political reasons see Preuss in *R I F*, 4 (1937), pp 10-19, 240 254, and in *American Political Science Quarterly*, 36 (1942), pp 701 710 See also *Columbia Law Review*, 44 (1944), pp 736 751 English courts will not recognise in time of war any change of nationality brought about by a decree of an enemy State which purports to turn any of its subjects into a stateless person or a subject of a neutral State *The King* v *Home Secretary Ex parte L* [1945] K B 7 And see for comment thereon Abel in *Modern Law Review*, 8 (1945), pp 77 80 For a different, though somewhat hesitating, attitude of American courts see *United States ex rel Schwarzkopf* v *Uhl* (1943), 137 F 2*d*, 898

[2] See British Nationality and Status of Aliens Act, 1914, § 14 Section 7 of the corresponding Act of 1943 amends Section 14 of the Act of 1914 by providing that declarations of alienage are not valid until they have been registered at the Home Office and that in time of war the Secretary of State may, at his discretion, refuse the registration of a declaration of alienage See also Otten, *Der Verzicht auf die Staatsangehörigkeit eine rechtsvergleichende Studie* (1934)

[3] But this right cannot be exercised in time of war so as to make the declarant an enemy, *Rex* v *Commanding Officer*, etc (1917), 33 T L R 252

[4] See above, § 299

[5] See § 13 of the Act of 1914, and below, § 306

Just as naturalisation abroad *ipso facto* extinguishes the nationality of their subjects according to the Municipal Law of some States, so, according to International Law, through subjugation or cession the inhabitants of the conquered or ceded territory become subjects of the State which annexes the territory, and their former nationality is extinguished by substitution of the new [1]

IV

NATURALISATION IN ESPECIAL

Vattel, i § 214—Hall, §§ 71, 71*—Westlake, § i pp 232 237—Lawrence §§ 95, 96—Phillimore, i §§ 325 332—Halleck, i pp 432 443—Taylor, §§ 181, 182—Walker, § 19—Wharton, ii §§ 173-186—Moore, iii §§ 377-380—Hackworth, iii §§ 223 241—Wheaton, § 85—Hershey, §§ 230 234—Hyde, i §§ 350 371—Bluntschli, §§ 371, 372—Ullmann, §§ 110, 111—Pradier-Fodéré, iii §§ 1656-1659—Fauchille, § 422—De Louter, i pp 268 271—Cruchaga, §§ 372 374—Calvo, ii §§ 581 646—Martens, ii §§ 47, 48—Keith's Wheaton, pp 307 318—Baty, pp 364 369—Cockburn, *Nationality* (1869), ch 2—Stoicesco, *Étude sur la naturalisation* (1875)—Folleville, *Traité de la naturalisation* (1880)—Cogordan, *La nationalité*, etc (2nd ed , 1890), pp 117-282, 307 313—Delécaille, *De la naturalisation* (1893)—Henriques, *The Law of Aliens*, etc (1906), pp 91 121—Piggott, *Nationality and Naturalisation*, etc , 2 vols (1907)—Baldassarri, *La naturalizzazione* (1912)—Borchard, §§ 228 252, 263 272—Keith, *Responsible Government in the Dominions* (2nd ed , 1928), ii pp 1041 1048—Mervyn Jones, *op cit* (at p 585), pp 158 177—Hart, Edwards, Sargant, and Phillimore in *J C L*, New Ser , 2 (1900), pp 11-26 , 14 (1914), pp 314 336 , and 17 (1917), pp 165 171—Wilkinson in *Law Magazine and Review*, 40 (1915 1916), pp 187 195—Edwards in *L Q R* , 30 (1914), pp 433-447—Flournoy in *Yale Law Review*, 31 (1922), pp 702 719, 848-868—Randall in *L Q R* , 40 (1924), pp 18 30—Hackworth in *A S Proceedings*, 1925, pp 56-69—Hazard, *ibid* , 1926, pp 67-84—Butler and Maccoby, *The Development of International Law* (1928), ch x —*Harvard Draft Convention* (and Comment), *A J* , 23 (1929), April, Special Number, pp 41-76—Triepel in *Z o V* , 1 (1929), pp 191 196.

Conception and Importance of Naturalisation

§ 303 Naturalisation in the narrower sense of the term—in contradistinction to naturalisation *ipso facto* through marriage, legitimation, option, domicile, and Government office (see above, § 299)—must be defined as reception of an alien into the citizenship of a State through a formal act

[1] See above, § 301 Concerning the option sometimes given to inhabitants of ceded territory to retain their former nationality, and as to changes of nationality due to the Treaties of Peace after the First World War see above, § 219

on application of the favoured individual International Law does not at present provide any rules for such reception, but it recognises the natural competence of every State, as a sovereign, to increase the number of its subjects through naturalisation [1]

Object of Naturalisation

§ 304 The object of naturalisation is always an alien Some States will naturalise such aliens only as are stateless because they never have been citizens of another State or because they have renounced, or have been released from, or deprived of, the citizenship of their home State. But other States naturalise also such aliens as are, and remain, subjects of their home States Most States, such as Great Britain,[2] naturalise such persons only as have taken up their domicile in their country, have been residing there for some length of time, and intend permanently to remain in their country And according to the Municipal Law of many States, the naturalisation of a married man includes that of his wife and of his children under age [3] But although every alien may be naturalised, no alien has, according to the Municipal Law of most States, a claim to become naturalised, naturalisation being a matter of discretion for the Government, which can refuse it without giving any reasons.[4]

Conditions of Naturalisation

§ 305 If granted, naturalisation makes an alien a citizen But it is left to the discretion of the naturalising State to grant naturalisation upon any conditions it likes [5] And it must be specially mentioned that naturalisation need not

[1] In *Apostolidis* v *Turkish Government* the Franco Turkish Mixed Arbitral Tribunal held, in May 1928, that the effects of naturalisation granted by one State ought to be recognised by other States *Annual Digest*, 1927 1928, Case No 207

[2] An exception being made in the case of persons employed in the service of the British Government

[3] See § 5 (1) of the British Nationality and Status of Aliens Act, 1914, as to the inclusion of minor children in the certificate of naturalisation at the discretion of the Secretary of State

[4] Some Governments discriminate for this purpose between aliens of different races, *e g* United States of America see Garner in *J C L*, 3rd ser, 6 (1924), pp 210-212, Hershey, § 234, Hazard in *R I*, 3rd ser, 12 (1931), pp 700 736, 13 (1932), pp 131-183 As to British Columbia see Angus in *Canadian Bar Review*, 9 (1931), pp 1 12

[5] According to Section 303 of the Nationality Act of 1940 the right to become a naturalised citizen of the United States is limited to 'white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere' However, subject to these and various other limitations, the proceedings following upon a petition for naturalisation are of a judicial nature Unlike in Great Britain, the grant of naturalisation is not a matter

give an alien absolutely the same rights as are possessed by natural-born citizens Thus according to Article 2 of the Constitution of the United States of America a naturalised alien can never be elected President However, according to § 3 of the British Nationality and Status of Aliens Act, 1914, a naturalised British subject is entitled (subject to the provisions of this Act) to all rights, powers, and privileges, and is subject to all obligations, duties, and liabilities, to which a natural-born British subject is entitled or subject [1]

Effect of Naturalisation upon Previous Citizenship

§ 306 Since the Law of Nations does not at present comprise any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter for the Municipal Law of the States concerned Some States, like Great Britain,[2] have legislated that any one of their subjects becoming naturalised abroad thereby loses his previous nationality [3], but other States have not done

of administrative discretion See also, as to the French Nationality Law of 1927, Garner in *A J*, 22 (1928), p 381, Louis Lucas, *La nationalité française* (1929) And see the interesting decision of the Supreme Court of the United States, given by a bare majority, to the effect that professed conscientious objectors refusing to subscribe to the part of the oath pledging them to defend the United States against domestic and foreign enemies are ineligible for naturalisation *United States* v *Schwimmer* (1929) 279 U S 644, *Macintosh* v *United States* (1931) 283 U S 605, *Bland* v *United States* (1931) 283 U S 636—all reported in *Annual Digest*, 1929 1930, Cases Nos 136 138 For comment thereon see *A J*, 23 (1929), pp 626 632, Hazard, *ibid*, pp 783 808 On the facilitation of naturalisation in the United States through military service see R R Wilson in *A J*, 36 (1942), pp 454 460

[1] Except that in certain circumstances (see below, § 307) the British Government may deprive a naturalised British subject of his British nationality, which it cannot do in the case of a natural born British subject

[2] Up to the Naturalisation Act of 1870, Great Britain upheld the rule *nemo potest exuere patriam* Its antithesis is the rule *ne quis invitus civitate mutetur, neve in civitate maneat invitus* (Cicero, *pro Balbo*, c 13, § 31, see Rattigan, *Private International Law* (1895), p 29, No 21)

[3] § 13 of the Act of 1914, but not in a State at war with Great Britain (*R* v *Lynch* [1903] 1 K B 444), in which case the act of becoming naturalised amounts to treason, nor can a person holding British and another nationality, and entitled in the normal course to divest himself of his British nationality by a declaration of alienage, make such a declaration when Great Britain is at war so as 'to become solely the subject of an enemy State' (Ex parte *Freyberger* [1917] 2 K B at p 139), nor (possibly) so as to become solely the subject of a neutral State (*Vecht* v *Taylor* (1917) 116 L T 446), nevertheless, a *bona fide* marriage between a British woman and an enemy national in time of war is valid and not criminal, and operates under § 10 of the Act of 1914 to cause her to lose her British and acquire enemy nationality *Fasbender* v *Attorney General* [1922] 2 Ch 850 The United States Nationality Act of 1940 lays down expressly, in Section 401 (*a*), that the naturalisation of an adult person in a foreign country, upon his or her application, entails immediate loss of American nationality

this. Be that as it may, there can be no doubt that a person who is naturalised abroad, and temporarily or permanently returns to the country of his origin, can be held responsible [1] for all acts and omissions there at the time before his naturalisation abroad The British Nationality and Status of Aliens Act, 1914, expressly provides, in § 16, that a British subject who ceases to be a British subject shall not thereby be discharged from any obligation, duty, or liability in respect of any act done before he ceased to be a British subject

Naturalisation in Great Britain

§ 307 The present law of Great Britain [2] concerning naturalisation [3] is mainly contained in the British Nationality and Status of Aliens Act, 1914, as amended by the British Nationality and Status of Aliens Acts, 1918 and 1933

Grant of Certificate of Naturalisation —The applicant must satisfy certain conditions as to length of residence in the King's dominions or of service of the Crown, as to character and knowledge of the English language, and as to his intentions with regard to future residence or service of the Crown [4] The grant of a certificate of naturalisation is

[1] Many instructive cases concerning this matter are reported by Wharton, II §§ 180, 181, and Moore, III §§ 401 407 See also Hall, § 71, where details concerning the practice of many States are given with regard to their subjects naturalised abroad, and Borchard, § 234, and the case of *Lucien Alibert* (1852) in *United States Documents, 1859 1860*, II 176, and Pitt Cobbett, *Leading Cases on International Law*, I (4th ed , 1922), p 197 On the position, in the United States, of declarant aliens, *i e* of persons who have applied for naturalisation, see Koessler in *University of Pennsylvania Law Review*, 91 (1942), pp 321 338

[2] See McNair in *L Q R* , 35 (1919), pp 216 223, and *Legal Effects of War* (2nd ed , 1944), pp 17-24 As regards naturalisation in the United States of America see Moore, III §§ 381-389 , Hackworth, III §§ 223 241 , Dyne, *Naturalisation in the United States* (1907), and Hershey, §§ 233, 234 See also the Convention adopted by the Seventh Pan-American Conference in December 1933 *A J* , 28 (1934), Suppl , pp 63, 64

[3] Not to be confused with naturalisation proper is naturalisation through *denization* by means of letters patent under the Great Seal It pressly provided by § 25 of the British Nationality and Status of Aliens Act, 1914, that nothing in this Act shall affect the grant of letters of denization by His Majesty This way of making an alien a British subject is based on a very ancient practice (see Hall, *Foreign Powers and Jurisdiction*, § 22) which, though still lawful, has not been used for many years and is not likely to be resorted to Denization required no previous residence in the King's dominions The status of most denizens was inferior to that of naturalised persons see Dicey, pp 157, 158

[4] Section 2 of the Act as amended by the Act of 1918 is as follows

2 —(1) The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the

entirely in the discretion of the Home Secretary The naturalisation of a man includes his wife,[1] and, upon his application, the Home Secretary may include in the certificate the name of any child who is a minor; within one year of attaining his majority (twenty-one years) that child may make a declaration of alienage and cease to be a British subject [2]

Secretary of State—(*a*) that he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application, and (*b*) that he is of good character and has an adequate knowledge of the English language, and (c) that he intends if his application is granted either to reside in His Majesty's dominions or to enter or continue in the service of the Crown

(2) The residence required by this section is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application

(3) The grant of a certificate of naturalization to any such alien shall be in the absolute discretion of the Secretary of State, and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision

(4) A certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance

(5) In the case of a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the requirements of this section as to residence shall not apply, and the Secretary of State may in any other special case, if he thinks fit, grant a certificate of naturalization, although the four years' residence or five years' service has not been within the last eight years before the application

(6) For the purposes of this section a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom

And see above, § 299 (n), with regard to the naturalisation of married women according to the Act of 1933 As to Nationality and Naturalisation Laws of certain foreign countries see 'Misc. No 3 (1893)' [Cmd 7027], 'Misc No 7 (1922)' [Cmd 1771], 'Misc No 2 (1927)' [Cmd 2852], 'Misc No 7 (1928)' [Cmd 3221], and 'Misc No 14 (1931)' [Cmd 3907], 'Misc No 4 (1935)' [Cmd 5028]

The British Nationality and Status of Aliens Act, 1943, provides, in Section 4, for the naturalisation of French subjects who served with the Allied forces during the Second World War For an undertaking to that effect given by the British Minister to General de Gaulle in 1940 see France No 2 (1940) Cmd 6220

[1] Automatically and without the inclusion of her name in his certificate see § 10 of the Act of 1914 As to the effect of naturalisation upon the nationality of children see *In re Carlton* (1945) 61 T L R 332

[2] Section 5 of the Act of 1914

Revocation of Certificate of Naturalisation—Until January 1, 1915, no provision existed for the revocation of a certificate of naturalisation, but the Acts of 1914 and 1918 enable the Home Secretary in his discretion (but, in certain cases, after an inquiry of a judicial character) to revoke a certificate of naturalisation upon a variety of grounds which may be summarised as follows (i) the use of fraud, active, or passive, in obtaining the certificate, (ii) disaffection or disloyalty to His Majesty, (iii) intercourse with an enemy during war, (iv) within five years of the date of the grant of the

Imperial and Local Naturalisation —A certificate granted by the Home Secretary in accordance with the provisions above mentioned confers a kind of naturalisation which is already nearly imperial in scope and will probably in course of time become entirely so At present the naturalisation conferred by it is operative throughout all parts of the British Empire,[1] except the Irish Free State, which by its Nationality and Citizenship Act, 1935, repealed the British Acts of 1914 and 1918 in so far as they were ever in force in the State [2] Moreover, naturalisation similar in extent to that created by a certificate granted by the Home Secretary is conferred by a certificate granted by the Government of 'any British Possession,' provided that, except in the case of certificates granted by the Governments of India, Canada, Australia, New Zealand, South Africa, Newfoundland, and the Irish Free State, the certificate must in each case receive the sanction of the Secretary of State for the Colonies In so far as certificates fail to confer naturalisation which is imperial in scope, their operation is local and is confined to the part of the British Empire which granted it and those other parts which recognise it [3], nevertheless, as has already been stated,[4] for all international purposes the holder of such a certificate has British nationality and will receive British diplomatic protection

certificate, the fact of being sentenced by a British Court to imprisonment for certain periods or to a fine of one hundred pounds, (v) being found to be not 'of good character' at the date of the grant of the certificate, (vi) absence from the King's dominions for seven years except for certain good reasons, (vii) that he remains the subject of a State with which Great Britain may be at war See Sections 7 and 7A of the Act of 1914 as amended in 1918 As to the United States see Hazard in *A J*, 23 (1929), pp 50 55 and, with regard to denationalisation, see below, § 313*a*

[1] See Dicey, pp 183, 184, McNair, *Legal Effects of War* (2nd ed, 1944), pp 21, 22, Keith, *op cit*, II p 1043, and Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp 47 71 See also the Report of the Committee on Nationality submitted to the Imperial Conference of 1926, Cmd 2769 Appendix VII

[2] On the effect, which is controversial, of that Act see Keith in *J C L*, 3rd ser, 17 (1935), pp 115, 116 New Zealand, which for a time refused to adopt Part II of the Imperial Act, did so in an Act which became law in 1929 (No 58 of 1928)

[3] See *Markuald* v *Attorney General* [1920] 1 Ch 348, *Hanau* v *Hanau*, decided in November 1927 by the Anglo German Mixed Arbitral Tribunal *Annual Digest*, 1927-1928, Case No 23

[4] See above, § 293 See also Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940), Hancock in *The Legal Status of Aliens in Pacific Countries* (ed. by MacKenzie, 1937), pp 88-103

V

DOUBLE NATIONALITY AND STATELESSNESS

Hall, §§ 71, 74—Westlake, I pp 228 232—Lawrence, § 96—Halleck, I pp 440 443—Taylor, § 183—Wheaton, § 85 (Dana's Note)—Moore, III §§ 426 430—Hackworth, III § 255—Hyde, I §§ 372 375—Fenwick, pp 183-188—Bluntschli, §§ 373, 374—Hartmann, § 82—Heffter, § 59—Stoerk in *Holtzendorff*, II pp 650 655—Ullmann, § 110—Fauchille, § 422—Pradier-Fodéré, III §§ 1660 1665—Rivier, I pp 304 306—Calvo, II §§ 647 654—Martens, II § 46—Borchard, §§ 11, 253 262—De Louter, I pp 271-274—Leibholz in *Strupp, Wort*, II pp 698, 699—Bodmann in *Archiv für öffentliches Recht*, XII (1897) pp 200 and 317—Kunz, *Die volkerrechtliche Option*, II (1928), pp 290 301, and in *Ostrecht*, II (1928) pp 401-437—Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), pp 131-150—Colanéri, *De la condition des 'Sans patrie'* (1932)—Seckler Hudson, *Statelessness With special reference to the United States* (1934)—Lipovano, *L'apatridie* (1935)—Vishniac, *Legal Status of Stateless Persons* (1945)—Editorial comment in *A J*, 9 (1915), pp 942 948—Baty in *R I*, 3rd ser, 7 (1926), pp 622 632—Flournoy, *Yale Law Journal*, 31 (1922), pp 702 719, 848 868, and in *A S Proceedings*, 1925, pp 69 78—Audinet in 52 *Clunet* (1925), pp 882 896—*International Law Association's Thirty third Report* (1925), pp 25 53—Gargas in *Bibliotheca Visseriana*, 7 (1928), pp 1 130—*Répertoire*, IV pp 638-693, and VIII pp 557-574—Bouvé in *A S Proceedings*, 1928, pp 31-50—Becker in *Z V*, 15 (1930), pp 478 518—Vichniac in *Hague Recueil*, vol 43 (1933) (I), pp 119 246—Philonenko in *Clunet*, 60 (1933), pp 1161 1187—Scheltel, *ibid*, 61 (1934), pp 36 69—François in *Hague Recueil*, vol 53 (1935) (III), pp 287-374—Louis-Lucas, *ibid*, vol 64 (1938) (II), pp 5 65—Biscottini in *Rivista*, 32 (1940), pp 379 422—Loewenfeld in *Grotius Society*, 27 (1941), pp 59 112

Possibility of Double and Absent Nationality

§ 308. As the Law of Nations has at present no generally binding rules concerning acquisition and loss of nationality beyond this, that nationality is lost and acquired through subjugation and cession, and as the Municipal Laws of the different States differ in many points concerning this matter, the necessary consequence is that an individual may possess more than one nationality as easily as none at all The points to be discussed here are therefore How double[1] nationality occurs, the position of individuals with double nationality, how statelessness occurs, the position of stateless individuals, and, lastly, means of redress against difficulties arising from double nationality and statelessness.

It must, however, be specially mentioned that the Law

[1] It may be plural nationality

of Nations is concerned with such cases only of double nationality and statelessness as are the consequences of conflicting Municipal Laws of several absolutely different States Such cases as are the consequence of the Municipal Laws of a Federal State, or of a State, different parts of which, as in the case of the British Empire,[1] may enact different legislation on the subject of naturalisation, fall outside the scope of the Law of Nations For, internationally, such individuals appear as subjects of such Federal State or the British Empire, whatever their position may be inside these States

How Double Nationality occurs

§ 309 An individual may possess double nationality knowingly or unknowingly, and with or without intention[2] And double nationality may be produced by every mode of acquiring nationality Even birth can invest a child with double nationality Thus, every child born in Great Britain of German parents acquires at the same time British and German nationality, for such child is British according to British, and German according to German, Municipal Law Double nationality can likewise be the result of marriage Thus, a citizen of the United States of America marrying an Englishman acquires according to British law British nationality, but according to American law she does not now as a rule *ipso facto* lose her American nationality Legitimation of illegitimate children can produce the same effect Thus, the illegitimate child of a German born in England of an English mother is a British subject according to British and German law, but if after the birth of the child the father marries the mother and remains a resident in England, he thereby legitimates the child according to German law, and such child acquires thereby German nationality without losing its British nationality Naturalisation in the narrower sense of the term is frequently a cause of double nationality, since individuals may apply

[1] See above, § 293

[2] The following cases in which double nationality has been discussed may be mentioned Ex parte *Freyberger* [1917] 2 K B 129, *Vecht* v *Taylor* (1917) 116 L T 446, *Kramer* v *Attorney-General* [1923] A C 528, *Baron Frédéric de Born* v *Yugoslav State*, decided on July 12, 1926, by the Yugoslav Hungarian Mixed Arbitral Tribunal *Annual Digest*, 1925-1926, Case No 205, *Barthez de Montfort* v *Treuhander Hauptverwaltung*, decided on July 10, 1926, by the Franco German Mixed Arbitral Tribunal, *ibid*, Case No 206

for, and receive, naturalisation in a State without thereby losing the nationality of their home State [1]

Position of Individuals with Double Nationality

§ 310 Individuals possessing double nationality bear, in the language of diplomatists, the name *sujets mixtes* The position of such 'mixed subjects' is awkward on account of the fact that two different States claim them as subjects, and therefore claim their allegiance In case a serious dispute arises between these two States which leads to war, an irreconcilable conflict of duties is created for these unfortunate individuals. Those who are natural-born *sujets mixtes* in most cases do not know it until they have to face the conflict, and their difficult position is not due to their own fault Each of the States claiming such an individual as a subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject But against third States each of them appears as his sovereign, and it is therefore possible that each of them can exercise its right of protection over him within third States On the other hand, a third State can treat an individual possessing two nationalities as a subject of either of the two States to which he owes allegiance [2] Thus an Austrian by birth who had become naturalised in Chile, but had not thereby lost his Austrian nationality, and who had become resident in England, was compelled to register in England as an enemy alien at the outbreak of the First World War Similarly a subject of two States resident in a third State may be deported by the latter State to either of the former

Hague Codification Conference and Double Nationality

§ 310*a*. The inconveniences and hardships resulting from double nationality became particularly [3] prominent in con-

[1] See below, §§ 310 and 313*a* Peculiar cases of double nationality were made possible by § 10 of the British Nationality and Status of Aliens Act, 1914 (as amended by the Act of 1918), according to which the wife of a British subject who becomes an alien may by a declaration maintain her British nationality, and a British-born wife of an alien who is a subject of a State at war with Great Britain may be allowed to resume British nationality if the Secretary of State is satisfied that this is desirable

[2] But see below, § 310*a*, on the relevant provisions of the Hague Convention of 1930

[3] In 1812, a time when Great Britain still kept to the rule that no natural born British subject could lose his nationality, the impressment

sequence of the changes of nationality arising out of the Peace Treaties of 1919, and this was probably one of the reasons why the Hague Codification Conference of 1930 reached agreement on certain aspects of the matter The Convention on Certain Questions Relating to the Conflict of Nationality Laws (see above, § 35) expressly declares that a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses (Article 3), and that a State may not give diplomatic protection to one of its nationals against a State whose nationality that person possesses (Article 4) Further, the Convention provides that if a person has more than one nationality, he shall, within a third State, be treated as if he had only one , in particular, it is laid down that that third State shall recognise exclusively either the nationality of the State in which he is habitually and principally resident, or the nationality of the State with which he appears in fact to be most closely connected (Article 5) The Convention thus gives effect to what may be called the principle of effective nationality [1] It is laid down that if a person, without any voluntary acts of his own, possesses double nationality, he may renounce one of them with the permission of the State whose nationality he wishes to surrender, but that, subject to the laws of the State concerned, such permission shall not be refused if that person has his habitual residence abroad (Article 6) In a special Protocol Relating to Military Obligations in Certain Cases of Double Nationality [2] it was agreed that if a person of two or more nationalities possesses the effective nationality of one country in the meaning described in Article 5, he shall

of Englishmen naturalised in the United States proved one of the causes of the war between the two countries There were also, for a similar reason, frequent disputes in the nineteenth century between the United States and Prussia For a survey of the various treaties concluded between the United States and other States since 1868 (in which year the so called 'Bancroft conventions' were concluded with the North German Confederation and other German States) in order to regulate conflicting claims to the allegiance of naturalised persons, see Hackworth, III § 256

[1] See Pfeiffer, *Das Problem der effektiven Staatsangehörigkeit im Völkerrecht* (1933)

[2] *A J*, 24 (1930) Suppl , p 201 , Hudson, *Legislation*, v p 374 The Protocol has been ratified, among others, by Great Britain, the United States and Brazil, and has now entered into force

be exempt from all military obligations in the other country or countries subject to the possible loss of nationality in those countries (Article 1)[1] It is provided, secondly, that if a person possessing two or more nationalities is entitled, under the law of any of the States, to renounce its nationality on coming of age, he shall be exempt during his minority from military service in the State in question (Article 2)[2] Finally, it is laid down that if under the law of a State a person has lost its nationality and has acquired another nationality, he shall be exempted from the military obligations in the State whose nationality he has lost (Article 3)

How Statelessness occurs.

§ 311 An individual may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own Even by birth a person may be stateless Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality, because according to German law it does not acquire German nationality, and according to British law it does not acquire British nationality Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, stateless But statelessness may take place after birth, for instance, as the result of deprivation of nationality (see above, § 302 (2)) All individuals who have lost their original nationality without having acquired another are, in fact, destitute of nationality[3]

Position of Individuals destitute of Nationality

§ 312 Since stateless individuals do not own a nationality, the principal link[4] by which they could derive benefits

[1] The Treaty of November 1, 1930, between Norway and the United States provides that a person born in the territory of one party of parents who are nationals of the other party, and having the nationality of both parties, shall not, if he has his habitual residence in the State of his birth, be held liable for military service or any other act of allegiance during a temporary stay in the territory of the other party *U S Treaty Series*, No 832, *A J*, 25 (1931), Suppl, p 151 As to the Franco Belgian Treaty of September 12, 1928, for avoiding conflicts in the matter of recruitment see Dreyfus in 56 *Clunet* (1929), pp 939 950

[2] In the part of the Final Act relating to Nationality it was recommended (*a*) that States should adopt legislation designed to facilitate, in cases of persons possessing more than one nationality, the renunciation of nationality in the countries in which they are not resident, and (*b*) that effect be given to the principle that the acquisition of a foreign nationality through naturalisation involves the loss of previous nationality *A J*, 24 (1930), Suppl, p 182

[3] As to English law see *Stoeck* v *Public Trustee* [1921] 2 Ch 67, and cases therein discussed

[4] See above, § 291

from International Law is missing, and thus they lack protection as far as this Law is concerned Their position may be compared to vessels on the open sea not sailing under the flag of a State, which likewise do not enjoy any protection In practice, stateless individuals are in most States treated more or less as though they were subjects of foreign States, but however much they are maltreated,[1] International Law[2] as at present practised cannot aid them unless their position is made the subject of express regulation in treaties, in which case every contracting party acquires the right to protect them notwithstanding the rule as to nationality of claims[3]

Regulation of Statelessness by Treaty

§ 313. The rules of International Law relating to diplomatic protection are based on the view that nationality is the essential condition for securing to the individual the protection of his rights in the international sphere This being so, the admissibility of statelessness must be regarded as a serious defect in this branch of International Law There is now a growing tendency to reduce by international conventions the possibilities of statelessness or, where that is impossible, to render less difficult the position of stateless persons

[1] It cannot be considered mal treatment if a State compels individuals destitute of nationality either to become naturalised or to leave the country

[2] As to humanitarian intervention see above §§ 137 and 292 The position of the Jews in Roumania before 1919 furnished a sad example According to Municipal Law they were, with a few exceptions, considered as foreigners for the purpose of avoiding the consequences of Article 44 of the Treaty of Berlin, 1878, according to which no religious disabilities were to be imposed by Roumania upon her subjects But as these Jews were not subjects of any other State, Roumania compelled them to render military service, and actually treated them in every way according to discretion without any foreign State being able to exercise a right of protection over them See Rey in *R G*, 10 (1903), pp 460 526, Bar in *R I* 2nd ser, 9 (1907), pp 711-716, Stambler, *L'histoire des Israélites roumains et le droit d'intervention* (1913), Kohler and Wolf, *Jewish Disabilities in the Balkan States* (1916), Kohler in *Bulletin of the Jewish Academy of Arts and Sciences*, No 1 (1933) See also above, § 293 But on December 9, 1919, Roumania undertook, by a treaty with the Principal Allied and Associated Powers (Treaty Series (1920), No 6, Cmd 588), to recognise as Roumanian subjects *ipso facto* and without any formality Jewish inhabitants who were stateless See Rey in *R G*, 32 (1925), pp 133-162, and *Kahane* v *Paris*, decided on March 19, 1929, by the Austro Roumanian Mixed Arbitral Tribunal *Annual Digest*, 1929-1930, Case No 131.

[3] See above, § 291 (n)

The Hague Codification Conference of 1930 [1] adopted a number of provisions calculated to reduce the possibility of statelessness

(1) *Loss of Nationality as the Result of an Expatriation Permit* —The Convention on Certain Questions Relating to the Conflict of Nationality Laws [2] provides that an expatriation permit issued by a State shall not entail the loss of the nationality of that State unless the person to whom it is issued possesses another nationality or unless he acquires another nationality

(2) *Married Women* —The provisions of the Convention on this subject have been noted above, p 595, n 2

(3) *Nationality of Children* —The same convention provided that if children do not acquire the nationality of their parents as a result of the naturalisation of the latter, they shall retain their existing nationality (Article 13), that a child whose parents are unknown or who have no nationality, or whose nationality is unknown, shall have the nationality of the country of birth, and that where adoption causes loss of nationality that result shall be conditional upon the acquisition by the adopted person of the nationality of the person by whom he is adopted (Article 17)

(4) *Special Cases* —In a special Protocol Relating to a Certain Case of Statelessness [3] it was laid down that in a State whose nationality is not conferred by the mere fact of birth in its territory, a person born there of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of that State (Article 1)

(5) *Mitigation of Consequences of Statelessness* —Finally in a special Protocol Concerning Statelessness,[4] provision was made for the case of persons rendered stateless as the result of being deprived of their nationality after they entered a

[1] The Conference adopted a unanimous recommendation to the effect that it is desirable that in regulating questions of nationality States should make every effort to reduce so far as possible cases of statelessness

[2] See above, §§ 35 and 310*a*

[3] See above, § 35

[4] See above, § 35

foreign country. It is laid down there that the State of origin is bound to admit such persons at the request of the State in whose territory he is if he is permanently indigent,[1] or if he has been sentenced to not less than one month's imprisonment

At the same time attempts have been made in some cases to mitigate the lot of particular categories of stateless persons.[2] Thus in the Convention of October 28, 1933,[3] relating to the International Status of Refugees, the contracting parties undertook definite obligations with regard to the treatment of Russian, Armenian, and assimilated refugees as defined in previous agreements concluded in 1926 and 1928.[4] They agreed to grant to these persons so-called Nansen passports, not to expel, except for reasons of public order and safety, refugees regularly residing in the State concerned, and to grant to them free access to the

[1] However, his home State may even in that case refuse to receive him if it undertakes to meet the cost of relief. It will be noted that the provisions of the Protocol may be liable to objection in so far as they are calculated to interfere with the principle of asylum for political refugees—a category of persons most likely to be affected by measures of denationalisation. By 1945 the Protocol had not entered into force. See generally as to expulsion of stateless persons Philonenko in 60 *Clunet* (1933), pp 1161-1187, and Trachtenberg in *R I*, 3rd ser., 17 (1936), pp 552-563.

[2] See Trachtenberg in *Répertoire*, vii pp 582-599, Nitti in *R G*, 36 (1929), pp 739-759, Scheftel in 61 *Clunet* (1934), pp 36-69, Bentwich in *Geneva Special Studies*, vi, No 5 (1935), and in *B Y*, 16 (1935), pp 114-129, Kuhn in *A J*, 30 (1936), pp 495-499, Rubinstein in *International Affairs*, 15 (1936), pp 716-734, Poulin in *Annuaire Suisse de droit international*, 3 (1946), pp 95-196, Mezger in *Nouvelle Revue de droit international privé*, 13 (1946), pp 56-95. As to the legal status of political refugees see Holborn in *A J*, 32 (1938), pp 680-703.

[3] Treaty Series, No 4 (1937), Cmd 5347. Great Britain acceded in October 1936. See as to this Convention Tager in 63 *Clunet* (1936), pp 1130-1167.

[4] For the Agreement concerning the Issue of Certificates to Russian and Armenian Refugees of May 12, 1926, see *L N T S*, 89, p 47, Hudson, *Legislation*, iii p 1884. For the Arrangement concerning the Legal Status of Russian and Armenian Refugees of June 30, 1928, see League Doc. L S C 11-1928 (1), *Off J*, 1929, p 485, *L N T S*, 89, p 53, Hudson, *Legislation*, iv p 2486. As to the validity of that Arrangement in France see *Clot* v *Schpolianshy*, *Annual Digest*, 1929-1930, Case No 218 and Note. Previously the work of relief of refugees had been transferred in 1925 to the International Labour Office and re-transferred in 1930 to the Secretariat of the League. On January 19, 1931, the Council approved the Statutes of the Nansen International Office for Refugees, which was placed under the direction of the League in accordance with Article 24 of the Covenant (see above, § 167*h*). *Off J*, 1931, p 156, Hudson, *Legislation*, v p 872. The Office was liquidated in 1939, as provided by the Seventeenth Assembly, 1936, *Plenary Meetings*, p. 139.

courts and exemption from the requirement of reciprocity applying in some cases to aliens [1]

Abolition of Statelessness

§ 313a The attempts, as outlined above,[2] to reduce the occasions for statelessness are not only an expression of the desire to do away with a source of inconvenience to Governments and of grave hardship to individuals They are also a recognition of the fact that so long as nationality is the link between the individual and the protection of rights accruing to him by virtue of International Law,[3] it is both illogical and offensive to human dignity that International Law should permit a condition of statelessness As may be seen from some of the provisions of the Hague Convention of 1930,[4] there are no vital interests of States which stand in the way of introducing such a measure of uniformity in the law relating to acquisition of nationality by birth, marriage, naturalisation or otherwise as may be sufficient to prevent statelessness arising on that account The same applies to the abandonment of the practice, which is of comparatively recent origin, of adding the penalty of deprivation of nationality for disloyalty or other reasons to the manifold and severe punishments available to States under their Municipal Law [5] Probably measures to abolish

[1] A similar Arrangement was concluded on July 4, 1936, concerning the Status of Refugees from Germany Treaty Series, No 33 (1936), Cmd 5338, Hudson, *Legislation*, vii p 376 This provisional agreement was replaced by a Convention signed on February 10, 1938 (*L N T S*, vol 192, p 59) And see *Off J*, 1939, p 399 extending the Convention to Austrian refugees In September 1933 the Fourteenth Assembly of the League decided, on the proposal of the Dutch Government, that the problem of the German refugees should be dealt with by international co operation As from 1939 a new organisation was set up under the 'High Commissioner for Refugees under the Protection of the League of Nations' *Off J*, 1938, p 365 As the result of the Evian Conference held in July 1938 there was created an Intergovernmental Committee on Refugees Doc C 244, M 143, 1938, XII In December 1946 the General Assembly adopted the Constitution of the International Refugee Organisation, which has taken the place of the Intergovernmental Committee on Refugees Its main purpose is the repatriation, legal protection, and resettlement of about one and a half million refugees and displaced persons In October 1946 an Agreement was signed relating to the issue of a travel document to refugees who are the concern of the Intergovernmental Committee on Refugees [Cmd] 7033 See also Jennings in *B Y*, 20 (1939), pp 98-114, Simpson, *The Refugee Problem* (1939), and Cohn in *Modern Law Review*, 4 (1941), pp 200-209

[2] See above, § 313

[3] See above, § 291

[4] See above, § 310a

[5] See above, § 302 (2) Most States apply the penalty of denationalisation to naturalised subjects only (by way of cancellation of naturalisation)—a limitation which lends itself to the interpretation that naturalised persons

statelessness can best be attempted on the lines of the following two principles (1) that every individual shall be entitled to the nationality of the State where he or she is born unless on attaining majority he or she declares for the nationality which may be open to him or her by virtue of descent, (2) that no person shall be deprived of his or her nationality by way of punishment or deemed to have lost his or her nationality for any other reason, such as marriage, except concurrently with the effective acquisition of a new nationality

VI

RECEPTION OF ALIENS AND RIGHT OF ASYLUM

Vattel, II § 100—Hall, §§ 63, 64—Westlake, I pp 215 217—Lawrence, §§ 97, 98—Phillimore, I §§ 365 370—Twiss, I § 238—Halleck, I pp 493-495—Taylor, § 186—Walker, § 19—Wharton, II § 206—Wheaton, § 115, and Dana's note—Moore, IV §§ 560 566—Hackworth, III §§ 293, 294, 297 301—Hershey, §§ 237 249—Hyde, I §§ 59, 60—Bluntschli, §§ 381 398—Hartmann, §§ 84, 85, 89—Heffter, §§ 61-63—Stoerk in *Holtzendorff*, II pp 637 650—Gareis, § 57—Liszt, § 20 (I, III)—Ullmann, §§ 113 115—Kohler, pp 115 121—Fauchille, § 441—Despagnet, §§ 338 343—Rivier, I pp 307 309—Nys, II pp 275 283—Calvo, II §§ 701-706, VI 119—Martens, II § 46—De Louter, I pp 287 291—Suarez, §§ 194 198—Borchard, § 26—Overbeck, *Niederlassungsfreiheit und Ausweisungsrecht* (1906)—Henriques, *The Law of Aliens*, etc (1906)—Sibley and Elias, *The Alien Acts*, etc (1906)—*A S Proceedings*, 5 (1911), pp 65 116—Verdross in *Hague Recueil*, vol 37 (1931) (3), pp 327 347

No Obligation to admit Aliens

§ 314 Many writers [1] maintain that every member of the Family of Nations is bound by International Law to admit all aliens into its territory for all lawful purposes, although they agree that every State could exclude certain classes of aliens This opinion is generally held by those who assert that there is a fundamental right of intercourse between States It will be remembered [2] that no such fundamental right exists, but that intercourse is a characteristic of the position of the States within the Family of Nations, and, therefore, a presupposition of the international personality

are bound by duties of allegiance more exacting than natural born persons It is clear that in most cases the persons affected live abroad and that their denationalisation takes place without regard to the legitimate interests of the State where they are resident at the time For an attempt to safeguard some of these interests see above, § 313 (5)

[1] See, for instance, Bluntschli, § 381

[2] See above, § 141

of every State A State, therefore, cannot exclude aliens altogether from its territory without violating the spirit of the Law of Nations, and endangering its very membership of the Family of Nations But no State actually does exclude aliens altogether The question is only whether an international legal duty can be said to exist for every State to admit all unobjectionable aliens to all parts of its territory And it is this duty which must be denied as far as the customary Law of Nations is concerned It must be emphasised that, apart from general conventional arrangements, as, for instance, those concerning navigation on international rivers, and apart from special treaties of commerce, friendship, and the like, no State can claim the right for its subjects to enter into, and reside on, the territory of a foreign State The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory [1] And it is only by an inference from this competence that Great Britain,[2] the United States of America,[3] and other States have made special laws according to which paupers and criminals, as well as diseased and other objectionable aliens, are prevented from entering their territory Every State is, and must remain, master in its own house, and this is of special importance with regard to the admission of aliens Of course, if a State excluded all subjects of one State only, this would constitute an unfriendly act, against which retorsion would be admissible, but it cannot be denied that a State is competent to do this, although in practice such wholesale exclusion is improbable in normal times [4]

[1] *Musgrove* v *Chun Teeong Toy* [1891] A C 272, and authorities cited

[2] See the Aliens Restriction Acts, 1914 and 1919, as amended by the Former Enemy Aliens (Disabilities Removal) Act, 1925 See also Hen riques, *The Law of Aliens*, etc (1906), and Sibley and Elias, *The Aliens Act*, etc (1906), with regard to the position of aliens under British law prior to the First World War And see now Davies, *The English Law Relating to Aliens* (1931)

[3] See Bouvé, *A Treatise on the Laws governing the Exclusion and Expulsion of Aliens in the United States* (1912)

[4] Certain States do in fact dis criminate against immigrants of particular nationalities and races—for instance, the United States of America and the Commonwealth of Australia see Hyde, 1 §§ 59, 60, Hackworth, III §§ 299-303, Parker in *A J*, 18 (1924), pp 737 754, and *ibid*, 19 (1925), pp 23 47 See also

Hundreds of treaties of commerce and friendship exist between States according to which they are obliged [1] to receive each other's unobjectionable subjects, and thus in practice the matter is settled, although in strict law every State is competent to exclude foreigners from its territory [2]

Reception of Aliens under Conditions

§ 315 It is obvious that, if a State need not receive aliens at all, it can receive them only under certain conditions [3] Most States make a distinction between such aliens as intend to settle down in the country, and such as intend only to travel in the country, no alien is allowed to settle in the country without having asked for and received a special authorisation, whereas, subject to police and visa regulations, the country is open unconditionally to all aliens who are merely travelling

The so called Right of Asylum

§ 316 The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or aliens, excludes the prosecution of aliens thereon by foreign States Thus, a foreign State is, provisionally at least, an asylum for every individual who,

Ichihashi, *Japanese in the United States* (1932), Treat, *Diplomatic Relations between the United States and Japan, 1853 1895* (1932), MacKenzie, *The Legal Status of Aliens in Pacific Countries* (1937) In December 1943 the United States repealed its Chinese Exclusion Acts

[1] In practice it is believed that since the First World War most States tacitly recognise one another's restrictive conditions in the matter of aliens and refrain from pressing their rights under such treaties, for the sake of obtaining a corresponding freedom in the matter

[2] The Institute of International Law adopted at its meeting at Geneva in 1892 (see *Annuaire*, 12, p 219) forty one articles concerning the admission and expulsion of aliens, Articles 6 13 deal with the admission of aliens

[3] See the Aliens Restriction Acts, 1914 and 1919, as amended by the Former Enemy Aliens (Disabilities Removal) Act, 1925

The League of Nations summoned a conference upon Passport Regulations which was held at Geneva in May 1926, for the Report see *Off J*, August 1926, pp 1088 1098, and *R G*, 24 (1927), pp 242 248 See also Wehberg, *Das Passwesen* (1923), Reale, *Le régime des passeports et la Société des Nations* (1930) and *Manuel pratique des passeports* (1931), and in *Hague Recueil*, vol 50 (1934) (iv) pp 89 182, Roscoe in *Grotius Society*, 16 (1930), pp 65-72 There exist a considerable number of conventions providing for the abolition of visas on the passports issued by the contracting parties An agreement of June 12, 1929, concerning the preparation of a transit card for emigrants provides that, subject to certain conditions, the contracting parties will permit emigrants to pass *in transit* through their respective territories without requiring their passports to have a consular visa and without any control or traffic charges *Off J*, 1929, p 1351 It entered into force on September 12 of that year as between thirteen of its original signatories As to American passports see Hyde, 1 §§ 399 406, Hackworth, III §§ 259 272

being prosecuted at home, crosses its frontier In the absence of extradition treaties stipulating for the contrary, no State is by International Law obliged to refuse admission into its territory to such a fugitive or, in case he has been admitted, to expel him or deliver him up to the prosecuting State On the contrary, States have always upheld their competence to grant asylum, if they choose to do so [1] Now the so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping prosecution in some other State should grant protection and asylum For such State need not grant these things The so-called right of asylum is nothing but the competence of every State mentioned above, inferred from its territorial supremacy, to allow a prosecuted alien to enter, and to remain on, its territory under its protection, and thereby to grant an asylum to him Such fugitive alien enjoys the hospitality of the State which grants him asylum, but it might be necessary to place him under surveillance, or even to intern him at some place, in the interest of the State which is seeking to prosecute him For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organising hostile expeditions or by preparing common crimes against its Head, members of its government or its property [2] And if a State grants asylum to a prosecuted alien, this duty becomes of special importance

[1] See the Convention on Political Asylum adopted in December 1933 by the Pan American Conference *A J*, 28 (1934), Suppl, pp 70 *et seq* Article 3 lays down that political asylum, being an institution of a humanitarian character, is not subject to reciprocity and that any person may resort to its protection whatever his nationality The United States did not sign the Convention on the ground that they did not recognise the doctrine of asylum as part of International Law See Mettgenberg, *Freies Geleit und Exterritorialität* (1929) And see on the right of asylum generally Reale in *Hague Recueil*, vol 63 (1938) (1), pp 473 510, 541 561, Raestad in *R I*, 3rd ser, vol 19 (1938), pp 115 131, De Moncada in *Z o R*, 23 (1944), pp 403 472 See also Balogh, *Political Refugees in Ancient Greece* (1943) For an affirmation of the principle of asylum with regard to 'quislings and traitors' among displaced persons see *Journal of the First General Assembly* of the United Nations, First Session, 1946, pp 544 564 The Russian proposal that such persons should not be entitled to the protection of the United Nations was rejected (p 564) This does not apply to war criminals (see *ibid*, p 661)

[2] See above, § 127*a*

VII

POSITION OF ALIENS AFTER RECEPTION [1]

Vattel, I § 213, II §§ 101-115—Hall, §§ 63, 87—Westlake, I pp 218, 219 327-330—Lawrence, §§ 97, 98—Phillimore, I §§ 332 339—Twiss, I § 163 —Taylor, §§ 173, 187, 201 203—Walker, § 19—Wharton, II §§ 201 205—Wheaton, §§ 77 82—Moore, IV §§ 534 549—Hackworth, III §§ 277-291—Hershey, §§ 237-249—Fenwick, pp 188 196—Bluntschli, §§ 385 393—Hartmann, §§ 84, 85—Heffter, § 62—Stoerk in *Holtzendorff*, II pp 637 650—Gareis, § 57—Liszt, § 20 (II)—Ullmann, §§ 113 115—Hatschek, pp 219 221—Fauchille, § 442—Despagnet, §§ 339-343—Rivier, I pp 309-311—Calvo, II §§ 701-706—Martens, II § 46—De Louter, I pp 274 287, 295 299—Cruchaga, §§ 406 409—Suarez, §§ 167-179—Keith's Wheaton, pp 207 211—Stowell, pp 279 285—Scelle, II pp 63 135—Frisch in *Strupp, Wort*, I pp 330 334—Cockburn, *Nationality* (1869), ch V—Gaston de Leval, *De la protection des nationaux à l'étranger* (1907)—Delessert, *L'établissement et le séjour des étrangers* (1924)—Steinbach, *Untersuchungen zum internationalen Fremdenrecht* (1931)—*The Legal Status of Aliens in Pacific Countries* (edited by MacKenzie, 1937)—Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940)—Gibson *Aliens and the Law* (1940) (as to the United States)—Konvitz, *The Alien and the Asiatic in American Law* (1946)—Wheeler in *A J*, 3 (1909), pp 869 884—*A S Proceedings*, 5 (1911), pp 32 66, 150 225—Borchard, §§ 6 8, 14 25, 34 46, 133 136, and in *A J*, 7 (1913), pp 497 520, and in *Bibliotheca Visseriana*, 3 (1924), pp 3 52—Churchill in *L Q R*, 31 (1920), pp 402 428—Holdsworth in *Revue d'histoire du droit*, 3 (1921), pp 175-214—Fachiri in *B Y*, 1925, pp 159-171—Zaitzeff in *Michigan Law Review*, 24 (1926), pp 441 460 (as to aliens in Russia)—S Basdevant in *Répertoire*, 8, pp 3 61—Cavaglieri in *Hague Recueil*, vol 26 (1929) (I), pp 452 467—Healy, *ibid*, vol 27 (1929) (II), pp 405 492—Verdross in *Hague Recueil*, vol 37 (1931) (III), pp 348-406—Kelsen, *ibid*, vol 42 (1932) (IV), pp 248 260—Cutler in *A J*, 27 (1933), pp 225 246—Bouvé in *A S Proceedings*, 1934, pp 92-105—Borchard, *ibid*, 1939, pp 51 63—Castrén in *Z o V*, XI (1943), pp 325 417

Aliens subjected to Territorial Supremacy

§ 317 With his entrance into a State, an alien, unless he belongs to the class of those who enjoy so-called exterritoriality, falls at once under the territorial supremacy of that State, although he remains at the same time under the personal supremacy of his home State He is therefore under the jurisdiction [2] of the State in which he stays, and

[1] Every student desiring information on a special point arising out of the position of aliens after reception, or concerning citizens and their property abroad, must study the standard work of Borchard, *The Diplomatic Protection of Citizens Abroad* (1915)

[2] On the punishment of aliens for political crimes see Preuss in *Grotius Society*, 20 (1934), pp 85-105

is responsible to it for all acts he commits on its territory [1] He owes allegiance, for the duration of his residence, to the State within the territory of which he resides. Moreover, it has been held that an alien who on leaving the territory of the State submits himself to the protection of that State, *i e* by asking for and receiving a passport entitling him to diplomatic protection, continues to owe allegiance to it and is liable for treason committed abroad [2] If in consequence of a public calamity, such as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all aliens, as well as against citizens But apart from jurisdiction, and mere local administrative arrangements, which concern all aliens alike, a distinction must be made between such aliens as are merely travelling, and stay, therefore, only temporarily on the territory, and such as take up their residence there either permanently or for some length of time. A State has wider power over aliens of the latter kind; it can make them pay rates and taxes,[3] and can even

From November 5 to December 5, 1929, there sat in Paris a conference with a view to accepting a convention on the treatment of foreigners and foreign enterprises No convention was adopted See Kuhn in *A J*, 24 (1930), pp 570 572 And see *Off J*, 1930, No 2, p 84, League Doc C 36 M 21 1929 II (preparatory documents for the Conference on the treatment of aliens) and C 97 M 23 1930 II (minutes of the Conference) And see League Doc of 1928 C 562 M 178 1928 II (a general report of governmental experts) and C 345 M 102 1928 II and Supplement No 1 (1929) (a collection of treaties and municipal regulations), Report of the General Meeting of Government Experts on Double Taxation and Tax Evasion in League Doc C 562 M 178 1928 II For a list of fourteen conventions concluded between 1930 and 1935 see Fiscal Committee Report to the Council of June 17, 1935, in League Doc C 252 M 124 1935 IIA

[2] *Joyce* v *Director of Public Prosecutions* (1946), 62 T L R 208 See Lauterpacht in *Cambridge Law Journal* (1947), pp 33, 92 342

[3] The questions of Double Taxation and Tax Evasion have received attention from a Committee of Experts appointed by the League of Nations see their Reports, C 115 M 55 1925 II F 212, and C 216 M 85 1927 II 40, and memorandum by Sir Basil Blackett (E F S 16, A 16 1921) and Report by Bruns, Einaudi, Seligman, and Sir Josiah Stamp (E F S 73 F 19), Resolution of the Institute of International Law (as to death duties) in *Annuaire*, 29 (1922), p 256, Wittmann in *International Law Association's Twenty fifth Report* (1908), pp 518 530, and Suyling in the Association's *Thirtieth Report* (1921), vol 1 pp 424 431, Salvioli, *Le doppie imposte in diritto internazionale* (1914), see also Hyde, 1 §§ 205, 206, and Beale in *H L R*, 32 (1919), pp 587 633, Hackworth, III § 281, Griziotti in *Hague Recueil*, 1926 (III), pp 5 156, Picard in 52 *Clunet* (1925), pp 40 53, Dorn in *Vierteljahresschrift für Steuer und Finanzrecht*, 1 (1927) pp 189 249, Niboyet in *Répertoire*, v pp 672 692, and in *Hague Recueil*, vol 31 (1930) (1), pp 5-100, Sack in *R G*, 37 (1930), pp 97 143, Peeters in *B I I I*,

compel them in case of need, and under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety On the other hand, an alien does not fall under the personal supremacy of the local State, therefore he cannot, unless his own State consents,[1] be made to serve[2] in its army or navy, and cannot, like a citizen, be treated according to discretion.[3]

23 (1930), pp 14 25, Carroll in *A J*, 29 (1935), pp 586 597, Buhler in *Hague Recueil*, vol 55 (1936) (i), pp 437-502, Guggenheim, *L'imposition des successions en droit international et le problème de la double imposition* (1928), Seligman, *Double Taxation and International Fiscal Cooperation* (1928), and as to double taxation of shipping, McNair in *A J*, 19 (1925), pp 569 573 On April 16, 1945, two important Con aiming at reducing the evil of double taxation, were concluded between Great Britain and the United States The first (Cmd 6624) refers to taxes on income, the second (Cmd 6225) to taxation on estates of deceased persons In both Conventions residence is made the principal test of taxation Thus, for instance, it is provided that a teacher resident in Great Britain who visits the United States for a period not exceeding two years for the purpose of giving lectures shall be exempt in the United States from taxation on income derived therefrom See Parry in *B Y*, 23 (1946), pp 326 330 See also Cmd 6692 for the Treaty with France of October 19, 1945 And see Allix in *Hague Recueil*, vol 61 (1937) (iii), pp 548 637, and Koch, *The Double Taxation Conventions* (1947)

[1] In Great Britain, by the Allied Powers (War Service) Act, 1942 (5 and 6 Geo 6, ch 29), nationals of Allied Powers were, under certain conditions, made liable to national service under the various National Service Acts Previously, under Defence Regulation 58A, International Labour Force Orders were issued by the Minister of Labour and National Service (see *e g.* S R & O, 1941, No 719, with regard to Belgian nationals) It appears that both the Act of 1942 and the various Orders issued in 1941 were preceded by agreements made with the various Allied Governments concerned For a statement to that effect made before Parliament in connection with the Act of 1942 see Hansard, House of Commons Debates, vol 380, col 2178 And see S R & O 1943, No 381, for the Order applying the Act to various Allied nationals See Hauptmann in *Modern Law Review*, 6 (1942), pp 72 75, Oppenheimer in *A J*, 36 (1942), p 588, Schwelb, *ibid*, 39 (1945), pp 109 111 As to the practice of the United States during the First World War to exact military service from aliens who have declared their intention to become citizens of the United States (so called declarant aliens) and the protests of various countries against that practice see Hackworth, iii § 282 By an Act of Congress approved in December 1941 all male persons between the ages of 20 and 45, residing in the United States, were made liable for training and service in the land or naval forces However, it was provided that nationals of neutral countries could apply for exemption as aliens, such application to have the effect of debarring the alien in question from becoming a citizen of the United States A French Decree of April 1939 prescribed that stateless persons and aliens enjoying the right of sanctuary in France shall be subject to all obligations incumbent upon French nationals under the Law of July 11, 1938, providing for the organisation of the nation in time of war

[2] See above, § 127

[3] As regards religious disabilities of foreigners see Henriques in *Law Magazine and Review*, 39 (1914), pp 320 326, and Hackworth, iii § 286 As to the position of aliens in Soviet Russia see Bogolepoff, *Die Rechtstellung der Auslander in Sovjet Russland* (1927), and Zaitzeff, *op cit* See also Einaudi in *Hague Recueil*, vol 25 (1928) (v), pp 5-118.

It must be emphasised that an alien is responsible to the local State for all illegal acts which he commits while the territory concerned is during war temporarily occupied by the enemy An illustrative case is that of *De Jager* v. *The Attorney-General for Natal*[1] De Jager was a burgher of the South African Republic, but a settled resident in Natal when the South African War broke out In October 1899 the British forces evacuated that part of Natal in which Waschbank, where he lived, is situated, and it was occupied by the Boer forces for some six months He joined them, and served in different capacities until March 1900, when he went to the Transvaal and took no further part in the war He was tried in March 1901, convicted of high treason, and sentenced to five years' imprisonment and a fine of £5000, or, failing payment thereof, to a further three years

Aliens in certain Asian and African Countries

§ 318 The rule that aliens fall under the territorial supremacy of the State found until recently an exception with regard to a considerable number of States on the ground that their institutions were inferior to or different from the civilisation of most European and American States and of Japan[2] Many States entered into treaties (sometimes called Capitulations) with some Asian and African States as the result of which their subjects when entering into the territory of these Asian and African States remain wholly under the jurisdiction of their home States, whose consuls exercise that jurisdiction over their fellow-subjects,

[1] [1907] A C 326 See Baty in *Law Magazine and Review*, 33 (1908), pp 214-218, who disapproves of the conviction of De Jager

[2] As to this kind of extern torial jurisdiction in general see literature cited above, § 317, and particularly Twiss, 1 § 163, Phillimore, 1 §§ 333-339, Hall, *Foreign Powers and Jurisdiction* (1894), §§ 59 91, Piggott, *Exterritoriality* (1907), Hyde, 1 §§ 259 265, Borchard, §§ 201 205, Hackworth, II §§ 177-190, Thornley in *B Y*, 1926, pp 121-134, Fauchille, §§ 777-791 (19), Travers, §§ 1724-1745, Mettgenberg in *Völkerbund und Volkerrecht*, III pp 528 534, and also literature cited below, §§ 439 441 As to exterritorial jurisdiction in the ancient world see Kassan in *A J*, 29 (1935), pp 237 247 A privilege, not amounting to exterritoriality, which was granted to aliens in Japan in the form of so called perpetual leases not subject to ordinary taxation was largely abolished in 1937 as the result of separate agreements made between Japan and the foreign Powers concerned. For the agreement with Great Britain see *Treaty Series*, No 29 (1937) See also Hudson in *A J*, 32 (1938) pp 113-116

usually upon the basis of the enactments of the Municipal Law of the home States, for instance, in the case of Great Britain, upon the basis of the Foreign Jurisdiction Act, 1890 Exterritorial jurisdiction [1] came to an end in Japan in 1899, in Turkey in 1914 (with regard to the Central Powers which recognised their unilateral denunciation by Turkey) and 1923,[2] in Siam in 1927,[3] and in Persia on May 10, 1928 [4] With regard to China, in pursuance of a resolution adopted at the Washington Conference on the Limitation of Armaments in 1921,[5] representatives of the interested Powers

[1] As to the effect of war upon exterritoriality see Keeton, *The Development of Extraterritoriality in China*, i (1928), ch x, sec viii

[2] In September 1914 Turkey announced the abrogation of the many treaties or 'Capitulations' with foreign States as from October 1, 1914, and by clause 28 of the Treaty of Lausanne of 1923 the other contracting parties accepted 'the complete abolition of the Capitulations in Turkey in every respect' An nexed to the Treaty are (i) a 'Convention respecting conditions of Residence and Business and Juris diction' containing some important provisions with reference to jurisdiction over foreigners in Turkey (see the case of the *Lotus* above, § 147*a*, which turned upon Article 15 of this Convention), and (ii) a 'Declaration by the Turkish Govern ment relating to the Administration of Justice,' whereby it undertook to accept, as observers in its civil, commercial, and criminal courts for a period of not less than five years, 'a number of European legal counsellors' selected by it from a list, to be prepared by the Permanent Court, of jurists who are nationals of countries which were neutral in the First World War Germany in 1917 and Soviet Russia in 1921 renounced the Capitulations in Turkey See Pelissié du Rausus, *Le régime des capitulations dans l'Empire Ottoman* (2nd ed, 1910), Mandelstam, *La justice ottomane dans ses rapports avec les Puissances étrangères* (1911), and in *R G*, 14 (1907), pp 5 and 534, and 15 (1908), pp 329-384, Overboek, *Die Kapitulationen des osmanischen Reichs* (1917), Mestre, *L'étranger en Turquie d'après le Traité de Lausanne* (1924), Jones, *Extraterritoriality in Japan* (1931), Sousa, *The Capitulatory Régime of Turkey* (1933), Thayer in *A J*, 17 (1923), pp 207 233, Bentwich in *J C L*, 3rd ser, 5 (1923), pp 182 188, and *ibid*, 6 (1924), pp 330 332, Abi Chakla, *L'extinction des capitulations en Turquie et dans les régions arabes* (1924), Ténékidès in 51 *Clunet* (1924), pp 339 351, Carabiber in *Répertoire*, iii pp 39 87, Rechid in *Hague Recueil*, vol 46 (1933) (iv), pp 169 224, and in *R G*, 42 (1935), pp 293 311 The capitulations in Syria, Palestine and Iraq have also been abolished See Hackworth, ii § 181, Goadby in *J C L*, 3rd ser, 6 (1924), pp 258 271, and Bentwich in *B Y*, 14 (1933), pp 97 100 The Judicial Agreement of March 4, 1931, between Great Britain and Iraq abolished, subject to certain safeguards, the special judicial régime in favour of certain foreigners established by the Judicial Agreement of March 25, 1924 Treaty Series, No 33 (1931), Cmd 3933

[3] As the result of a series of recent treaties, see for a detailed examination and enumeration Sayre in *A J*, 22 (1928), pp 70 88, and see also James in *A J*, 16 (1922), pp 585-603, Moncharville in *R G*, 33 (1926), pp 321-344, and Treaty between Great Britain and Siam in *A J*, 22 (1928), Suppl, pp 12 18 And see Toynbee, *Survey* (1929), pp 405-417

[4] Subject, however, to certain safeguards stipulated for by a convention, see Matine-Daftary, *La suppression des capitulations en Perse* (1930) and *Documents*, 1928, pp 200 209

[5] Cmd 1627, at p 85

met in Peking in 1920 and prepared a Report upon Extraterritoriality in China, containing certain recommendations regarding the eventual relinquishment of exterritorial rights in China [1] Subsequently China concluded treaties with a number of countries such as Belgium, Italy, Poland, Spain, and Denmark, which, subject to certain conditions, abolished exterritoriality In December 1929 the Chinese Government issued a Mandate to the effect that on and after New Year's Day 'all foreign nationals in the territory of China who are enjoying extraterritorial privileges shall abide by the laws, ordinances and regulations' of the Chinese Government [2] But no effective steps were taken to abolish ex-

As to China see Report of the Commission on Extraterritoriality in China, Cmd 2774 of 1926 (for tracts see *A J*, 21 (1927), Suppl, pp 58 66), Tchou, *Le régime des capitulations en Chine* (1915), chille, §§ 791-791 (10), Willoughby, *Foreign Rights and Interests in China* (1927), Keeton, *The Development of Extraterritoriality in China* (1928), Tyau in *B Y*, 1921-1922, pp 133 149, Williams in *A J*, 16 (1922), pp 43-58, Hyde, *ibid*, pp 70 74, Hackworth, II § 178, Denby, *ibid* (1924), pp 667 675, Wing Mah, *ibid*, pp 676 695, Quigley, *ibid*, 20 (1926), pp 46-68, Bishop, *ibid*, pp 281-299, Keeton in *L Q R*, 42 (1926), pp 101 106, 481 501, *ibid*, 43 (1927), pp 236 261, and in *J C L*, 3rd ser, 8 (1926), pp 225 238, discussion in *A S Proceedings*, 1927, pp 82 100 As to the abrogation of exterritoriality rights in Manchukuo see Tabouillot in *Volkerbund und Volkerrecht*, III pp 459 464

As to the Belgian treaty with China see Orders of the Permanent Court on the *Denunciation of the Treaty of November 2, 1865, between China and Belgium*, Series A, Nos 8 and 14, and Woolsey in *A J*, 21 (1927), pp 289 294 With regard to the Mixed Court at Shanghai which was established in 1869, it was agreed in a Provisional Agreement signed on August 31, 1926, that with the exception of cases covered by treaties involving the right to invoke consular protection, a Court established by the Kiangsu Provisional Government shall replace the Mixed Court in the International Settlement at Shanghai Martens, *N R G*, 3rd ser, 20, p 128, Hudson, *Legislation*, III p 1994, and in *A J*, 21 (1927), pp 451 471 According to a further Agreement of February 17, 1930, the Provisional Court was replaced by a District Court and a branch of the High Court established by the Chinese Government (Treaty Series, No 20 (1930), Cmd 3563), Hudson, *Legislation*, III p 1997, Escarra in *R I* (*Paris*), 6 (1930), pp 326 335 See also above, § 171 (3), as to the foreign Concessions in China As to protection of Catholic missions in China and other non-Christian countries see Goyau in *Hague Recueil*, vol 26 (1929) (I), pp 81 202, Delos in *R G*, 39 (1932), pp 565 613

For a valuable List of Treaties, etc, between Great Britain and China and of Treaties between Great Britain and Foreign Powers, relating to China, see Treaty Series, No 34 (1925), Cmd 2502

[2] See *Documents*, 1929, pp 284 *et seq*, Cmd 3480 (1930), China No 1, Toynbee, *Survey*, 1929, pp 316 322, Millard, *The End of Exterritoriality in China* (1931), Tchéou, *Evolution des relations diplomatiques et la Chine avec les puissances, 1597-1929* (1931), Ounag, *Essai sur le régime des capitulations en Chine* (1933), Escarra, *Droits et intérêts étrangers en Chine* (1928), the same in *Répertoire*, III pp 428-439, and the same, *La Chine et le droit international* (1931), pp 38 209, Turner in *B Y*, 10 (1929), pp 56 64, Wright in *A J*, 24 (1930), pp 217-227, Wu in *A S Proceedings*, 1930, pp 182 194

territoriality, although some of the interested Powers expressed in principle their willingness to relinquish the rights connected therewith [1] On January 11, 1943, Great Britain [2] and the United States signed treaties with China in which they relinquished extraterritorial rights in that country Other countries followed suit.

With regard to Egypt the position until 1937 was that in civil and commercial matters and for some police offences most foreigners in Egypt were subject to the jurisdiction of international courts, called Mixed Courts, while as regards other criminal matters they were subject to the jurisdiction of their own courts [3] Following upon the Treaty of Alliance of August 1936 [4] with Great Britain, a conference took place in Montreux in April 1937,[5] which, in a Convention signed on May 8, 1937, agreed to the abolition of capitulations but provided for a transitional period of twelve years during which certain cases involving foreigners will be tried by mixed courts composed of Egyptian and foreign nationals [6] It may therefore be said that, apart from the transitional régime in Egypt, and some minor but highly complicated

[1] *A J*, 37 (1943), Suppl, pp 65 *et seq* See Wright in *A J*, 37 (1943), pp 286 289

[2] Cmd 6417 China No 1 (1943), Cmd 6456

[3] See Brinton, *The Mixed Courts of Egypt* (1930), Awad, *Les pouvoirs des Tribunaux mixtes d'Egypte* (1930), Dykmans, *Le Statut contemporain des étrangers en Egypte vers une réforme du régime capitulaire* (1933), Messina in *Hague Recueil*, vol 41 (1932) (III), pp 367-497, Bentwich in *B Y*, 14 (1933), pp 93 95, Hansson in *Nordisk T A*, 5 (1934), pp 104 122, Stross in *Z o R*, 15 (1935), pp 394 407, Peter-Pirkham, *ibid*, pp 471-484, 62 *Clunet* (1935), pp 5 44

[4] Treaty Series, No 6 (1937), Cmd 5360, Article 13 and Annex thereto

[5] For the Final Act, Convention and other documents regarding the abolition of capitulations in Egypt see Cmd 5491 (1937), *Documents*, 1937, pp 538 553 See also Gordon in *R I*, 3rd ser, 18 (1937), pp 267-275, Wathelet, *ibid*, pp 391 437, Anonymous in *B Y*, 18 (1937), pp. 95, 96, and 19 (1938), p 16, Hackworth, II § 180, Chrétien in *R G*, 45 (1938), pp 302-372 See also Christophe, *L'Egypte et le régime des capitulations* (1937), Aghion and Feldman, *Les Actes de Montreux* (1937), Fahmi, *La Conférence de Montreux 1937* (1938), Beeley in Toynbee, *Survey*, 1937 (1), pp 581-605, v Tabouillot in *Z o V*, 7 (1937), pp 511 535, Loewenfeld in *Grotius Society*, 26 (1940), pp 83 123

[6] Following upon the abolition of capitulations in Egypt by the Convention of Montreux, a convention was signed on July 29, 1937, between Great Britain and France for the abolition of British capitulatory rights in the French zone of Morocco as well as for the abolition of French capitulatory rights in Zanzibar Treaty Series, No 8 (1938), *A J*, 34 (1940), p 225 The United States has not recognised the abolition of extraterritoriality in the French and Spanish Zones of Morocco and in Muscat See Hackworth, vol II pp 506, 508, 530 As to Great Britain see *B Y*, 20 (1939), pp 58-82

exceptions like Muscat and Bahrein, capitulations are now a matter of the past [1]

Aliens under the Protection of their Home State.

§ 319 Although aliens fall at once under the territorial supremacy of the State they enter, they remain, nevertheless, under the protection of their home State By a universally recognised customary rule of the Law of Nations every State holds a right of protection [2] over its citizens abroad, to which corresponds the duty of every State to treat foreigners on its territory with a certain consideration which will be discussed below, §§ 320-322 The question here is only when and how this right of protection can be exercised Now there is certainly, as far as the Law of Nations is concerned, no duty incumbent upon a State to exercise its protection over its citizens abroad The matter is absolutely in the discretion of every State, and no citizen abroad has by International Law a right to demand protection from his home State, although he may have such a right by Municipal Law Often for political reasons States have in certain cases refused to exercise their right of protection over citizens abroad Be that as it may, every State *can* exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time being, or by the officials or the citizens of such State, if it does not interfere for the purpose of making good the wrong done [3] And this right can be exercised in several ways

[1] See Carabiber in *Répertoire*, iii pp 87-94 For an account of the régime of capitulations in Abyssinia until 1936 see Gardiner in *R G*, 44 (1937), pp 90 96

[2] This right has grown up in furtherance of intercourse between the members of the Family of Nations (see above, § 142), Hall (§ 87) and others deduce this indubitable right from the 'fundamental' right of self preservation

[3] See above, §§ 151 167, Anzilotti in *R G*, 13 (1906), pp 5, 285, Hall, § 87, Westlake, i pp 327-337, Suarez, §§ 180-193, Moore, vi §§ 979-997 And see in particular Borchard, *Diplomatic Protection of Citizens Abroad* (1915), the same in *Annuaire*, 36 (1) (1931), pp 256 454, and 37 (1932), pp 235 262, Dunn, *The Protection of Nationals* (1932), and *Diplomatic Protection of Americans in Mexico* (1933), Raestad in *R I (Paris)*, 11 (1933), pp 493 544, Beckett in *Grotius Society*, 17 (1931), pp 175-194 On the protection of shareholders of companies registered abroad see Ch de Visscher in *R I*, 3rd ser, 15 (1934), pp 624 651 On diplomatic protection of investments see Staley, *War and the Private Investor* (1935), and in *R G*, 42 (1935), pp 541-558, 659-667 And see Rundstein in *Hague Recueil*, vol 23 (1928) (iii), pp 331 461, on arbitral settlement of claims of private organisations For further literature see

Thus, a State whose subjects are wronged abroad can diplomatically insist upon the wrongdoers being punished according to the law of the land and upon damages, if necessary, being paid to its injured subjects [1] It can, further, exercise retorsion and reprisals for the purpose of making the other State comply with its demands

Protection to be afforded to the Persons and Property of Aliens

§ 320 In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien, provided he possesses some nationality, cannot be outlawed in foreign countries, but must be afforded protection for his person and property The home State of the alien has, by its right of protection, a claim upon such State as allows him to enter its territory that such protection shall be afforded, and it is no excuse that such State does not provide any protection whatever for its own subjects In consequence thereof, every State is by the Law of Nations compelled to grant to aliens at least equality [2] before the law with its citizens, as far as

above, § 289, with regard to the access of individuals Concerning the right of protection of a State over its citizens with regard to public debts of foreign States see above, §§ 135 (6) and 155*a* As to the protection of aliens against expropriation of property see above, § 155*d*

[1] As to the effect of 'Calvo clauses see above, § 155*a*

[2] On the question whether equality of treatment of aliens and nationals is the test or whether aliens are entitled to be treated in accordance with the ordinary standards of civilisation, see above, § 155*d*, on the plea of non discrimination As to the question whether a State in granting compensation for damages sustained as the result of war is bound to treat its own subjects and aliens alike see the various opinions expressed in 1932 and the subsequent years in the course of the dispute between Switzerland and France before the Council of the League concerning the damage suffered by Swiss subjects in France during the First World War See Lapradelle, *Les Suisses et les dommages de guerre* (Causes célèbres du droit des gens, 1931, with opinions of other writers), Nostitz-Wallwitz in *Z o V*, 5 (1935), pp 633 640, Lapradelle in *R I (Paris)*, 6 (1930), pp 148 204, Maupas in 63 *Clunet* (1936), pp 560 570, Kunz in *New York University Law Quarterly Review*, 14 (1937), pp 289 318, *Off J*, 1935, pp 127-133, 183-189, 620 626, for a series of French decisions see Rousseau in *R G*, 42 (1935), pp 227-229, and see for a pronounced view on the matter the award of the British-American Claims Arbitral Tribunal in the case of *Eastern Extension, Australasia and China Telegraph Company Ltd Annual Digest*, 1923-1924, Case No 225 (v) In an Agreement of August 2, 1929, Great Britain and France each agreed to grant, with minor exceptions, to the nationals of the other party compensation for war damage suffered in their respective territories Treaty Series, No 28 (1929), Cmd 3404 For an interpretation of a treaty providing for equality of treatment see the *China* case decided in 1934 by the Permanent Court *P C I J*, Series A/B, No 63; *Annual Digest*, 1933-1934, Case No.

safety of person and property is concerned [1] An alien must in particular not be wronged in person or property by the officials and courts of a State [2] Thus, the police must not arrest him without just cause, custom-house officials must treat him civilly, courts of justice must treat him justly and in accordance with the law Corrupt administration of the law against natives is no excuse for the same against aliens, and no Government can cloak itself with the judgment of corrupt judges

How far Aliens can be treated according to Discretion

§ 321 Apart from protection of person and property, every State can treat aliens according to discretion, except in so far as its discretion is restricted through international treaties [3] Thus, a State can exclude aliens from certain professions and trades [4], it can exclude them from holding real property, it can, as Great Britain did in former times [5] and again during the First World War and since, compel

130 The 'Court of Racial Health' in Berlin held in 1934 that an alien was liable to compulsory sterilisation in pursuance of a law for the prevention of hereditary diseases *Sterilisation (Germany) Case, Annual Digest*, 1933 1934, Case No 128, see also *ibid*, 1935 1937, Case No 149

[1] In the *Oscar Chinn* case between Great Britain and Belgium, decided on December 12, 1934, the Permanent Court of International Justice held in effect that respect due to the vested rights of an alien does not imply an obligation for the State to refrain from the granting of such special benefits to its subjects as may result incidentally in losses to the alien Series A/B, No 63, p 88 And see generally on vested rights Kaecken beeck in *Hague Recueil*, vol 59 (1937), (1), pp 354 415

[2] As regards the plea of 'Act of State' against an alien see above, § 148 (n 1) The fundamental character of the alien's right to sue is expressed in the following emphatic passage in *Berger* v *Stevens*, decided in 1929 by the Supreme Court of North Carolina 'It is incompatible with a state of national friendship, and is a cause of war, if the citizens of another country are not allowed to sue for and obtain redress of wrongs in our courts' *Annual Digest*, 1929-1930, Case No 160 It has been held by the Canadian Exchequer Court that an alien can maintain a petition of right against the Crown *Massein* v *The King, Annual Digest*, 1938-1940, Case No 124 While the Supreme Court of Wisconsin held in 1933 (*Coules* v *Pharris*, 212 Wisc 558, *Annual Digest*, 1933 1934, Case No 123) that an alien who has entered unlawfully cannot sue, the Supreme Judicial Court of Massachusetts gave, in the same year, a contrary decision *Janusis* v *Long*, 248 Mass 403, *Annual Digest*, 1933 1934, Case No 124 The Court said 'Such aliens unlawfully in the country must live They must in the nature of things make the ordinary contracts incident to existence' See also, to the same effect, *Martinez* v *Fox Valley Bus Lines, Inc ibid*, 1935-1937, Case No 151

[3] Some States discriminate amongst aliens of different races, see Garner in *J C L*, 3rd ser, 6 (1924), pp 212-214

[4] As to the United States see Hackworth, II § 131 And see generally *The Legal Status of Aliens in Pacific Countries*, edited by MacKenzie (1937)

[5] See an Act for the Registration of Aliens 1836 (6 & 7 William 4, c 11).

them to register their names for the purpose of keeping them under control,[1] and the like Before the First World War there was a tendency to treat admitted aliens more and more on the same footing as citizens, political rights and duties, of course, excepted [2] Thus, for instance, with the exception that an alien could not be sole or part owner of a British ship, aliens who had taken up their domicile in this country were for all practical purposes treated by the law of the land on the same footing as British subjects But this is no longer the case For example, the Aliens Restriction (Amendment) Act, 1919,[3] provides, among other disabilities, that no alien is to hold a pilotage certificate for any pilotage district in the United Kingdom,[4] or act as master, chief officer, or chief engineer of a British merchant-ship registered in the United Kingdom, or as skipper or second hand of a British fishing-boat,[4] or receive an appointment to the Civil Service In practically all countries the restrictions are now, in a period of economic nationalism, much more severe [5]

Departure from the Foreign Country

§ 322 Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, under any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts,

[1] See the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920

[2] The Final Act of the Meeting of the Foreign Ministers of the American Republics of July 1940 declared, somewhat vaguely and with some exaggeration, that the generally recognised principle of the exclusion of foreigners from the enjoyment and exercise of strictly political rights implies the prohibition for foreigners to engage in political activities within the territory of the State in which they reside *A J*, 35 (1941), Suppl, p 10 The Uruguayan Constitution of 1934 contains the unusual provision that citizenship is not a prerequisite of suffrage and that all persons who have lived in Uruguay for 15 years shall have the right of suffrage

[3] §§ 4-12

[4] These general prohibitions are subject to certain exceptions

[5] Thus the Constitution of Afghanistan of October 1931 lays down that foreign subjects have 'absolutely no right' to own land in Afghanistan. *British and Foreign State Papers*, 134, p 1204 On the position in France, and in particular on the regime of so-called identity cards, see Cassel in *Répertoire*, iii pp 103-121. On the overriding right of Congress to regulate the registration of aliens see *Hines (Pennsylvania)* v *Davidowitz* (1941) 312 U S 52 And see above, p 617, n 3 As to unemployment insurance see the Exchange of Notes of November 19, 1929, between Switzerland and Great Britain providing for the reciprocal granting of unemployment benefit to the nationals of the two countries Treaty Series, No 8 (1930), Cmd 3489 On the position of aliens in colonies see Asbeck in *Hague Recueil*, vol 61 (1937) (iii), pp 5 93

and the like An alien leaving a State can take his property away with him on the same conditions as a national, and a tax for leaving the country, or tax upon the property he takes away with him,[1] cannot be levied Since the beginning of the nineteenth century the so-called *droit d'aubaine* belongs to the past, this is the name of the right of a State which was formerly frequently exercised, to confiscate the whole estate of an alien deceased on its territory [2] But if a State levies estate duties in the case of a citizen dying on its territory, as Great Britain does according to the Finance Act [3] of 1894, and subsequent legislation, such duties can likewise be levied in case of an alien dying on its territory

VIII

EXPULSION OF ALIENS

Hall, § 63—Westlake, I p 217—Phillimore, I § 364—Halleck, I pp 493, 494—Taylor, § 186—Walker, § 19—Wharton, II § 206—Moore, IV §§ 550-559—Hackworth, III § 291—Hershey, § 247—Hyde, I §§ 61 64—Bluntschli, §§ 383, 384—Stoerk in *Holtzendorff*, II pp 644-650—Ullmann, § 115—Liszt, 20 (III)—Fauchille, § 443—Despagnet, §§ 336, 337—Pradier-Fodéré, III §§ 1857-1859—Rivier, I pp 311 314—Nys, II pp 284 289—Calvo, VI §§ 119 125—Fiore, *Code*, §§ 257-264—Martens, I § 79—De Louter, I pp 292 294—Suarez, §§ 199 205—Fleischmann in *Strupp, Wort*, I pp 334 340—Bleteau, *De l'asile et de l'expulsion* (1886)—Berc, *De l'expulsion des étrangers* (1888)—Féraud Giraud, *Droit d'expulsion des étrangers* (1889)—Langhard, *Das Recht der politischen Fremdenausweisung* (1891)—Overbeck, *Niederlassungsfreiheit und Ausweisungsrecht* (1906)—Martini, *L'expulsion des étrangers* (1909)—Kobarg, *Ausweisung und Abweisung von Auslandern* (1930)—Borchard, §§ 27 32—Rolin Jaequemyns in *R I*,

[1] So called *gabella emigrationis* For an example of a conventional regulation of the general principles of treatment of aliens see the Convention on the Status of Aliens adopted in February 1928 by the Sixth American International Conference *A J*, Suppl, 22 (1928), pp 136 138

[2] See details in Wheaton, § 82 The *droit d'aubaine* was likewise named *jus albinagii* A mitigation of the *droit d'aubaine* was the *droit de retraite*, or *droit de détraction* or *jus detractus*, according to which the estate of a deceased alien was not confiscated, but a tax was levied upon its removal by the foreign heir

[3] Estate duty is levied in Great Britain in the case also of such aliens dying abroad as leave movable property in the United Kingdom without having ever been resident there As far as the Law of Nations is concerned, it is doubtful whether Great Britain is competent to claim estate duties in such cases On the question of estate duties in general see Meynen, *Die Erbschaftssteuer im internationalen Rechte* (1912)

20 (1888), pp 499 508—Gregory in *A S Proceedings* (1911), pp 119-150—Blondel in *Répertoire*, viii pp 105-163—Boeck in *Hague Recueil*, vol 18 (1927) (iii), pp 447 646 (an exhaustive study)—Puente in *A J*, 36 (1942), pp 252 270 (as to Latin-America)

Competence to expel Aliens

§ 323 Just as a State is competent to refuse admission to an alien, so, in conformity with its territorial supremacy, it is competent to expel at any moment an alien who has been admitted into its territory[1] And it matters not whether that individual is only on a temporary visit, or has settled down for professional or business purposes on its territory, having taken his domicile thereon Such States, of course, as have a high appreciation of individual liberty and abhor arbitrary powers of government will not readily expel aliens Thus, the British Government had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court, or without an Act of Parliament making provision for such expulsion, except during war or on an occasion of imminent national danger or great emergency

On the other hand, it cannot be denied that, especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is, by its right of protection over citizens abroad, justified in making diplomatic representations[2] to the expelling State, and asking for the reasons for the expulsion Although a State may exercise its right of

[1] See *Attorney General for Canada* v *Cain* [1906] A C 542 See now the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920 For an instance of deportation under a convention for the mutual deportation of persons liable to military service see *Ex parte Duke of Chateau Thierry* [1917] 1 K B 922

For an instance of conventional regulation of deportation see Agreement of July 29, 1933, between the British Government, the Government of India, and the French Government regarding deportations from certain eastern British and French territories Treaty Series, No 30 (1933), Cmd 4409

[2] See Borchard, § 31 The Pan-American Convention on the Status of Aliens of February 20, 1928 (Hudson, *Legislation*, iv p 2377), provides that States may expel aliens for reasons of public order or safety (Article 6) This provision, however wide, seems to imply at the same time that expulsion must not be arbitrary For an interesting decision of the Supreme Federal Tribunal of Brazil circumscribing the executive right of expulsion see *In re Manoel de Campos Moledo Annual Digest*, 1929-1930, Case No 164

expulsion according to discretion it must not abuse its right by proceeding in an arbitrary manner [1]

Just Causes of Expulsion of Aliens

§ 324 In view of this the question is of importance what just causes of expulsion of aliens there are As International Law gives no detailed rules regarding expulsion, everything depends upon the merits of the individual case Theory and practice correctly make a distinction between expulsion in time of war and in time of peace A belligerent may consider it convenient to expel all enemy subjects residing, or temporarily staying, within his territory And, although such a measure may be very hard and cruel, the opinion is general that such expulsion is justifiable [2] As regards expulsion in time of peace, on the other hand, the opinions of writers, as well as the practice of States, naturally differ much [3] A State which expels an alien will hardly admit not having had a just cause The fact cannot be denied that an alien is more or less a guest in the foreign land, and the question under what conditions a guest makes himself objectionable to his host cannot be answered once

[1] See above, § 155*aa* But see previous editions for a view different from that expressed in the text And see *Boffolo* case and other cases cited by Lauterpacht, *The Function of Law*, p 289 In the *Boffolo* case the arbitrator said 'The country exercising the power of expulsion must, when occasion demands, state the reason of such expulsion before an international tribunal, and an insufficient reason or none being advanced, accept the consequences' (Ralston, *Venezuelan Arbitrations*, 1903, pp 696, 705) When in December 1934 Yugoslavia expelled a great number of Hungarian subjects as a reprisal against alleged complicity of Hungarian authorities in the activities of terrorists, she explained that, in view of a large measure of unemployment in Yugoslavia, the persons in question lived in Yugoslavia under periodically renewable permits only Toynbee, *Survey*, 1934, pp 573 577 In the *Hochbaum* case, decided in 1934 by the Upper Silesian Arbitral Tribunal, it was held that when expulsion is based on grounds of public safety the Tribunal will not, as a rule, review the decision of the competent State authorities *Decisions of the Tribunal*, vol 5, No 1, pp 20 *et seq* , *Annual Digest*, 1935 1937, Case No 559 , *Z o V* , 5 (1935), pp 653 655 In January 1940 a United States Circuit Court of Appeals refused the request of the Government for the deportation of a Polish couple to Poland, then under German occupation, on the ground that, in the circumstances, the deportation would be 'inhuman and shocking to the senses' *The Times* newspaper, January 5, 1940 See also, to the same effect, *United States* ex rel *Weinberg* v *Scholfeldt*, *Annual Digest*, 1938 1940, Case No 134

[2] See below, ii § 100

[3] The Institute of International Law at its meeting at Geneva in 1892 adopted a body of forty one articles concerning the admission and expulsion of aliens, and in Article 28 thereof enumerated nine just causes for expulsion in time of peace, see *Annuaire*, 12, p 223 Many of these causes, such as conviction for crimes, for instance, are certainly just causes, but others are doubtful

for all by the establishment of a body of rules But the border line between discretion and arbitrariness, although elastic, is a real one, and in case of doubt it is for an impartial organ to determine whether it has been overstepped With the gradual disappearance of despotic views in the different States, and with the advance of true constitutionalism guaranteeing individual liberty and freedom of opinion and speech, expulsion of aliens, especially for political reasons, will become less frequent Expulsion will, however, never totally disappear, because it may well be justified [1]

How Expulsion is effected

§ 325 Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when compulsion is meted out to a domiciled alien [2] And the home State of the expelled alien, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence But this is valid as regards the first expulsion only Should the expelled alien refuse to leave the territory voluntarily, or, after having left, return without authorisation, he may be arrested, punished, and forcibly brought to the frontier [3]

[1] Thus, for example, Prussia after the annexation of the formerly Free Town of Frankfort on the Main, was certainly justified in expelling those individuals who, for the purpose of avoiding military service in the Prussian Army, had by naturalisation become Swiss citizens without giving up their residence at Frankfort On the question whether membership of the communist party justifies the expulsion of an alien see *Kessler* v *Strecker* (1939) 59 Sup Ct 694, and comment in *Oregon Law Review*, 18 (1939), pp 335 337 On the expulsion of political refugees see Reale in *Hague Recueil*, vol 63 (1938) (1), pp 556 561

[2] See the award in *Ben Tillett's* case between Great Britain and Belgium on March 19, 1898 Cmd 9235 (1899), Hudson, *Cases*, p 1056

[3] As to the procedure of expulsion in the British Empire see Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940) De portation takes place normally to the country of origin See *United States ex rel Hudak* v *Uhl*, where the Court held that the petitioner, a native of Poland, was not entitled to insist on being deported to Canada *Annual Digest*, 1935 1937, Case No 161 During the Second World War the courts in the United States in some cases ordered the delivery of deported persons, nationals of countries under belligerent occupation, to the authorities of their Governments in exile See, *e g*, *Morattis* v *Delany* for an instance of deportation of a Greek subject from the United States to England on the ground that the latter was the residence of the Greek Government in exile *Annual Digest*, 1941-1942, Case No 96

Reconduction in contradistinction to Expulsion

§ 326 In many Continental States destitute aliens, foreign vagabonds, suspicious aliens without papers of legitimation, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier But although such reconduction, often called *droit de renvoi*, is materially not much different from expulsion, it nevertheless differs much from it in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners [1] The home State of such reconducted aliens has the duty to receive them, since, as will be remembered,[2] a State cannot refuse to receive such of its subjects as are expelled from abroad [3]

IX

EXTRADITION

Hall, §§ 13, 63—Westlake, I pp 252 261—Lawrence, §§ 110, 111—Phillimore, I §§ 365 389*d*—Twiss, I § 326—Halleck, I pp 250 256, 273 287—Taylor, §§ 205 211—Hackworth, IV §§ 304 348—Hyde, I §§ 310-314, 319 341—Fenwick, pp 237 247—Walker, § 19—Hershey, §§ 250 252—Wharton, II §§ 268 282—Wheaton, §§ 115 121—Moore IV §§ 579 622—Bluntschli, §§ 394 401—Hartmann, § 89—Heffter, § 63—Lammasch in *Holtzendorff*, III pp 454 566—Liszt, § 44—Ullmann, §§ 127 131—Hatschek, pp 222 227—Fauchille, §§ 455 481—Travers, IV §§ 1932-2011, and V *passim* — Despagnet, §§ 276 303 — Pradier Fodéré, III §§ 1860 1893 — Mérignhac, II pp 732 778—Rivier, I pp 348 357—Nys, II pp 290 303—Calvo, II §§ 949 1071—Fiore, *Code*, §§ 589 592—Martens, II §§ 91-98—De Louter, I pp 299 307, 312 315—Cruchaga, §§ 386 397—Suarez, §§ 153-160, 162-166—Keith's Wheaton, pp 211 228—Stowell, pp 261-278—*Harvard Research* (1935), pp 51 434 (the most comprehensive treatment of the subject)—Spear, *The Law of Extradition* (1879)—Lammasch, *Auslieferungspflicht und Asylrecht* (1887)—Martitz, *Internationale Rechtshilfe in Strafsachen*, 2 vols (1888 and 1897)—Bernard, *Traité théorique et pratique de l'extradition*, 2 vols (2nd ed , 1890)—Moore, *Treatise on Extradition* (1891)—Clarke, *The Law of Extradition* (4th ed , 1903)—Piggott, *Extradition* (1910)—Saint Aubin, *L'extradition*, 2 vols (1913)

[1] Rivier, I p 308, correctly distinguishes between reconduction and expulsion, but Phillimore, I § 364, seems to confuse them On the practice of deportation and reconduction in the United States see Clark, *Deportation of Aliens from the United States to Europe* (1931), Oppenheimer, *The Enforcement of the Deportation Laws of the United States* (1931), Van Vleck, *The Administrative Control of Aliens* (1932), Hackworth, III §§ 293 302

[2] See above, § 294

[3] On the expulsion of a State's own subjects see Leibholz in *Z o V* I (1929), pp 95, 96

—Mettgenberg in *Strupp, Wort*, 1 pp 81-88—Rolin in *Hague Recueil*, 1923, pp 181 227—Poittevin in *Répertoire*, viii p 163—Report by Brierly and Charles de Visscher, for League Codification Committee, in *A J*, 20 (1926), Special Suppl, pp 243 251, and comment by Kuhn in *A J*, 20 (1926), pp 754 757—*International Law Association's Twenty-seventh Report*, 1912, pp 139-161, and *Thirty fourth Report*, 1927, pp 441 448—Lammasch in *R G*, 3 (1896), pp 5 14—Diena in *R G*, 12 (1905), pp 516 544—Hyde in *A J*, 8 (1914), pp 487 514—Puente in *Michigan Law Review*, 28 (1929-1930), pp 665 722 (as to Latin America)—Mercier in *Hague Recueil*, vol 33 (1930) (iii), pp 172 237—Baldassari in *Rivista*, 23 (1931), pp 3 31 (as to Italy)—Lieck in *J C L*, 3rd ser, 15 (1933), pp 59 66—Hudson in *A J*, 28 (1934), pp 274 306—Mervyn Jones in *Grotius Society*, 27 (1942), pp 113 142

Extradition no Legal Duty

§ 327 Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of,[1] a crime, by the State on whose territory the alleged criminal happens for the time to be Although Grotius [2] holds that every State has the duty either to punish, or to surrender to the prosecuting State, such individuals within its boundaries as have committed a crime abroad, and although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, this rule of Grotius has never been adopted by the States, and has, therefore, never become a rule of the Law of Nations On the contrary, States have always upheld their competence to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases excepted, of course, which fall under stipulations of special extradition treaties, if any. There is, therefore, no universal rule of customary International Law in existence which commands extradition

How Extradition Treaties arose

§ 328 Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States, stipulating the cases in which extradition shall take place According to these treaties, individuals prosecuted for the more important crimes, political crimes excepted, are in fact always surrendered to the prosecuting State, if not punished locally But this solution of the problem of extradition is a product of the nineteenth century only Before the

[1] Notice that §§ 10 and 26 of the British Extradition Act, 1870, expressly include convicted criminals

[2] II. c. 21, § 4.

eighteenth century, extradition of ordinary criminals hardly ever occurred, although many States used then frequently to surrender to each other political fugitives, heretics, and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States frequently stipulated for extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like Vattel (II § 76) is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other But special treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State When, however, in the nineteenth century, with the appearance of railways and transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries It was then, and in consequence of this, that the conviction was forced upon the States of civilised humanity that it was in their common interest to surrender ordinary criminals regularly to each other Special treaties of extradition became, therefore, a necessity, and there is a tendency towards the conclusion of general extradition treaties [1]

Municipal Extradition Laws

§ 329 Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards

[1] The Second Pan American Conference of 1902 produced a treaty of extradition which was signed by twelve States but was not ratified, see the text in *Annuaire de la vie internationale* (1908 1909), p 461 Note also the inclusion of extradition in Bustamante's draft code of Private International Law as adopted by the Pan-American International Commission of Jurists in 1927 (see Scott in *A J*, 21 (1927), at p 448) In December 1933 the States represented at the Seventh Pan American Conference concluded a Convention on Extradition which was ratified by a number of signatories including (subject to important reservations) the United States Hudson, *Legislation*, VI p 597 But contrast the Report of Brierly and Charles de Visscher for the League Codification Committee, *op cit*, which pronounced against the feasibility of a general international convention dealing with the whole subject of extradition

the conclusion of extradition treaties and the procedure in extradition cases [1] They have therefore enacted special Municipal Laws, which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases These Municipal Laws [2] furnish the basis for the conclusion of extradition treaties The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated It was not until 1870 that Great Britain followed the example given by Belgium British public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees This country possessed, therefore, before 1870 a few extradition treaties only, and they were in many points inadequate But in 1870 the British Government succeeded in getting Parliament to pass an Extradition Act This Act, which was amended in 1873, in 1895, in 1906, and in 1932, has furnished the basis for extradition treaties between Great Britain and a very large number of other States [3] Such States as possess no extradition laws, and whose written constitution does not mention the matter, leave it to their Governments to conclude extradition treaties according to their discretion And in these countries the Governments

[1] In the case of Great Britain the powerlessness of the Crown at common law to arrest a fugitive criminal and surrender him to another State for trial made legislation essential, see Clarke, *op cit*, pp 126 128, for some early cases illustrating this rule On the history of extradition in Great Britain before the Extradition Act, 1870, see Clarke, *op cit*, pp 126 166

[2] See Martitz, *Internationale Rechtshilfe*, 1 pp 747 818, where the history of all these laws is sketched and their text is printed

[3] The full text of these treaties is printed by Clarke, *op cit*, as well as Biron and Chalmers, *op cit* Not to be confused with extradition of criminals to foreign States is the return of a fugitive offender from one part of the British Empire to another, or the rendition of alleged criminals between the different member States of the United States of America The former is regulated by the Fugitive Offenders Act, 1881 For the extradition laws of other States see Travers, *op cit* As to extradition between Swiss Cantons see Lienhart, *Die interkantonale Auslieferung* (1933) See also Muddiman, *The Law of Extradition from and to British India* (2nd ed by Graham and Samuel, 1927) As to extradition from Australia see Castieau in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935) pp 122-142

are usually competent to extradite an individual, even if no extradition treaty exists [1]

Object of Extradition

§ 330 Since extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose territory he happens for the time to be, the object of extradition can be any individual, whether he is a subject of the prosecuting State, or of the State which is required to extradite him, or of a third [2] State Many States, however, such as France and Germany, have adopted the principle of never extraditing one of their own subjects to a foreign State, but themselves punishing their own subjects for grave crimes committed abroad [3] Other States, *e g* Great Britain, have not adopted this principle, and, in the absence of treaty provisions to the contrary, make no distinction between their own subjects and other persons who are alleged to have committed extraditable crimes abroad Thus in 1879 Great Britain surrendered to Austria, where he was convicted and hanged,[4] one

[1] As to the extradition of 'war criminals' see Article 228 of the Treaty of Peace with Germany (1919), Article 112 of the German (Weimar) Constitution, and below, vol II p 457, n 2 As to the extradition of persons accused of war crimes after the Second World War see vol II § 257*a* and Lauterpacht in *B Y*, 21 (1944), pp 86 95

[2] *Reg* v *Ganz* (1882) 9 Q B D 93

[3] For instance, Article 112 of the German (Weimar) Constitution The Constitution of Yugoslavia of September 1931 provides expressly that the extradition of nationals is not permitted (Article 20) *British and Foreign State Papers*, 134, p 1173

[4] This case is all the more remarkable as (see 24 & 25 Vict c 100, § 9) the Criminal Law of England extends over murder and manslaughter committed abroad by British subjects Although Great Britain is ready to extradite one of her own subjects for crimes committed abroad, she is in some cases prevented from doing so because the extradition treaties concerned comprise a clause stipulating that nationals *should not* be extradited Thus the extradition of Alfred Thomas Wilson, who had committed a theft in Zurich in 1877, and whose surrender was claimed by Switzerland, had to be refused, because the Anglo Swiss Treaty of 1874 comprised such a clause (see *Reg* v *Wilson* (1877) 3 Q B D 42) To avoid such a deplorable result, subsequent extradition treaties between Great Britain and foreign States usually comprise a clause according to which no party is *compelled* to extradite nationals As late as 1906, the extradition of a British subject had to be refused to France because Article 2 of the Anglo-French Extradition Treaty of 1876 precluded the surrender of nationals However, by a convention of 1908 (Treaty Series (1909), No 34), Article 2 of the Treaty of 1876 has been remodelled by making optional the refusal to extradite nationals See *King* v *The Governor of Brixton Prison* (1912) 3 K B 568, where the Court, in reliance upon that Convention, granted the extradition of a British subject In the case of *Valentine et al.*

Tourville, a British subject, who, after having murdered his wife in the Tyrol, had fled home to England The object of extradition is an individual who is alleged to have committed a crime abroad, whether or not he was during the commission of the criminal act physically present on the territory of the State where the crime was committed [1]

A conflict between International and Municipal Law may arise if a certain individual must be extradited according to an extradition treaty, but cannot be extradited according to the Municipal Law of the State from which extradition is demanded [2]

v *United States, ex rel Neidecker* (1936) 299 U S 5, *A J*, 31 (1937), p 134, *Annual Digest*, 1935-1937, Case No 167, the Supreme Court of the United States interpreted Article V of the Extradition Treaty of 1909 which provided that 'Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention' as meaning that the Government of the United States was without power to surrender citizens of the United States to France For a criticism of this point of view see Garner in *A J*, 30 (1936), pp 481-486 (with reference to the decision of the United States Circuit Court of Appeals in this case 81 F (2nd) 32), Manton in *Temple Law Quarterly*, 10 (1935 1936), pp 12 34, Preuss in *R I F*, 3 (1937), pp 159-173, 244 254, Kuhn in *A J*, 31 (1937), pp 476-480 And see Rafuse, *The Extradition of Nationals* (1939) However, in the absence of treaty provisions the practice of the United States has been to surrender its nationals See Hackworth, IV § 318 See also *ibid*, § 319, for an unsuccessful request of the German diplomatic representative in the United States in February 1940 that one Strakosch, a German national, should not be extradited to Great Britain on the ground that, even if acquitted, he would be liable to internment as an alien enemy

[1] Thus, in 1884, Great Britain surrendered to Germany one Nillins, who, by sending from Southampton forged bills of exchange to a merchant in Germany as payment for goods ordered, was considered to have committed forgery, and to have obtained goods by false pretences, in Germany See Clarke, *op cit* pp 177 and 262 See the comments on this principle in the *Lotus* case referred to above, § 147*a* It has been held that no extradition can be granted unless it is proved that the offence in question was actually committed in the territory of the requesting State *Kossekechatko and Others* v *Attorney General for Trinidad* [1932] A C 78

[2] See *e g* the *Paladini* case as reported in Moore, IV § 594, pp 290 297

It is noteworthy that the United States, although they do not any longer press for extradition of Italian subjects who, after having committed a crime in the United States, have returned to Italy, nevertheless considered themselves bound by the Treaty of 1868 to extradite to Italy such American subjects as have committed a crime in Italy Therefore, when in 1910 the Italian Government demanded from the United States extradition of one Porter Charlton, an American citizen (see *A J*, 5 (1911), pp 182 192, 7 (1913), pp 580-582, 637 653), for having committed a murder in Italy, extradition was granted by the United States Government, and this action was upheld by the Supreme Court of the United States to which Charlton appealed (*Charlton* v *Kelly*, 229 U S 447). See below, § 547 (n 2), Hyde, I § 319, Hershey, p 379, n 74, *Harvard Research* (1935), pp 123-137

Extraditable Crimes

§ 331. Unless a State is restricted by an extradition law, it can grant extradition for any crime it thinks fit [1] And unless a State is bound by an extradition treaty, it can refuse extradition for any crime Such States as possess extradition laws frame their extradition treaties conformably therewith, and specify in those treaties all those crimes for which they are willing to grant extradition [2] And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition [3] However, it is not within the province of

[1] As to the policy adopted by certain States of extraditing persons accused of capital crimes only on condition that the death penalty is not inflicted see Reeves in *A J*, 18 (1924), pp 298 300

[2] The Convention for the Suppression of Counterfeiting Currency of April 20, 1929, provides that the offences dealt with by the Convention shall be deemed to be included in the various extradition treaties concluded by the contracting parties C 153 M 59 1929 II., *L N T S*, 112, p 371 See above, p 300, n 2 And see 25 and 26 Geo 5, c 25 For a Draft Convention on Extradition adopted in 1928 by the International Law Association see *Report of Thirty-fifth Conference* (1928), pp 324 329, and *Grotius Society*, 14 (1928), pp 108-112 And see a Model Draft prepared in 1931 by a Sub Committee of the International Penal and Prison Commission and printed in *Harvard Research* (Extradition, 1935), pp 309 315

[3] In the recent case of *Factor* v *Laubenheimer and Haggard* the Supreme Court of the United States, in interpreting the Extradition Treaty with Great Britain, refused to follow this principle and found that the offence with which the plaintiff was charged was an extraditable crime even if it were not punishable by the law of the State of Illinois where the plaintiff was taken in custody (1933) 290 U S 276, 54 S Ct 191, *A J*, 28 (1934), p 149 For a criticism of the decision see Hudson, *ibid*, pp 274 306 But see Borchard, *ibid*, pp 742-746 See also *Z o V*, 4 (1934), pp 686 690 It is of some interest that in December 1932 the Greek Court of Appeals refused the extradition of the financier Samuel Insull, an alleged fugitive from justice from the State of Illinois, on the ground that the offence with which he was charged did not constitute a crime under Greek law see *A J*, 28 (1934), p 308, n 4, *Annual Digest* 1933-1934, Case No 146 See also on the principle of double criminality Lapradelle, *Causes célèbres du droit des gens Affaire Henry M Blackmer, Extradition* (1929) As regards Great Britain, the extraditable crimes are specified in the Extradition Acts of 1870, 1873, 1906, and 1932, and include the following murder and manslaughter, counterfeiting and uttering counterfeit money, forgery and uttering what is forged, embezzlement and larceny, obtaining goods or money by false pretences, crimes by bankrupts against bankruptcy laws, fraud by a bailee, banker, agent, factor, trustee, or by a director, or member, or public officer of any company, rape, abduction, child stealing, burglary and housebreaking, arson, robbery with violence, threats with intent to extort, piracy by the Law of Nations, offences relating to dangerous drugs, sinking or destroying a vessel at sea, assaults on board ship on the high seas with intent to destroy life or to do grievous bodily harm, revolt or conspiracy against the authority of the master on board a ship on the high seas, kidnapping, false imprisonment, perjury, subornation of perjury, and bribery For the extra-

the courts of the requested State to try the case on its merits, but merely to ascertain whether the evidence submitted justifies *prima facie* judicial proceedings against the accused [1]

Political criminals are, as a rule, not extradited,[2] and according to many extradition treaties, military deserters and persons who have committed offences against religion are likewise excluded from extradition

Effectuation and Condition of Extradition

§ 332 Extradition is granted only if asked for,[3] and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any It is effected through the handing over of the criminal by the police of the extraditing State to the police of the prosecuting State According to most extradition treaties, it is a condition of extradition that the surrendered individual shall be tried and punished for those crimes exclusively for which his extradition has been asked and granted, or for those, at least, which the extradition treaty concerned enumerates [4] If, nevertheless, an extradited individual is tried and punished

dition statutes of the principal countries see *Harvard Research* (Extradition, 1935), Appendix VI And see the Extradition Treaty of December 22, 1931, between Great Britain and the United States Treaty Series, No 18 (1935), Cmd 4928 See also the so-called Bustamante Code, Articles 344 381, adopted at Habana on February 20, 1928 *L N T S*, 86, p 344, Hudson, *Legislation*, iv pp 2283 2354, the Montevideo Convention on Extradition adopted on December 26, 1933, by the Seventh Pan-American Conference *Harvard Research* (Extradition, 1935), pp 289 293

[1] See the protest of the United States made in November 1935 against the refusal of Greece to extradite the financier Samuel Insull following upon the decision of the Athens Court of Appeals which investigated the substance of the charge in respect of which extradition was sought For an account of the case see Hyde in *A J*, 28 (1934), pp 307-312, and see *ibid*, pp 362 372, for the text of the decision, Ahmed Rechid in *R G*, 41 (1934), pp 687 710

[2] See below, §§ 333 337

[3] Many treaties make it a condition of extradition that *reciprocity* is granted On the so-called reciprocity clause see Mettgenberg in the *Archiv für öffentliches Recht*, 25 (1910), pp 1 148

[4] See Mettgenberg in *Z I*, 18 (1908), pp 425 430, and Becker in *Z V*, 11 (1918 1920), pp 230-240, and *United States* v *Rauscher* (1886) 119 U S 407, Hudson, *Cases*, p 956, with a useful note on p 962 This rule is often referred to as the principle of speciality It received an interesting illustration in two decisions in *United States* v *Milligan* (1934) 74 F (2nd) 220 and (1935) 76 F (2nd) 511—in the second of which it was held that the *rationale* of the principle is not any interest of the accused, but that of the extraditing State which can waive the benefit of it See also *R* v *Corrigan* (1930) 22 Cr App R 106

for another crime, the extraditing State has a right to complain [1]

An important question is whether, in case a criminal, who has succeeded in escaping into the territory of another State, is erroneously handed over, without the formalities of extradition having been complied with, by the police of the local State to the police of the prosecuting State, such local State can demand that the prosecuting State shall send the criminal back, and ask for his formal extradition This question was decided in the negative in February 1911 by the Court of Arbitration at The Hague in the case of *France* v *Great Britain* concerning Savarkar [2]

[1] It was held in *United States ex rel Donnelly* v *Mulligan* that a person who was acquitted of a charge for which he had been extradited may be extradited, on another charge, to a third State with the consent of the State which originally granted the extradition 74 F (2d) 220, *Annual Digest*, 1933 1934, Case No 144, 76 F (2d) 511, *Annual Digest*, 1935-1937, Case No 169 It has been held by the Italian Court of Cassation that if the accused consents and the extradition treaty provides for such consent he may be tried on charges other than those for which he has been extradited *In re Arrietto*, *Annual Digest*, 1933 1934, Case No 140 On the other hand, the same Court held that, in the absence of a treaty provision to the contrary, the extradited person cannot validly consent to a prosecution on such charges *Vallerini* v *Grandi*, *ibid*, 1935-1937, Case No 176 For an emphatic affirmation of the principle of identity of extradition and prosecution as being a principle of International Law see the decision of the Spanish Supreme Court in *Fiscal* v *Samper* (*ibid*, 1938 1940, Case No 152) The Institute of International Law in 1880, at its meeting in Oxford (see *Annuaire*, v p 127), adopted a body of twenty six rules concerning extradition And see *Harvard Research* (Extradition, 1935), *passim* As to the retroactive effect of extradition treaties, in connection with the *Insull* case (above, p 640, n 3), see Stowell in *A J*, 27 (1933), p 130 See also Harness in *Indiana Law Review*, 11, pp 351 363

[2] This Indian, a British subject, who was prosecuted for high treason and abetment of murder, and was being conveyed in the P and O boat *Morea* to India for the purpose of standing his trial there, escaped to the shore on October 25, 1910, while the vessel was in the harbour of Marseilles He was, however, seized by a French policeman, who, erroneously and without further formalities, reconducted him to the *Morea* with the assistance of individuals from the vessel who had raised a hue and cry Since Savarkar was *prima facie* a political criminal, France demanded that Great Britain should give him up, and should request his extradition in a formal way, but Great Britain refused to comply with this demand, and the parties, therefore, agreed to have the conflict decided by the Court of Arbitration at The Hague The award, while admitting that an irregularity had been committed by the reconduction of Savarkar to the British vessel, decided in favour of Great Britain, asserting that there was no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has a prisoner in its custody to restore him on account of a mistake committed by the foreign agent who delivered him up to that Power It should be mentioned that the French Government had been previously informed of the fact that Savarkar

X

PRINCIPLE OF NON-EXTRADITION OF POLITICAL CRIMINALS

Westlake, I pp 256 258—Lawrence, § 111—Taylor, § 212—Hershey, §§ 253-255—Wharton, II § 272—Moore, IV § 604—Hackworth, IV § 316—Hyde, I §§ 315 318—Bluntschli, § 396—Hartmann, § 89—Lammasch in *Holtzendorff*, III pp 485 510—Liszt, § 44 (II 2)—Ullmann, § 129—Rivier, I pp 351-357—Nys, II pp 300-303—Calvo, II §§ 1034 1036—Martens, II § 96—Fauchille, §§ 464-466—Pradier-Fodéré, III §§ 1871 1873—Mérignhac, II pp 754 771—De Louter, I pp 307 311—Cruchaga, §§ 381 385—Soldan, *L'extradition des criminels politiques* (1882)—Martitz, *Internationale Rechtshilfe in Strafsachen*, II (1897) pp 134 707—Lammasch, *Auslieferungspflicht und Asylrecht* (1887), pp 203 355—Grivaz, *Nature et effets du principe de l'asile politique* (1895)—Piggott, *Extradition* (1910), pp 42 60—Carlton Hall, *Political Crime* (1923)—Herbold, *Das Politische Asil im Auslieferungsrecht* (1933)—*Harvard Research* (1935), pp 107-119—Teichmann, Hornung, Martens, and Saripolos, in *R I*, 11 (1879), pp 475 526—Scott in *A J*, 3 (1909), pp 459-461—Hyde in *A J*, 8 (1914), pp 489 495—Walker in *Z O*, 4 (1924 1925), pp 335 349—Kraus in *R I*, 3rd ser, 8 (1927), pp 161 181—Politevin in *Répertoire*, VIII pp 202 214—Mettgenberg in *Z V*, 16 (1931-1932), pp 731 741—Deere in *A J*, 27 (1933), pp 247 270—Mannheim in *Grotius Society*, 21 (1935), pp 109 125—Reale in *Hague Recueil*, vol 63 (1938) (I), pp 541 561

How Non-Extradition of Political Criminals became the Rule

§ 333 Before the French Revolution [1] the term 'political crime' was unknown both in the theory and practice of the Law of Nations, and the principle of non-extradition of political criminals was likewise non-existent [2] On the contrary, whereas extradition of ordinary criminals was, before

would be a prisoner on board the *Morea* while she was calling at Marseilles, and had agreed to this

See Hamelin, *L'Affaire Savarkar* (Extrait du *Recueil général de Jurisprudence, de Doctrine, et de Législation coloniales*, 1911), who defends the French view The award of the Court of Arbitration has been severely criticised by Baty in *Law Magazine and Review*, 36 (1911), pp 326-330, Kohler in *Z V*, 5 (1911), pp 202-211, Strupp, *Zwei praktische Falle aus dem Volkerrecht* (1911), pp 12-26, Robin in *R G*, 18 (1911), pp 303-352, Hamel in *R I*, 2nd ser, 13 (1911), pp 370-403 For a case having certain features in common with the case of *Savarkar* see Charteris in *J C L*, 3rd ser, 8 (1926), pp 246-249 And see the Lamirande case between Great Britain and France reported in the former editions of this treatise And see above, § 128, as to jurisdiction in case of irregular apprehension

The documents relating to this case are printed on pp 28-29 of the British counter-case in the *Savarkar Arbitration*

[1] Note, however, an anticipation by Francis Hutcheson in *System of Moral Philosophy* (published in 1755), Book 3, ch 10, § 9, p 105, where he asserts the principle of the non-extradition of 'State criminals,' as he describes them

[2] This section is largely a summary of the facts given by Martitz, *op cit* II pp 134-184

the eighteenth century at least, hardly ever stipulated for, treaties very often stipulated for the extradition of individuals who had committed such deeds as are nowadays termed 'political crimes,' and such individuals were frequently extradited, even when no treaty stipulated for it [1] Moreover, writers in the sixteenth and seventeenth centuries did not at all object to such a practice on the part of the States , on the contrary, they frequently approved of it [2] It was indirectly due to the French Revolution that matters gradually underwent a change, since this event was the starting-point for the revolt in the nineteenth century against despotism and absolutism throughout the western part of the European continent It was then that the term ' political crime ' arose, and Article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country ' for the cause of liberty ' On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States However, the modern principle of non-extradition of political criminals did not even then conquer the world Until 1830, political criminals were frequently extradited But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives And in 1816 Lord Castlereagh declared that there could be no greater abuse of the law than to allow it to be the instrument of inflicting punishment on foreigners who had committed political crimes only The second in the field was Switzerland, the asylum for many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary continental monarchs refused the introduction of constitutional reforms which

[1] Martitz *op cit*, ii p 177, gives a list of important extraditions of political criminals which took place between 1648 and 1789

[2] So Grotius, ii c 21, § 5, No 5

were demanded by their peoples And although, in 1823, Switzerland was forced by threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition went on fighting its way [1]

On the other hand, in 1833 a reaction set in when Austria, Prussia, and Russia concluded treaties which remained in force for a generation, and which stipulated that thenceforth individuals who had committed crimes of high treason and *lèse-majesté*, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted her celebrated extradition law, the first of its kind, being the very first Municipal Law which expressly interdicted the extradition of foreign political criminals As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt it her duty to make it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put into practice in the treaty of extradition concluded in 1834 between Belgium and France The latter, which until 1927 [2] had no municipal extradition law, has nevertheless since 1831, in her extradition treaties with other Powers, always stipulated the principle of non-extradition of political criminals The other Powers followed gradually Even Russia had to give way, and after 1867 this principle is to

[1] Which country first prohibited the extradition of political criminals is a controversial question see Mettgenberg in *Z V*, 14 (1927), pp 237 247 In 1829 a celebrated dissertation by a Dutch jurist made its appearance, in which the principle of non extradition of political criminals was for the first time defended with juristic arguments, and on a juristic basis H Provo Kluit, *De Deditione Profugorum*

[2] See Travers in 54 *Clunet* (1927), pp 595 610, and Saint-Aubin in *R G*, 35 (1928), pp 10 31 The Law of March 10, 1927, forbids extradition when the offence is of a political character or it is reasonably suspected that extradition is requested for political purposes, and gives a liberal definition of political crime

be found in nearly all her extradition treaties.[1] It is due to the firm attitude of Great Britain, Switzerland, Belgium, France, and the United States that the principle has conquered the world

Difficulty concerning the Conception of Political Crime

§ 334 Although the principle became, and is, generally recognised that political criminals should not be extradited, serious difficulties exist concerning the conception of 'political crime'.[2] This conception is of great importance, as the extradition of a criminal may depend upon it It is unnecessary here to discuss the numerous details of the controversy It suffices to state that, whereas many writers call such a crime 'political' as was committed from a political motive, others call 'political' any crime committed for a political purpose[3], again, others recognise such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose, and, thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as high treason, *lèse-majesté*, and the like[4] To the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will, probably, for ever exclude the possibility of finding a satisfactory conception and definition[5] The difficulty is caused through the so-

[1] Article 12 of the Constitution of the Russian Socialist Federal Soviet Republic of May 11, 1925, grants the right of asylum to 'tous les étrangers persécutés pour leur activite politique ou leurs convictions religieuses'

[2] On the question whether 'war crimes' (see below, vol II §§ 251 257) should be considered as political crimes or not, and on the refusal of Holland to surrender the ex Kaiser William, see Fauchille, § 469 (1) and Travers in *R I*, 3rd ser, II (1921), pp 125-150

[3] The *Fort* case in Germany in 1921 is an interesting one Two persons who were accused of having murdered the Spanish Prime Minister Dato in 1921, and had fled to Germany, were extradited, although the German-Spanish treaty precluded extradition for political offences, on the ground that the alleged murder was an act of revenge, possibly arising out of a political motive but not committed with a view to achieving a political object see Mettgenberg in *Z V*, 12 (1923), pp 200 221 See also the same writer in *Strupp, Wort*, I pp 43, 44, and Diena in *R G*, 2 (1895), pp 306 336

[4] See Mettgenberg, *Die Attentatsklausel im deutschen Auslieferungsrecht* (1906), pp 61 76, where a survey of the different opinions is given On the refusal of the Court of Turin on November 23, 1934, to extradite to France the persons accused of participating in the assassination of the King of Yugosalvia see Philonenko in 61 *Clunet* (1934), pp 1157-1169

[5] According to Stephen, *History of the Criminal Law in England*, II p 71, political crimes are such as are incidental to, and form a part of, political disturbances

called 'relative political crimes' or *délits complexes*—namely, those complex cases in which the political offence comprises at the same time [1] an ordinary crime, such as murder, arson, theft, and the like Some writers deny categorically that such complex crimes are political, but this opinion is wrong and dangerous, since indeed many honourable political criminals would have to be extradited in consequence thereof On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political Such cases have aroused the indignation of the whole civilised world, and have indeed endangered the very value of the principle of non-extradition of political criminals Three practical attempts have therefore been made to deal with such complex crimes without violating this principle

The so-called Belgian *Attentat* Clause

§ 335 The first attempt was the enactment of the so-called *attentat* clause by Belgium in 1856, following the case of Jacquin [2] in 1854 A French manufacturer named Jules Jacquin, domiciled in Belgium, and a foreman of his factory named Célestin Jacquin, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor

[1] The problem came twice before the English courts, see *Ex parte Castioni* [1891] 1 Q B 149, and *In re Meunier* [1894] 2 Q B 415 In the case of Castioni, a Swiss who had taken part in a revolutionary movement in the canton of Ticino and had incidentally shot a member of the Government, the Court refused extradition because the crime was considered to be political On the other hand, in the case of Meunier, a French anarchist who was prosecuted for having caused two explosions in France, one of which resulted in the death of two individuals, the extradition was granted because the crime was not considered to be political On the American practice, see Hyde in *A J*, 8 (1914), pp 491 495 See also as to anarchists generally Poittevin in *Répertoire*, 1 pp 559-562 And see *In re Kaphengst* in which the Swiss Federal Court granted, in October 1930, extradition of a person accused of having committed bomb outrages of a purely terroristic character *Annual Digest* 1929-1930, Case No 188 In the *Pavan* case the Swiss Federal Court granted extradition (to France) of a person accused of killing an Italian fascist in France *Annual Digest*, 1927 1928, Case No 239 The same Court refused extradition for homicide in a case in which a member of the German Social Democratic Party killed a member of the National-Socialist Party The Court held that the alleged offence took place in the course of a political struggle approaching a civil war *In re Ockert*, *Annual Digest*, 1933 1934, Case No 157

[2] See details in Martitz, *op cit*, II p 372

Napoleon III France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender on account of the Belgian extradition law interdicting the surrender of political criminals To provide for such cases in the future, Belgium enacted in 1856 a law amending her extradition law and stipulating that murder of the Head of a foreign Government, or of a member of his family, should not be considered a political crime Many European States, not including Great Britain, have adopted that *attentat* clause [1]

The Russian Project of 1881.

§ 336 Another attempt to deal with complex crimes, without detriment to the principle of non-extradition of political criminals, was made by Russia in 1881 Influenced by the murder of the Emperor Alexander II in that year, Russia invited the Powers to hold an international conference at Brussels to consider the proposal that henceforth no murder, or attempt to murder, ought to be considered as a political crime But the conference did not take place, since Great Britain, as well as France, declined to take part in it [2]

The Swiss Solution of the Problem in 1892

§ 337 Eleven years later, in 1892, Switzerland attempted a solution of the problem on a new basis In that year Switzerland enacted an extradition law Article 10 of which recognises the non-extradition of political criminals, but, at the same time, lays down the rule that political criminals shall nevertheless be surrendered, in case the chief feature of the offence wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the Bundesgericht, the highest Swiss court of justice [3]

The Proposed Convention against Terrorism

§ 338-340*a* [4] After the assassination of King Alexander of

[1] For a survey of the treaties and a criticism of the *attentat* clause see *Harvard Research* (Extradition, 1935), pp 115 118, and Bourquin in *Hague Recueil* (1927) (1), pp 212, 213 See also Mettgenberg, *op cit*, pp 109 114 As to the United States of America, see Hyde, 1 § 317 The French Law of 1927 (see above, § 333) seems to have rejected the *attentat* clause

[2] See details in Martitz, *op cit*, II p 479

[3] See Langhard, *Das schweizerische Auslieferungsrecht* (1910)

The Institute of International Law at its meeting at Geneva in 1892 (see *Annuaire*, 12, p 182) adopted four rules concerning the extradition of political criminals

[4] §§ 339 340*a* of the previous editions have been omitted

Yugoslavia in France on October 9, 1934, the Council of the League of Nations, in pursuance of a proposal made by France, took steps to bring about an international convention for the prevention and punishment of crimes of a political character described as acts of political terrorism [1] In the Convention signed at Geneva on November 16, 1937, twenty-three States undertook to treat as criminal offences acts of terrorism—including conspiracy, incitement, and participation in such acts—and, in some cases, to grant extradition for such offences In a supplementary Convention, signed on the same day, ten of the signatories of the principal Convention agreed to the creation of an International Criminal Court to which the parties would be entitled to hand over the accused if they decided not to extradite them or to try them before their own courts Apart from India, no member of the British Commonwealth of Nations signed either Convention [2] It is doubtful whether States wedded by their law and tradition to the principle of non-extradition of political offenders will acquiesce in any conventional regulation impairing the asylum hitherto granted to political offenders Such acquiescence on their part is unlikely at a time when the suppression of individual freedom and the ruthless persecution of opponents in many countries tend to provoke violent reaction of a criminal character against the governments concerned [3]

[1] See above, p 260, n 3

[2] For an analysis see *B Y*, 19 (1938), pp 214 217

[3] For the literature on the subject see above, p 260, n 2 See also Mettgenberg in *Volkerbund und Volkerrecht*, 2 (1935), pp 18 23, and Saldaña in *Revue internationale de droit pénale*, 13 (1936), pp 26 37 For the final draft of the Convention for the International Prevention and Punishment of Terrorism and of the Convention for the Creation of an International Criminal Court see the Report of the Committee of Jurists of April 26, 1937, Doc C 222 M 162 1937 V, Hudson, *Legislation*, vii pp 862, 878 For the replies of Governments see Doc A 24 1936 V See also, for the discussion in the First Committee of the Seventeenth Assembly in 1936, *Off J*, Special Suppl, No 156 And see above, p 618, n 1, for the Resolution of the First Assembly of the United Nations as to so called 'quislings and traitors' In the various Peace Treaties concluded in 1946 provision is made for the apprehension and surrender, on the part of the defeated States, of nationals of any Allied Power accused of having violated their national law by treason or collaboration with the enemy during the war (see *e g*, Art 45 of the Treaty with Italy) These provisions must be regarded as a retrogressive step so far as the principle of non-extradition of political offenders is concerned

XI

THE PROTECTION OF MINORITIES

Higgins in Hall, pp 61 64—Fauchille, §§ 409 (9) 409 (14)—Strupp, *Éléments*, pp 61 64—Hatschek, pp 48-65—Schucking und Wehberg, pp 125-134—Schwarzenberger, pp 110 118—Scelle, II pp 187-256—Hoijer, *Le Pacte de la Société des Nations* (1926), pp 489 506—Vichniac, *La protection des droits des minorités* (1920)—Wolzendorff, *Grundgedanken des Rechts der nationaler Minderheiten* (1921)—Duparc, *La protection des minorités de race, de langue, et de religion* (1922)—Rosting, *La protection des minorités par la Société des Nations* (1922)—Epstein, *Der nationale Minderheitsschutz* (1922)—Lucien Brun, *Le problème des minorités* (1923)—Mandelstam in *Hague Recueil*, 1923, pp 367 517—Ruyssen, *Les minorités nationales de l'Europe et la guerre mondiale* (1923)—Hobza in *Hague Recueil*, 1924, IV (as to religion)—Krstitch, *Les minorités, l'État, et la communauté internationale* (1924)—International Conciliation Pamphlet, No 222 (1926), articles by Eisenmann, Rappard, Wilson Harris, and Buell—Kraus, *Das Recht der Minderheiten* (1927) (a collection of documents)—Plettner, *Das Problem des Schutzes nationaler Minderheiten* (1927)—Robinson, *Das Minoritatenproblem und seine Literatur* (1927)—Mair, *The Protection of Minorities* (1928)—Bruns, *Minderheitsrecht als Völkerrecht* (printed as Suppl to *Z V*, 14 (1928))—Knubben, *Die Subjekte des Volkerrechts* (1928), pp 438 457—Wintgens, *Der volker rechtliche Schutz der Minderheiten* (1930)—Ito, *La protection des minorités* (1931)—V Truhart, *Volkerbund und Minderheitenpetitionen* (1931)—Erler, *Das Recht der nationalen Minderheiten* (1931)—Erdstein, *Le statut juridique des minorités en Europe* (1932)—Stone, *International Guarantees of Minority Rights* (1932), and in *B Y*, 12 (1931), pp 76 94—Macartney, *National States and National Minorities* (1933) (a leading treatise)—Petroff, *Les Minorités nationales en Europe Centrale et Orientale* (1935)—Moscov, *La garantie internationale en droit des minorités* (1936)—Flachbarth, *System des internationalen Minderheitsrechtes* (1937)—Robinson and others, *Were the Minorities Treaties a Failure?* (1943)—Janovsky, *Nationalities and National Minorities* (1945)—Report by Mandelstam to the Institute of International Law, *Annuaire*, 32 (1925), pp 246 392—Heyking in *Grotius Society*, 7 (1922), pp 119-132, 10 (1925), pp 143-157, 13 (1928), pp 31 49, and in *Z I*, 36 (1926), pp 41-73—Evans in *B Y*, 1923 1924, pp 95 113—Duparc in *R I*, 3rd ser, 4 (1923), pp 409 420, and *ibid*, 3rd ser, 7 (1926), pp 509 524—Rosting in *A J*, 17 (1923), pp 641 660—Giraud in *R G*, 31 (1924), pp 17 71—Laun in *Z I*, 31 (1923 1924), pp 252-258, and in *Strupp, Wort*, II pp 82-108—Kunz in *R I* (*Geneva*), 3 (1925), pp 69 82—Heyking, Magyary, Loewenfeld, and Ruckser in *International Law Association's Thirty third Report* (1925), pp 503 530—Kunz, and Reports by Committees, in the same Association's *Thirty fourth Report* (1927), pp 311-349—Dugdale in *Journal of British Institute of International Affairs*, 5 (1926), pp 79 95—Hamburger in *Z I*, 38 (1928), pp 215 243—Mandelstam in *Annuaire*, 34 (1928), pp 276 316, and 36 (1) (1931), pp 514 566—Kershaw in *Problems of Peace* (3rd ser, 1928), pp 156-177—Akzin in *Z ö R*, 8

(1929), pp 203 228—Philipse in *R I*, 3rd ser, 10 (1929), pp 492 510—Sereni in *Rivista*, 21 (1929), pp 461 500, and 22 (1930), pp 45 61, 153-179—Ch de Visscher in *R I*, 3rd ser, 11 (1930), pp 326 360—Redslob in *Hague Recueil*, vol 37 (1931) (III), pp 5 80 (with special reference to the principle of nationality)—Calderwood in *Geneva Special Studies*, II, No 9 (1931)—Kunz in *Z o R*, 12 (1932), pp 221-272—Hoor in *Z I*, 48 (1934), pp 177-312—Guggenheim in *Friedenswarte*, 44 (1944), pp 201-221

Until the End of the First World War

§ 340*b* The practice of making treaty stipulations for the purpose of ensuring certain rights to minorities begins in the sphere of religion as a means of settling the disputes arising out of the Reformation In particular the Treaty of Osnabruck of 1648 at the close of the Thirty Years' War may be mentioned, though there are earlier illustrations [1] In the Treaty of Berlin in 1878 the Great Powers compelled Bulgaria, Montenegro, Serbia, Roumania, and Turkey to promise religious freedom to their nationals, and the nineteenth century witnessed a number of other scattered illustrations of treaty recognition of this principle

Since the First World War

§ 340*c* After the First World War, when a number of new States had recently emerged out of the European melting-pot and large portions of territory were changing hands, the system of the protection of minorities received a new impetus The Principal Allied and Associated Powers were able to stipulate by treaty [2] with Poland, Czecho-Slovakia, the Serb-Croat-Slovene State, Roumania, Greece, Austria, Bulgaria, Hungary, and Turkey, for the just and equal treatment of their racial, religious, and linguistic minorities Subsequently, as a condition of their admission to the League of Nations, similar obligations were undertaken by Albania, Esthonia, Latvia, Lithuania,[3] and Iraq,[4] in the form of unilateral declarations accepted and rendered obligatory by various resolutions of the Council of the

[1] For the history see Fauchille, § 409 (9), and Temperley, *op cit*

[2] For a survey of the circumstances which led to the adoption of these provisions see Macartney, *op cit*, pp 212-258 See also Feinberg, *La question des minorités à la Conférence de la Paix de 1919 1920 et l'action juive en faveur de la protection internationale des minorités* (1929), Janowsky, *The Jews and Minority Rights (1919-1920)* (1933), Stillschweig, *Die Jeuden Osteuropas in den Minderheitsvertragen* (1936)

[3] As to the last three see Lasserson in *Z o V*, 2 (1) (1931), pp 401-429

[4] See Hudson, *Legislation*, VI p 39.

League.[1] The relevant clauses in the treaties are substantially the same, and the protection which they are designed to afford may be summarised as follows

(i) For the *inhabitants*, protection of life and liberty and the free exercise of religion without distinction of birth, nationality, language, race, or religion

(ii) In general, for *certain inhabitants*, automatic acquisition, or just facilities for the acquisition, of the nationality of the contracting State,

(iii) For the *nationals*, equality before the law and as to all civil and political rights, and as to the use of any language (The Permanent Court of International Justice repeatedly laid down that the prohibition of non-discrimination must operate in fact as well as in law and that a measure general in its application but in fact directed against members of a minority constitutes a violation of the Minorities Treaty [2]),

(iv) Freedom of organisation for religious and educational purposes, and

(v) State provision for the elementary instruction of their children through the medium of their own language in districts where a particular minority forms a considerable proportion of the population

The Sanctions of the Minority Clauses

§ 340*d* The method of ensuring the observance of the minority clauses was twofold: in the first place, constitutional, in the second, international (1) The contracting State by the treaty recognised the principal clauses as 'fundamental

[1] The principal treaties were as follows with Poland, June 28, 1919, Treaty Series, No 8 (1919), with Czecho-Slovakia, September 10, 1919, Treaty Series, No 20 (1919), with the Serb-Croat Slovene State, September 10, 1919, Treaty Series, No 17 (1919), with Roumania, December 9, 1919, Treaty Series, No 6 (1920), *L N T S*, 5, p 336, with Greece, August 10, 1920, Treaty Series, No 13 (1920), *L N T S*, 28, p 244, and additional protocol of July 24, 1923, Treaty Series, No 16 (1923), p 225, *L N T S*, 28, p 222, with Austria, Articles 64 69 of the Treaty of St Germain, with Bulgaria, Articles 49 57 of the Treaty of Neuilly, with Hungary, Articles 54 60 of the Treaty of Trianon, with Turkey, Articles 37 45 of the Treaty of Lausanne

[2] Advisory Opinion No 6 relating to German Settlers in Poland, Advisory Opinion on the Treatment of Polish Nationals in Danzig, Series A/B, No 44, p 28, Advisory Opinion on Minority Schools in Albania, Series A/B, No 64, p 18, where the Court, as in some former cases, laid stress on the principle that equality of treatment postulated in the Treaty must be both in fact and in law (at pp 18 20)

laws,' and undertook that 'no law, regulation, or official action shall conflict or interfere with' them. (2) The clauses, 'so far as they affect persons belonging to racial, religious, or linguistic minorities, constitute obligations of international concern,' were 'placed under the guarantee of the League of Nations' and could not be modified 'without the assent of a majority of the Council of the League of Nations' Any member of the Council had the right to bring to the attention of the Council any infraction, or danger of infraction, and 'the Council may thereupon take such action and give such directions as it may deem proper and effective in the circumstances' Any difference of opinion as to questions of law or fact arising out of the clauses between the contracting State and any one of the Principal Allied and Associated Powers or any member of the Council was to be regarded as a dispute of an international character, and had, if the party other than the contracting State demanded, to be referred to the Permanent Court, whose decision was to be final and have the same force and effect as an award or judicial decision under Article 13 of the Covenant [1] The League evolved a procedure for dealing with questions arising under the minority clauses. These questions were dealt with in the first instance by the Administrative Commissions and Minorities Section of the Secretariat In particular, rules were prescribed by the Council to which petitions addressed to the League had to conform [2]

[1] See Feinberg, *La juridiction de la Cour Permanente de la Justice Internationale dans le système de la protection internationale des minorités* (1931), and the same in *Hague Recueil*, vol 59 (1937) (i), pp 596 607, 633-702

[2] See Macartney, *op cit*, pp 370 423, V Truhart, *Volkerbund und Minderheitenpetitionen* (1931), Richard, *Le droit de pétition* (1932), pp 503 614, Stone, *International Guarantees of Minority Rights* (1932), Junghann, *Das Minderheitenschutzverfahren vor dem Volkerbund* (1934), Roucek in *A J*, 23 (1929), pp 538-551, Feinberg in *Hague Recueil*, vol 40 (1932) (ii), pp 598 627, Sibert in *R G*, 40 (1933), pp 257-272, Stone in *A J*, 26 (1932), pp 502-513, Hasselblatt in *Zeitschrift für osteuropaisches Recht*, 1934, pp 217-231

For an instance of the adoption of a system of protection of minorities with regard to limited regions see the Convention of May 15, 1922, between Germany and Poland concerning Upper Silesia That Convention expired in 1937 See Wanderholt, *Das Minderheitenrecht in Oberschlesien* (1930), Stone, *Regional Guarantees of Minority Rights* (1933), and, in particular, Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942) The Upper Silesian Arbitra Tribunal established by the Conven

The Nature of the Guarantee of Protection of Minorities

§ 340e. The terms of the Minorities Treaties were not definite on the question whether the guarantee of the protection of minorities was to be in the nature of a general guarantee implying a continuous responsibility of the Council and permanent organs charged with a regular duty of supervision, or merely in the nature of a duty of the Council to take cognisance of cases of infraction brought before it The Council resolved the doubt by denying the theory of a general guarantee [1] The reasons given in support of that interpretation of the minority clauses are controversial [2] It is probable that in this, as well as in other matters, the implementation of the system of protection of minorities was affected by the progressive weakening of the political structure of the League Thus, for instance, it did not inevitably follow from the terms of the Minorities Treaties that the petitions

tion has so far published, in German and Polish, six volumes of its decisions

See also the Convention of May 8 1924, concerning the Territory of Memel See *British and Foreign State Papers*, 119, p 502, Martens, *N R G*, 3rd ser, 15, p 106, Hudson, *Legislation*, II p 1265, League Doc C 159 M 39 1924 VII And see Toynbee, *Survey*, 1932, pp 394 408, Friesecke, *Das Memelgebiet* (1928), Rogge, *Verfassung des Memelgebietes* (1928), Robinson, *Kommentar der Konvention über das Memelgebiet*, 2 vols (1934) (a valuable and exhaustive commentary), in particular, I pp 244 319, Blociszewski in *R G*, 30 (1923), pp 143 162 See also the Judgment of the Permanent Court of June 25, 1932, concerning the Interpretation of the Statute of Memel Series A/B, No 47 As bearing on the status of Memel see the decision of the French Court of Cassation in *Administration des Douanes* v *Dewulf, Cailleret & Sons* of July 1934 Sirey, 1934, 1, 303, Hellard, *Le statut international du Territoire de Memel* (1932), Hallier, *Die Rechtslage des Memelgebietes* (1933), Rousseau in *R G*, 43 (1936), pp 498 500, Römer's, *ibid*, pp 257 269 For an interpretation of some of the essential provisions of the Statute of Memel see the Judgment of the Permanent Court of International Justice of August 11, 1932 Series A/B, No 49 See also Miatz, *Die nationale Autonomie im System des Minderheitenrechts* (1927), Dorge, *Der autonome Verband im geltenden Staats und Volkerrecht* (1931)

In a Resolution adopted at Lima on December 23, 1938, the American States declared that the system of protection of linguistic or religious minorities has no application in America 'where the conditions which characterise the group known as minorities do not exist,' that aliens cannot claim collectively the condition of minorities, but that individually they continue to enjoy the rights to which they are entitled At the same time the Conference declared that in accordance with the fundamental principle of equality before the law persecution on account of racial or religious motives is contrary to the political and juridical systems of America *A J*, 34 (1940), Suppl, p 198

[1] *Off J*, Special Suppl, No 73, p 62

[2] In particular, from the fact that the second paragraph of Article 12 of the Treaty provided specifically for the right of members of the Council to bring before it any cases of infraction, it did not necessarily follow that the general guarantee envisaged by the first paragraph was to be interpreted restrictively

of minorities were to be regarded merely as a source of information without giving the interested parties a *locus standi* entitling them to be informed of the grounds of the rejection of their petitions [1] Nevertheless, the system of protection of minorities, however attenuated by the interpretation given to it in practice, must be regarded as having justified itself, in its cumulative effect,[2] as a sound instrument of international supervision in the interest alike of elementary rights of the individual and of international peace [3]

XII

THE INTERNATIONAL LABOUR ORGANISATION

Fauchille § 409 (8)—Schwarzenberger, pp 478 496—Strupp, *Éléments*, pp 213-217—Liszt, § 48—Scelle, II pp 513 525—Mahaim, *Le droit international ouvrier* (1913), and in *Hague Recueil*, 1924 (III), pp 69 223—Hetherington, *International Labour Legislation* (1920)—Ayusawa, *International Labour Legislation* (1920)—Eckhardt and Kuttig, *Das internationale Arbeitsrecht im Friedensvertrag* (1920)—Bauer, *Der Wiederaufbau des internationalen Arbeiterschutzes* (1922)—Guerreau, *L'organisation permanente du travail* (1923)—Vabre, *Le droit international du travail* (1923)—Courtin, *L'Organisation permanente du Travail et son action* (1923)—Fehlinger, *Die internationale Arbeitsorganisation und ihre Ergebnisse* (1924)—Johnston, *International Social Progress* (1924)—Stein, *Die internationale Arbeitsorganisation und ihre Ergebnisse* (1924)—Tilly, *Internationales Arbeitsrecht* (1924)—Drechsel, *Le Traité de Versailles et le mécanisme des conventions internationales du travail* (1926)—Barnes, *History of the International Labour Office* (1926)—van Zanten, *L'influence de la Partie XIII du Traité de Versailles sur le développement du droit international public et sur le droit interne des États* (1927)—Hintonen, *La compétence de l'Organisation Internationale du Travail*, vol I (1929)—Scelle, *Organisation Internationale du Travail* (1930)—Berger, Kuttig and Rhode, *Internationales Arbeitsrecht Teil XIII des Vertrages von Versailles* (1931) (a useful collection of texts and commentary on the Constitution of the Organisation and the Standing Orders of the Conference and the Governing Body)—*The International Labour Organisation The First Decade* (1931)—*The Origins of the International Labour Organisation* (2 vols , 1934, ed by Shotwell)—Wilson,

[1] For a critical account of the procedure adopted see Macartney, *op cit*, and Stone, *International Guarantees of Minority Rights* (1932)

[2] See in particular Robinson and others, *Were the Minorities Treaties a Failure ?* (1943)

[3] There has been a tendency in some States bound by Minorities Treaties—see *e g* President Beneš in *Czecho-Slovak Year-Book of International Law*, 1942, pp 1-6—to urge the abandonment of the system in favour of a general international enactment of the rights of man It is clear that, unless the latter were to become an enforceable part of International Law as distinguished from a mere declaration of principle, the proposed change would be in the nature of a retrogression

Labour in the League System (1934)—Lowe, *The International Protection of Labour International Labour Organisation History and Law* (1935)—Zarras, *Le contrôle de l'application des conventions internationales du travail* (1937)—Dillon, *International Labour Conventions Their Interpretation and Revision* (1942)—Macdonell in *B Y*, 1920-1921, pp 191 222—Sanger in *Grotius Society*, 5 (1920), pp 145 154—Pic in *R G*, 33 (1926), pp 246 273—Hamburger in *Z I*, 36 (1926), pp 117 196—Morellet in *Répertoire*, II pp 683-704—Mahaim in *R I*, 3rd ser, 10 (1929), pp 699-734, and 11 (1930), pp 123-146, and in *International Labour Review*, 20 (1929), pp 765 796—Ianouloff in *Hague Recueil*, vol 51 (1935) (1), pp 487-573—Jenks in *Grotius Society*, 22 (1936), pp 45 86, in *Canadian Bar Review*, 17 (1935), pp 448 462, in *R I*, 3rd ser, 18 (1937), pp 156-183, 586 623, and in *J C L*, 3rd ser, 22 (1) (1940), pp 36 56—Morellet in *R G*, 51 (1947), pp 65 88

Amongst other publications, the Organisation publishes the *International Labour Review* (monthly), the *Official Bulletin*, the *Director's Reports to the General Conference*, a *Legislative Series*, an annual *International Survey of Legal Decisions on Labour Law*, the *I L O Year-Book*, *Year-Book of Labour Statistics*, the Minutes of the Governing Body, and the Record of Proceedings of the International Labour Conference See also *The International Labour Code*, 1939 A systematic Arrangement of the Conventions and Recommendations Adopted by the International Labour Conference, 1919 1939 (International Labour Office, 1941), International Labour Conference, 26th session Future Policy, Programme and Status of the International Labour Organisation, 1944

The International Labour Organisation

§ 340*f* Before the First World War a number of conventions on the subject of the international protection of labour were in force,[1] but there was no general international organisation charged with the duty of systematising and directing this movement Article 23 (*a*) of the Covenant of the League provided that the members of the League should 'endeavour to secure and maintain fair and humane conditions of labour for men, women, and children and for that purpose will establish and maintain the necessary international organisations' At the same time, a

[1] See Macdonell, *op cit* They dealt with such matters as the recruitment of 'indentured,' 'contract,' or 'recruited' labour, the emigration of labourers, particularly those having a standard of life lower than that of the native population, workmen's compensation for accidents and industrial diseases, and the equalisation and unification of labour laws and conditions

See, as to Labour Conventions before the Treaties of Peace of 1919 1920, Gemma, *Il Diritto internazionale del Lavoro* (1912), Sinzot, *Traités internationaux pour la Protection des Travailleurs* (1911), Mahaim, *Le droit international ouvrier* (1913), and in *R I*, 2nd ser, 14 (1912), pp 113-128, 388-410, Keichesberg, *Internationaler Arbeiterschutz* (1913), Lammasch, *Das Volke recht nach dem Kriege* (1917), pp 48-54, Bauer, *Arbeiterschutz und Volkergemeinschaft* (1918), Pic in *R G*, 11 (1904), p 515, 12 (1905), p 565, 14 (1907), p 495, 20 (1913), p 752 See also Reports of the International Association for Labour Legislation

special Part (XIII) of the Peace Treaties was devoted to Labour, and established a permanent International Labour Organisation [1] consisting of (1) a General Conference of Representatives of the members, and (2) an International Labour Office [2] controlled by a Governing Body and a Director

Only States [3] are members of the International Labour

[1] Amongst the permanent subsidiary commissions appointed by the International Labour Organisation are the following (1) the Joint Maritime Commission, and the Committees on (2) Native Labour, (3) Social Insurance, (4) Industrial Hygiene, and (5) Industrial Safety, (6) The Committee of Experts on the Application of Conventions (see McNair in *B Y*, 14 (1935), pp 143 145)

[2] The principal functions of the International Labour Office, in addition to those assigned to it by the Conference, are (1) the collection and distribution of information relating to industrial life and labour, (2) the examination of subjects proposed for discussion by the Conference, (3) the receipt of annual reports to give effect to the conventions to which members of the Organisation are party, (4) duties in connection with complaints

[3] As to Federal States see Taylor, *Federal States and Labour Treaties* (1935), Wilson in *South-western Political and Social Quarterly*, 10 (1929), pp 190 *et seq*, Weinfeld, *Labour Treaties and Labour Compacts* (1937), Stoke in *American Political Science Review*, 25 (1931), pp 424-431 As to Canada see Jenks in *J C L*, 3rd ser, 16 (1934), pp 201 215, 17 (1935), pp 12 30, and in *Canadian Bar Review*, 15 (1937), pp 86 *et seq*, and 464 *et seq* As to Australia see Bailey in *Proceedings of the Australian and New Zealand Society of International Law*, 1 (1935), pp 100-121 As to the United States see Hudson in *A J*, 28 (1934), pp 677-681, Riesman in *International Labour Review*, 44 (1941), pp 123-193 As to Switzerland *Message of Federal Council, Feuille Fédérale Suisse*, vol 72 (1920) (v), pp 455-461 And see the following cases As to Canada In the matter of Legislative Jurisdiction over Hours of Labour (see below, p 661, n 1), *Attorney General for Canada* v *Attorney General for Ontario and Others*, decided by the Judicial Committee on January 28, 1937, [1937] A C 326, an appeal from the Judgment of the Supreme Court of Canada of June 17, 1936, in *Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act* [1936] 3 *D L R* 673 For comment thereon see a series of articles in *Canadian Bar Review*, 15 (1937), pp 393 507 See also *In re Regulation and Control of Aeronautics in Canada* [1932] A C 54, and *In re Regulation and Control of Radio Communication in Canada* [1932] A C 304 As to Australia *The King* v *Burgess (ex parte Henry)* (1936) 55 *C L R*, 608, and Holmes in *Canadian Bar Review*, 15 (1937), pp 495-507 And see Art 19 (7) of the Constitution as revised in 1946 for detailed provisions with regard to Conventions or Recommendations the subject matter of which falls wholly or in part within the jurisdiction of constituent States, provinces, or cantons

As to the relationship between membership of the League of Nations and of the International Labour Organisation see Perassi in *Rivista*, 20 (1928), pp 375 380, Massart, *ibid*, 23 (1931) pp 171-199, Jenks in *B Y*, 16 (1935), pp 79 83 See also, as to the United States of America, *Documents*, 1934, pp 109-111, Hudson in *A J*, 28 (1934), pp 669 684, Phelan in *Political Science Quarterly*, 50 (1935), pp 107-121, Phelan, Hudson, and Shotwell in *International Conciliation* (Pamphlet No 309, April 1935), and the inconclusive dictum in the Advisory Opinion of the Permanent Court of International Justice Series B, No 18, p 10 Notwithstanding its assoc-

Organisation In particular, the following States are members of the Organisation [1] (1) Those States, whether members of the United Nations or not, which were members of the Organisation on November 1, 1945 [1], (2) Any other member of the United Nations accepting the obligations of the Constitution of the International Labour Organisation, (3) Any other State admitted by a vote concurred in by two-thirds of the delegates of the General Conference, including two-thirds of the Government delegates The Organisation is one of the specialised agencies of the United Nations in conformity with Article 57 of the Charter [2] The relations between the two Organisations are governed by a detailed Agreement approved by the General Assembly in December 1946 [3] However, membership of the United

ation with the League of Nations the International Labour Organisation obtained progressively a pronounced degree of independence of the League As a result, the dissolution of the League in 1946 did not affect directly the existence or the work of the Organisation though steps were under taken for bringing about an amend ment of those articles of the Con stitution of the Organisation which were based on the association with the League

See Report IV (1) of the 27th Session of the International Labour Conference Part I The Relation ship of the I L O to Other Inter national Bodies (1945), Report of the Conference Delegation on Constitutional Questions First Session (Montreal, 1946)

[1] See Article 2 of the Instrument for the Amendment of the Constitution of the International Labour Organisation adopted on November 5, 1945 *Treaty Series* No 20 [1946] For the various amendments to the Constitution, and comment thereon, see International Labour Conference, 29th Session, Montreal, 1946, Report II (1) Further amendments to the Constitution were adopted in 1946 Previously, in 1944, the Conference adopted the Declaration of Philadelphia which re defined the purposes of the Organisation and which now forms part of its Constitution See Jenks in *B Y*, 23 (1946), pp 303-317

[2] See above, § 168r

[3] *Journal of the Economic and Social Council*, 1946, No 29, p 486, Inter national Labour Conference, 29th Session, Montreal, 1946, Report II (2) The Agreement provides for the right of participation, without vote, of representatives of the United Nations in deliberations of the various organs of the International Labour Organisation, and conversely (Art 2) It lays down that the Organisation shall include on the agenda of its Governing Body items proposed by the United Nations, and that similarly the Economic and Social Council and its Commissions and the Trusteeship Council shall include on their agenda items proposed by the Organisation (Art 3) Provision is made for exchange of information and documents (Art 5) and for assistance to be given by the Organisation to the Security Council and the Trusteeship Council (Arts 6, 7) The Organisation is authorised to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities (Art 9) The Organisation is to consult the United Nations in the preparation of its budget and it agrees to transmit its proposed budget to the United Nations annually, at the same time as such budget is transmitted to its members, for examination and recommendations on the part of the General Assembly (Art 14)

Nations does not automatically involve membership of the International Labour Organisation A member of the United Nations becomes a member of the International Labour Organisation by communicating to the Director-General its formal acceptance of the obligations of the Constitution

The General Conference, as has been pointed out,[1] is not a diplomatic conference, but its composition is 'partly diplomatic and partly occupational' The distinctive nature of its composition is noteworthy in that it is not confined to representatives of Governments Each Government nominates four persons, of whom two are the delegates of the Government and the other two represent the employers and the workers respectively, being chosen by the Government in consultation with the most representative industrial organisations[2] Each delegate may be accompanied by technical advisers The Governing Body of the International Labour Office consists of thirty-two persons, of whom sixteen are Government representatives (of these, eight represent the Governments of the eight most important industrial States),[3] eight are elected by the employers' delegates to the General Conference, and eight by the workers' delegates to the General Conference[4] The General Conference (which meets at least once a year) has no legislative powers, and its proposals take one of two forms either (1) an international Convention, or (2) a recommendation to meet circumstances not considered suitable for a Convention In either case a majority of two-thirds of the delegates present is required for the adoption of the proposal A Convention or Recommendation thus adopted is communicated to all members for ratification or, in case of a Recommendation, for con-

[1] By Morellet in *International Labour Review*, 16 (1927)

[2] See Wilson, *Labour in the League System* (1934), Berenstein, *Les Organisations ouvrières Leurs compétences et leur rôle dans la Société des Nations et notamment dans l'Organisation Internationale du Travail* (1936)

[3] Scelle, *Organisation Internationale du Travail* (1930), pp 129 *et seq*, Cremer, *Die Verfassung der internationalen Arbeitsorganisation* (1930), pp 26 *et seq*, *The International Labour Organisation First Decade* (1931), p 61, pp 145 *et seq*, Gretschaninow in *Z o V*, 5 (1935), pp 428, 437 While originally the question as to which are the members of chief industrial importance was determined by the Council of the League of Nations, the matter now rests with the Governing Body aided by an impartial committee An appeal lies from the decision of the Governing Body to the Conference

[4] On this 'functional representation' see Hewes in *American Political Science Review*, 22 (1928), pp 324-338

sideration with a view to effect being given to it by national legislation or otherwise Each member [1] comes under a duty within one year, or at most eighteen months, to bring the Convention or the Recommendation before the national authority or authorities [2] within whose competence the matter lies, for the enactment of legislation or other action. When the competent national authority adopts a Convention, the member communicates the formal ratification [3] of the Convention to the Director-General of the Organisation [4] It binds the members ratifying it, but only them [5] However,

[1] Whether its Government delegates voted for or against the proposal see P C I J, Series B, No 13, p 17 For a discussion of the character of these Conventions see Mahaim in *International Labour Review*, 20 (1929), pp 765 796, and Jenks in *Canadian Bar Review*, 13 (1935), pp 448 462, and in *Grotius Society*, cited above at p 656

[2] There is some controversy on the question whether this means the Executive or the Legislature Surely it must mean whatever body is the one competent to make any necessary change in the Municipal Law This body may vary in each country See Report I, International Labour Conference, 26th Session (1944), Appendix, pp 169 183 (a Memorandum by C W Jenks, Legal Adviser to the Organisation) See as to Canada, *In the matter of Legislative Jurisdiction over Hours of Labour* in the Supreme Court of Canada, Canada Law Reports (1925), S C R 505, and *Annual Digest*, 1925 1926, Case No 299 Failure to bring the Recommendation or the Convention before the competent authority as required by Article 19 of the Constitution of the Organisation entitles any other Member to refer the matter to the Governing Body (Article 30)

[3] The peculiar use of the term 'ratification' should be noticed The process whereby a State becomes bound by a Labour Convention differs from that of the ordinary treaty, which is normally first signed by plenipotentiaries and later ratified (See below, §§ 510-518) A Labour Convention is not signed (it is authenticated by the President and the Director of the Office), and indeed a State might decide to ratify it, although its delegates, both governmental and occupational, had voted against it or abstained from voting see Fauchille, § 821 (1), Eysinga in *R I*, 3rd ser, 1 (1920), p 147, Mahaim in *R I*, 3rd ser, 10 (1929), pp 699 734, and 11 (1930), pp 123-146, Wilson in *A J*, 28 (1934), pp 506 526, Ianouloff in *Hague Recueil*, vol 51 (1935) (1), pp 487-573, Wilcox, *The Ratification of International Conventions* (1935), pp 161-204, on the procedure for the revision of international labour conventions see Jenks in *B Y*, 14 (193 pp 43 64, and Ørsted in *Nordisk T A*, 2 (1931), pp 3 20 On the question of reservations made on ratification see Memorandum by the Director of the International Labour Office, League Doc C 212 1927 V, and Report of the Committee of Experts for the Progressive Codification of International Law adopted by the Council of the League (C 357 M 130 1927 V 16) As to the time at which a Labour Convention duly ratified becomes applicable see Morellet, *op cit*

[4] A list of Draft Conventions will be found below in Appendix B, together with the number of ratifications secured in each case and an indication of those ratified by Great Britain

[5] A Federal State, whose power to enter into conventions on labour matters is limited, may treat a Convention as a Recommendation (see Article 19 of the Constitution) See above, p 657, n 3.

an amendment to the Constitution, adopted in 1946, provides that even when no legislative consent has been obtained and when, therefore, no obligation rests upon a non-ratifying State to give effect to the Convention, it shall report to the Director-General of the International Labour Office, at appropriate intervals indicated by the Governing Body, the position of its law and practice with regard to the matters dealt with in the Convention Such information is to show to what extent such law and practice actually give effect, or propose to give effect, to the provisions of the Convention It is also to state the difficulties which prevent or delay the ratification of the Convention [1] A similar obligation rests upon members with regard to Recommendations [2] This important innovation imposes upon members a certain measure of obligation in the matter of international instruments to which they have not become a party The periodic rendering of information, of the scope indicated, may prove an indirect and not insignificant means of securing a degree of compliance with the purpose of the instruments in question and, to some extent, an inducement to their eventual acceptance The effect of this innovation may be to impart a larger measure of reality to the legislative work of the Organisation than had been the case in the past, when a great number of Conventions concluded under the auspices of the Organisation secured only a modest number of ratifications Each member sends to the International Labour Office an annual report on the measures taken by it to give effect to any Convention ratified by it, and a summary of these reports is examined by the General Conference

The Sanction of Labour Conventions

§ 340g The Constitution of the Organisation makes provision [3] for the investigation by a Commission of Enquiry of a complaint made by a member which has ratified a Convention [4] to the effect that another member which has

[1] Article 19 (5) (e)

[2] Article 19 (6) (e)

[3] See, for instance, Articles 25 36 of the Constitution of the Organisation

[4] Or by a delegate to the General Conference or by the Governing Body itself It is necessary to distinguish from these 'complaints' the 'representation' which an industrial association of employers or workers may make to the International Labour Office to the effect that a member has failed to secure

also ratified it is not securing its effective observance Each Government concerned in the complaint has the right, if it does not accept the recommendations of the Commission, to refer the complaint to the International Court [1] In the event of default by a member in carrying out the recommendations of a Commission of Enquiry or a decision of the Court, the Governing Body may recommend such action as it may deem necessary to secure compliance therewith [2]

The Essential Character of the International Labour Organisation

§ 340*gg* The Constitution of the International Labour Organisation embodies features which in several ways signify a departure from traditional forms of international organisa-

the observance within its jurisdiction of a convention which it has ratified Whereupon the Governing Body communicates [the representation to the Government concerned for its observations In due course the representation and the answer, if any, may be published (Articles 409, 410) There has so far been published one 'complaint' and three 'representations' As to the first see Mr Jamnadas Mehta's complaint relating to the application of the Hours of Work (Industry) Convention, 1919, to Indian railways International Labour Office, *Official Bulletin*, 20 (1935), No 1, p 15 As to the representations see that of the Madras and Southern Mahratta Railway Employees Union concerning the application of certain conventions in the French possessions in India *ibid*, 21 (1936), No 10, pp 16-19, of the Madras Labour Union for Textile Workers, and of the Labour Party of Mauritius *ibid*, 22 (1937), pp 61-69, Jenks in *B Y*, 19 (1938), pp 228 230 See Gorresio in *R I*, 3rd ser, 14 (1933), pp 328 350 On the machinery for recording and controlling the enforcement of international Labour conventions by means of annual reports see McNair in *B Y*, 14 (1933), pp 143 145, and Zarras, referred to above at p 656

[1] Which, if the parties so demand, acts for this purpose by a special chamber for Labour cases See Article 26 of the Statute of the Court, and Fachiri, *The Permanent Court of International Justice* (2nd ed, 1932), pp 51-53 See also Fischer, *Les rapports entre l'Organisation Internationale du Travail et la Cour Permanente de Justice Internationale* (1946)

[2] See Berenstein in *R G*, vol 44 (1937), pp 446-464 The International Court of Justice, which is charged by Article 37 of the Constitution of the Organisation with the duty of interpreting the Constitution and any convention concluded thereunder, has given four Advisory Opinions on Labour questions Publications of the Court, Series B, No 1, in 1922, on the Appointment of the Workers' Delegate from the Netherlands, Nos 2 and 3 in 1922, in which it held that the competence of the International Labour Organisation extended to the international regulation of the conditions of labour of persons employed in agriculture, but not to the organisation and development of methods of agricultural production, No 13 in 1926, in which it held that it was within the competence of the Organisation to draw up and propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself, No 18 in 1930, in which it was held that the Free City of Danzig was not, in the absence of an agreement with Poland, in a position to become a member of the Organisation, No A/B 50 in 1932, in which it held that the provision of the Washington Convention of 1919 concerning the employment of women during the night applied also to women who hold positions of supervision or management and are not ordinarily employed in manual labour

tion and from accepted doctrines of International Law This applies in particular to the provisions securing to delegates of employers and employees representation and participation in the work of the Organisation and in the process of the elaboration of labour conventions [1] While the United Nations is according to its Charter an organisation of States, the International Labour Organisation is, to some extent, based on a different principle Although the representatives of employers and employees are appointed by the various States, the latter are under a duty to appoint them in accordance with the provisions of the Treaty and to leave them full freedom of action at the Conference In the matter of adoption of conventions as well as with regard to amendments of the Constitution, the final decision rests with the Governments, but any action on their part in this direction is conditioned by the initiative of the Conference in which State representatives constitute only one-half of the total number of delegates The Constitution of the Organisation thus signifies a limited but important departure from the principle generally obtaining in International Law, namely, that States only may take part in the process of creating new rules of International Law and that only the interests of States as such are entitled to direct representation in the international sphere [2] Secondly, the Constitution of the Organisation introduces an exception to the principle of unanimity inasmuch as it lays down that a majority of two-thirds is sufficient for the adoption of a convention or recommendation which the Governments are then bound to submit to their competent legislative authorities regardless of whether they voted for it or not Thirdly, the obligation to communicate information concerning the actual implementation of provisions of conventions and recommendations not accepted by and therefore not binding upon the members is expressive of the novel principle that mere membership of the Organisation implies certain obligations which are not of a purely formal

[1] See the articles by Jenks and Maham referred to above, at p 660, n 1

[2] See § 107 above for a similar development embodied in the establishment of the Vatican City as a normal person of International Law

character Finally, there must be mentioned the provision for the enforcement of labour conventions against States failing to comply with their obligations as well as the general recognition of the compulsory jurisdiction of the International Court of Justice with regard to the interpretation of labour conventions,[1] or of the Constitution of the Organisation, or in cases of appeal from commissions of enquiry in respect of complaints [2]

XIII

SLAVERY, SLAVE TRAFFIC, AND FORCED LABOUR

Phillimore, I §§ 296 313—Gidel, I pp 389 414—Lawrence, § 103—Lindley, pp 354 366—Toynbee, *Survey*, 1920 1923, pp 393-396—Dana's Wheaton, §§ 125-133—Moore, II § 310—Hershey, § 216 (with bibliography)—Fauchille, §§ 398 408 (2) (with bibliography)—Holland, *Lectures*, pp 160-162—Keith's Wheaton, pp 284 295—Higgins and Colombos, §§ 383 387—Mérignhac, III pp 512 523—Calvo, V §§ 2997-3003—Liszt, § 49—Queneuil, *De la traite des Noirs et de l'esclavage* (1907)—Lady Simon, *Slavery* (2nd ed, 1930)—Barclay in *R I*, 22 (1890), pp 317 335, 454 472—Engelhardt, *ibid*, pp 603 618—Nys, *ibid*, pp 57 59, 138 151—Rolin, *ibid*, 23 (1891), pp 560 576—Goudal in *R G*, 35 (1928), pp 591 625—*Geneva Special Studies*, II No 4 (1931)

Slavery and the Slave Traffic

§ 340*h* It is difficult to say that customary International Law condemns two of the greatest curses which man has ever imposed upon his fellow-man, the institution of slavery and the traffic in slaves [3] But Great Britain, who had abolished the slave traffic throughout her colonies in 1807,[4] induced France to agree in the Treaty of Paris of 1814 to co-operate with her in the furtherance of this policy, and at the Congress of Vienna in 1815 succeeded in obtaining from the Powers a solemn condemnation of the slave trade in principle [5] But this was not enough to make the traffic

[1] In Article 37 of the Constitution provision is made, in addition, for the appointment of tribunals for the expeditious determination of disputes relating to the interpretation of a Convention

[2] See above, § 340*g*

[3] Bonfils' assertion (see Fauchille, § 398) that International Law condemns slavery seems to rest on his further statement that slaves become free when they set foot in a country which rejects slavery, but the absence of any duty imposed by customary International Law to extradite criminals does not mean that International Law condones crime

[4] For an interesting account see Coupland, *Wilberforce* (1945)

[5] See Mathieson, *Great Britain and the Slave Trade*, 1839-1865 (1929), Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations*, 1814 1862 (1933), Ecarius, *Das Schiffsdurchsuchungsrecht zur Bekampfung des Negerhandels im Volkerrecht* (1934), Goudal in *R G*, 35 (1928), pp 591 625

in slaves a crime *jure gentium*,[1] as piracy is, and therefore repressible by any State regardless of the nationality of the offender or of the flag flown by his ship Accordingly, a number of treaties have been entered into for the purpose of ensuring international co-operation and (in some cases) of conferring mutual rights of visit and search The following general treaties may be mentioned (1) the Treaty of London, 1841, between Great Britain, Austria, France, Prussia, and Russia, (2) the General Act of the Congo Conference of Berlin, 1885, which in Article 9 dealt with the slave trade; (3) the General Act of the Anti-Slavery Conference of Brussels, 1890, which established an organisation having an International Maritime Office at Zanzibar, and a *Bureau Spécial* attached to the Belgian Foreign Office in Brussels, (4) the Convention of St Germain of September 10, 1919,[2] which abrogates, as between the signatories, the General Act of Brussels of 1890 and under which the signatories undertake to endeavour to secure the complete suppression of slavery and of the slave trade by land and by sea, and (5) the Slavery Convention of 1926, negotiated at Geneva under the auspices of the League and opened for signature on September 25, 1926,[3] by

[1] See *Le Louis* (1817) 2 Dods, 210, *Madrazo* v *Willes* (1820) 3 Barn and Ald 353 For a summary of the history see Pitt Cobbett, *Leading Cases on International Law*, 4th ed, 1 (1922), pp 303 304 As to the position of escaping slaves who reach British territory or public ships see Westlake, 1 p 269, and as to private ships, p 272, Lorimer, 1 pp 256 260 (where the celebrated [illegible] Circular of 1876 is printed), [illegible]ters in *B Y*, 1920 1921, pp 85, Hershey, § 255 While concluding on May 20, 1927, a Treaty of Friendship with Hejaz, Nejd, and Dependencies, Great Britain refused to renounce the right of manumitting slaves 'which has long been practised by H M 's consular services, and which enables them to liberate any slave who presents himself of his own free choice with a request for liberation and repatriation to his country of origin' Great Britain gave the assurance that her insistence on this right did not mean any interference in the affairs of Hejaz, but was due to the resolve of the British Government 'to carry out a duty which they owed to humanity' Treaty Series, No 25 (1927), Cmd 2951, *British and Foreign State Papers*, 134, p 276

[2] Signed by the United States of America, Belgium, the British Empire, France, Italy, Japan, and Portugal, and accepted in advance by Germany, Austria, Bulgaria, and Hungary in the Treaties of Peace

With regard to the question of slavery in Abyssinia upon her admission to the League in 1923 see Toynbee, *op cit* For a collection of documents with regard to slavery in Liberia see *R I (Geneva)*, 8 (1930), pp 289 347

[3] Hudson, *Legislation*, III p 2010, *L N T S*, 60, p 253 Up to December 1936, ratified or finally acceded to by over forty States (including Great Britain and Dominions, the

which the signatories undertake to suppress and prevent the slave trade and to bring about, progressively and as soon as possible, the entire suppression of slavery in all its forms [1]

Abolition of Forced Labour

§ 340*i* Forced labour, especially as practised in the past by some colonial Powers, tends, in the words of the Slavery Convention of 1926, to develop 'into conditions analogous to slavery' [2] In Article 5 of that Convention the parties agreed that in territories in which compulsory or forced labour for other than public purposes still survives they shall endeavour 'progressively and as soon as possible to put an end to this practice' In the Convention of June 28, 1930, concerning forced or compulsory labour, the signatory States undertook 'to suppress the use of forced or compulsory labour in all its forms within the shortest possible period' [3] While economic and social conditions in some parts of the world render difficult the total abolition of forced labour, it is believed that the paramount principle of the freedom and dignity of human personality is superior to such considerations and that it requires the absolute prohibition of forced labour except in the form of public service equally incumbent upon all, or as part of punishment duly pronounced by a court of law [4]

United States, and France It appears that slavery as a legal institution is now recognised only in minor Islamic countries such as some of the Arabian States The position in Tibet and Nepal (where the liberation of slaves was completed in 1926) is not clear For the most up to date survey of the existing position in the matter of slavery see *Report of the Committee of Experts on Slavery in Pursuance of the Resolution of the Assembly of the League of September* 25 1931 Doc C 618 1932 VI

[1] For the other humanitarian questions with which International Law has been concerned, particularly under the inspiration of the League, like White Slave Traffic, the Traffic in Opium and other Drugs, health activities, the suppression of the traffic in obscene publications, and the control of the liquor traffic and the traffic in arms and munitions, see Appendix A below As to the work for refugees see above, § 313 The humanitarian work done by or under the auspices of the League was conveniently surveyed in *The League from Year to Year*, published by the Information Section of the League

[2] In the United States courts have interpreted the prohibition of slavery and of involuntary servitude, laid down in the Thirteenth Amendment to the Constitution, as including peonage, the Chinese coolie trade, compulsory labour as punishment for breach of contract, and even specific performance of contracts of personal service The latter principle is rigidly followed by English courts

[3] Hudson, *Legislation*, v p 609 The Convention has been ratified by a considerable number of States, including Great Britain

[4] This would exclude the regimentation, for political or other

XIV

INTERNATIONAL PROTECTION OF THE RIGHTS OF MAN

The Bases of the International Protection of the Rights of Man

§ 340*k* As stated elsewhere in this treatise,[1] prior to the Charter of the United Nations International Law did not, notwithstanding various developments pointing in that direction, recognise what are often described as the fundamental, inalienable, or natural rights of man Since the Virginian Declaration of Rights of 1776, the American Declaration of Independence and the Bill of Rights in the form of the first ten Amendments to the Constitution, and the Declaration of the Rights of Man and the Citizen adopted in 1789 by the French National Assembly, the express recognition and the special protection of fundamental rights of man in the constitutions of various States [2] have become a general principle of constitutional law of civilised States In Great Britain, where the system of a written constitution superior to the ordinary law of the land is unknown, the same result was achieved in a different way [3] At the same time the view was gaining ground that as the national constitution itself was liable to change through prescribed, though more exacting, processes of the law, the rights of man, unless grounded in and safeguarded by effective recognition on the part of international society, were not sufficiently protected against violent encroachment by the State

In the gradual recognition of the rights of man Inter-

reasons and by executive decree, of large sections of the population for forced labour in concentration camps and otherwise For a detailed treatment of the subject see Goudal in *R G*, 36 (1929), pp 266 301, the same, *ibid*, 35 (1928) (with regard to mandates), the same in *International Labour Review*, 19 (1929), pp 621 638, Bastet, *Le travail forcé et l'organisation internationale* (1932)

[1] See above, § 292

[2] See *Constitutional Provisions concerning Social and Economic Policy*, published in 1944 by the International Labour Office See also Aulard and Mirkine Guetzévitch, *Les déclarations des droits de l'homme* (1929)

[3] This was accomplished, to some extent, by the great constitutional enactments such as the Magna Charta in 1215, the Petition of Right in 1628, and the Bill of Rights and Act of Settlement in 1689 which, notwithstanding the doctrine of the paramount supremacy of Parliament, had acquired by the time of Blackstone the character of fundamental laws of the kingdom and enabled him to say that the 'absolute rights of every Englishman as they are founded on nature and reason, so they are coeval with our form of government' *Commentaries*, 1 1 And see Lauterpacht, *An International Bill of the Rights of Man* (1945) (Chapter on 'Natural Rights in British Constitutional Law and Political Theory').

national Law played an indirect but important part The conception of the inherent rights of man derived much of its strength from the doctrines of the law of nature which, through Grotius and others, contributed powerfully to the creation of the modern law of nations In turn, the very idea of the law of nature received a weighty accession of strength from the fact that it proved to be of assistance in the accomplishment of the imperative task of building a system of law between the territorial States which arose upon the ruins of the temporal unity of Christendom. There were other significant points of contact between the idea of natural rights of man and International Law In the first instance, both are possible only on the assumption of a limitation of the absolute sovereignty of the State Secondly, both have seemed to many to be intimately connected by the fact that the final object of the State is to achieve, through freedom, the fullest development of human personality and that the purpose of International Law is to make possible the accomplishment of that end by securing the State from external aggression Finally, experience has shown that the denial of the fundamental right of man to freedom, to equality before the law and to government by consent tends to constitute a danger to international peace inasmuch as régimes based on the denial of these rights often tend to seek in foreign domination and aggrandisement a substitute for the organic cohesion of a nation under the free rule of law

For these reasons, the rise, in the period following the First World War, of various forms of authoritarian dictatorships gave a renewed impetus to the claim for an international recognition and protection of fundamental human rights. In 1929 the Institute of International Law adopted a Declaration of the International Rights of Man [1] and

[1] *Annuaire*, 35 (2) (1929), pp 298-300 , *A J* , 24 (1930), p 560, and 35 (1941), p 663 The Declaration, after recalling in the Preamble that 'the juridical conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the State' and that 'the declarations of rights, written into a large number of constitutions and especially into the American and French constitutions at the end of the eighteenth century, are ordained not only for the citizen, but for man,' states, in Article 1, that 'it is the duty of every State to recognize the equal right of every individual to life, liberty and property, and to

writers devoted increasing attention [1] to the subject The outbreak of the Second World War, provoked by a State which coupled the aggressive will for the domination of the world with a ruthless denial of fundamental human rights, strengthened the conviction that the international recognition and protection of the rights of man was in accordance not only with an enlightened conception of the objects of International Law but also with an essential requirement of international peace That conviction was repeatedly given expression in various declarations of war aims such as the so-called Atlantic Charter of August 14, 1941,[2] and the Declaration of the United Nations of January 1, 1942, in which they put on record that ' complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands ' [3]

The Charter of the United Nations and the Rights of Man

§ 340*l* The Charter of the United Nations indicates, in numerous provisions, the wide possibilities of the international recognition of human rights In the Preamble to the Charter the United Nations have expressed, among other things, their determination ' to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ' The Charter lays down, as one of the purposes of the United Nations, the achievement of international co-operation ' in promoting

accord to all within its territory the full and entire protection of this right, without distinction as to nationality, sex, race, language or religion ' On this Declaration see Mandelstam in *R I* (*Paris*), 5 (1930), pp 59-78, 12 (1933), pp 469-510, and 13 (1934), pp 61-104, Scott, *ibid*, 5 (1930), pp 79 99 See also the writers referred to in the following note

[1] See Scelle, II pp 42-135, Wehberg in *Friedenswarte*, 29 (1929), pp 354-357, and 33 (1933), pp 263-266, Steichele, *ibid*, 29 (1929), pp 41-44, Mirkine-Guetzévitch, *ibid*, p 214, Mandelstam in *R I*, 3rd ser, 11 (1930), pp 297 325, in *Z o V*, 2 (1) (1930), pp. 333-337, and in *Hague* [illegible] (1931) (IV), pp 129-230, Cosentini in *R I* (*Geneva*), 13 (1935), pp 167-189; Dumas in *Hague Recueil*, 59 (1937) (1), pp 7 93, H Friedmann in *Grotius Society*, 24 (1938), pp 133-146, Idelson, *ibid*, 30 (1945), pp 50-66 As to the rights of man according to Islam see Ostrorog in *R I* (*Paris*), 5 (1930), pp 100-114

[2] *A J*, 35 (1941), Suppl, p 191 (a Joint Declaration of the President of the United States and of the Prime Minister of Great Britain) See also the ' Four Freedoms ' Message of President Roosevelt to Congress of January 6, 1941 (H Doc, No 1, 77th Congress, 1st Session) These ' freedoms included (1) freedom of speech and expression, (2) freedom of religion, (3) freedom from fear, (4) freedom from want See Finch in *A J*, 35 (1941), pp 662 665

[3] *A J*, 36 (1942), Suppl., p 191.

and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion '[1] The General Assembly is enjoined to initiate studies and make recommendations for the purpose of assisting in the realisation of human rights and fundamental freedoms[2] The promotion of 'universal respect for and observance of' these rights and freedoms is declared to be one of the objects of the United Nations in the sphere of international economic and social co-operation as a prerequisite for the creation of 'conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'[3] With this object in view, the Economic and Social Council of the United Nations is authorised to make recommendations for the purpose of 'promoting respect for, and observance of, human rights and fundamental freedoms for all'[4] In particular, the Economic and Social Council is enjoined to set up a commission for the promotion of human rights[5] Finally, the 'encouragement of respect for human rights and for fundamental freedoms of all' is declared to be one of the principal objectives of the International Trusteeship System established by the Charter.

It cannot be said that these provisions signify a full and effective guarantee of the inalienable rights of man on the part of international society In particular, there are absent from the Charter clauses embodying either a more precise definition of these rights or a clear acknowledgment of the principle of the enforcement of their observance On the other hand, the articles enumerated above, in particular the mandatory provision[6] for setting up a commission for human rights, one of the principal tasks of which would be the drafting of an International Bill of the Rights of Man,[7]

[1] Article 1 (3)
[2] Article 13
[3] Article 55
[4] Article 62 (2)
[5] Article 68 See above, § 168*m*
[6] See British Commentary on the Charter, Cmd 6666 (1945), §§ 49 and 91
[7] For an early proposal of an International Bill of Rights see Wells, *The New World Order* (1940), pp 139-143 See also Streit, *Union Now* (193), p 126 For a lucid discussion see Quincy Wright, *Human Rights and World Order*, printed in the *Third Report of the Commission to Study the Organization of Peace*, February 1943 See also the statement, in the Fourth Report of the Commission, on 'International Safeguards of Human Rights,'

leave room for further developments in that direction Whatever these may be, the question of the observance of fundamental human rights has, as the result of the Charter, ceased to be one of exclusive domestic jurisdiction of States and, though not involving a right of direct intervention on

published in *International Conciliation*, September 1944, Pamphlet No 403, pp 552 574 And see the discussion on 'New Rights of Man in an International Organization' in *The World's Destiny and the United States A Conference of Experts in International Relations* (Chicago, 1941), pp 101 137 See also Schwarzenberger, *Power Politics* (1941), pp 389-390, Brierly, *The Outlook for International Law* (1944), pp 108-116 And see Lauterpacht, *An International Bill of the Rights of Man* (1945), the same in *Hague Recueil*, 1947, and Brunet, *La garantie internationale des droits de l'homme* (1947) See also Robinson, *Human Rights and Fundamental Freedoms in the Charter of the United Nations* (1946), and *The Annals of the American Academy of Political and Social Science*, January 1946 (a valuable symposium on 'Essential Human Rights') At its first Session in 1946 the Economic and Social Council set up a Commission on Human Rights, one of the first tasks of which is to be the preparation of an international bill of human rights See also the Report of the Preparatory Commission of the United Nations Cmd 6734, p 54

Subsequently, the nuclear Commission on Human Rights (established prior to the setting up of the full Commission) put on record its belief in the need 'for an international agency of implementation entrusted with the task of watching over the general observance of human rights' (*Report of the Session of May* 1946 *Journal of the Economic and Social Council*, 1946, No 14, p 162) In view of the necessity for making the observance of human rights a reality the Commission envisaged the contingency of political action on its part and requested the Economic and Social Council to take this aspect of the problem into consideration in connection with the future determination of the status and of the powers of the Commission on Human Rights In June 1946 the Economic and Social Council formally endorsed the view that the purpose of the United Nations with regard to the promotion and observance of human rights, as defined in the Charter of the United Nations, can only be fulfilled if provision is made for the implementation of human rights and for an international bill of rights (*ibid*, No 29, p 521) The Secretary-General was requested to make arrangements, *inter alia*, for the compilation and publication of a year book on law and usage relating to human rights, the collection and publication of information on the activities concerning human rights of all organs of the United Nations, and for the collection and publication of plans and declarations on human rights by official and non official national and international organisations Moreover, in addition to the sub commission on the status of women (subsequently set up as a full Commission), the Commission was empowered to set up sub commissions on freedom of information and of the press, on protection of minorities, and on the prevention of discrimination In December 1946 the First General Assembly adopted a Resolution recommending that all members of the United Nations who have not already done so should adopt the necessary measures for implementing the provisions of the Charter relating to human rights and fundamental freedoms for all without discrimination as to sex, by granting to women the same political rights as men

There was general agreement in the initial stages of the United Nations that the effective protection of fundamental human rights and freedoms on the part of international society organised under its aegis would provide a decisive accession of strength to the moral and political authority of the United Nations

the part of the United Nations,[1] has become a matter of legitimate concern to its members and to the Organisation as a whole.[2] Though imperfect from the point of view of enforcement, the relevant provisions of the Charter constitute legal obligations of the members of the United Nations and of the Organisation as a whole. The fundamental human rights and freedoms acknowledged by the Charter must henceforth be regarded as legal rights recognised by International Law. Their enforcement, subject to the limitations of the Charter,[3] must be regarded as a paramount object of the United Nations.

[1] See above, § 168*f*.

[2] See also for the Declaration regarding Non-Self-Governing Territories—Article 73 of the Charter—§ 94*o* above. And see above, § 94*t*, as to the International Trusteeship System. In Articles 15, 3, 2, 2, 6, respectively, of the Peace Treaties of 1946 with Italy, Roumania, Bulgaria, Hungary, and Finland these States bound themselves to take all measures necessary to secure to all persons under their jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and fundamental freedoms, including freedom of expression, of the press and publication, of religious worship, and of political opinion. Provision is also made for the repeal of discriminatory legislation on account, *inter alia*, of racial origin, and for the prohibition of the enactment of similar measures in the future.

[3] These limitations do not preclude the organs of the United Nations from taking action, short of intervention (see above, § 168 *f*(*b*)), on petitions and complaints alleging violations of fundamental human rights. Such action may include investigation and recommendations addressed either to the Economic and Social Council or to the State concerned. It appears that in 1947 the Commission on Human Rights took a more limited view of its powers in this respect. In February of that year it adopted a resolution, subsequently confirmed by the Economic and Social Council, that it had no power to take any action in regard to any complaints concerning human rights. There is no compelling reason for assuming that that view represents either a fixed attitude of the Commission on Human Rights or an accurate interpretation either of the Charter or of the Resolution of the Economic and Social Council referred to above (p. 671). The examination of complaints and petitions is essential to the proper fulfilment of the task of the Commission and must be considered as inherent in the task of the United Nations to encourage and promote the observance of human rights and freedom. See, however, for a different view the Report of the Working Group on Implementation prepared in December 1947 in the course of the meeting of the Commission on Human Rights. Doc. E/600, p. 51.

PART III

ORGANS OF THE STATES FOR THEIR INTERNATIONAL RELATIONS

CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I

POSITION OF HEADS OF STATES ACCORDING TO INTERNATIONAL LAW

Hall, § 97—Phillimore, II §§ 101, 102—Hershey, § 256—Bluntschli, §§ 115 125—Holtzendorff in *Holtzendorff*, II pp 77-81—Ullmann, § 40—Hatschek, pp 78 86—Liszt, § 21 (I, II)—Strupp, *Éléments*, § 12—Rivier, I § 32—Nys, II pp 378 382—Fiore, II § 1097—Mérignhac, II pp 294-305—Fauchille, §§ 632 647 (5)—De Louter, II pp 1, 2, 9 14—Anzilotti, pp 137 143, 257 261—Gemma, pp 126 130—Cavaglieri, pp 217 223—Suarez, §§ 227 231—Bynkershoek, *De foro legatorum* (1721), c III § 13—Satow, §§ 6-16

Necessity of a Head for every State

§ 341 As a State is an abstraction from the fact that a multitude of individuals live in a country under a sovereign Government, every State must have a Head as its highest organ, which represents it, within and without its borders, in the totality of its relations Such Head is the monarch in a monarchy, and a president or a body of individuals, such as the Bundesrath of Switzerland, in a republic The Law of Nations prescribes no rules as regards the kind of Head a State may have Some kind or other of a Head of the State is, however, necessary according to International Law, as without a Head there is no State in existence, but anarchy.

Recognition of Heads of States

§ 342 The recognition of new Heads of States has already been discussed above in §§ 75-75*f*

Competence of Heads of States

§ 343 The Head of a State, as its chief organ and representative in the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant international acts are considered to be acts of his State His competence to perform such acts is termed *jus repraesentationis omnimodae*. It comprises in substance chiefly . reception and mission of

diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. But it is a question in each case how far this competence is independent of Municipal Law For Heads of States exercise this competence for their States, and as representing them, and not in their own right If a Head of a State should, for instance, ratify a treaty without the necessary approval of his Parliament, he would go beyond his powers, and therefore such a treaty would not be binding upon his State [1]

On the other hand, this competence is certainly independent of the question whether a Head of a State is the legitimate head or a usurper The mere fact that an individual is for the time being the Head of a State makes him competent to act as such, and his State is legally bound by his acts [2] It may, however, be difficult to decide whether a certain individual is, or is not, the Head of a State, for after a revolution some time always elapses before matters are settled

Heads of States as Objects of the Law of Nations

§ 344 Heads of States are not subjects of the Law of Nations The position which a Head of a State has according to International Law is due to him, not as an individual, but as the Head of his State His position is derived from international rights and duties belonging to his State, and not from international rights of his own

Honours and Privileges of Heads of States

§ 345 All honours and privileges due to Heads of States from foreign States are derived from the fact that dignity is a recognised quality of States as members of the Family of Nations and International Persons [3] Concerning such honours and privileges, International Law distinguishes between monarchs and Heads of republics [4]

II

MONARCHS

Vattel, I §§ 38 45, IV § 108—Hall, § 49—Lawrence, § 105—Phillimore, II §§ 103 113—Taylor, § 184—Moore, II § 250—Hershey, § 281—Bluntschli, §§ 126 153—Heffter, §§ 48 57—Ullmann, §§ 41, 42—Rivier, I § 33—Nys,

[1] See below, § 497
[2] See above, § 74
[3] See above, § 121
[4] See below, §§ 355, 356

II pp 331-348—Calvo, III §§ 1454 1479—Fiore, II §§ 1098-1102—Fauchille, §§ 632 647 (5)—Mérignhac, II pp 294-314—Pradier Fodéré, III §§ 1564-1591—Praag, §§ 191 202—De Louter, II pp 2 5, 7, 8—Satow, I §§ 6-12—Frisch, *Der volkerrechtliche Begriff der Exterritorialitat* (1917), pp 38 44—Strisower in *Hague Recueil*, 1923, pp 263 269—Heyking, *L'exterritorialité* (1926), pp 121 133—Strupp in *International Law Association's Thirty fourth Report*, 1927, pp 426 440—*Harvard Research* (*Competence of Courts*, 1932), pp 476 479

Sovereignty of Monarchs

§ 346 In every monarchy the monarch appears as the representative of the sovereignty of the State, and thereby becomes a sovereign himself, and this fact is recognised by International Law And the difference between the Municipal Laws of the different States regarding this point matters in no way Consequently, International Law recognises all monarchs as equally sovereign, although the difference between the constitutional positions of monarchs is enormous, if looked upon in the light of the rules laid down by the constitutional laws of the different States

Consideration due to Monarchs at Home

§ 347 Not much need be said as regards the consideration due to a monarch from other States when within the boundaries of his own State Foreign States have to give him his usual and recognised predicates [1] in all official communications. Every monarch must be treated as a peer of other monarchs, whatever difference in title and actual power there may be between them

Consideration due to Monarchs Abroad

§ 348 However, as regards the consideration due to a monarch abroad from the State on whose territory he is staying, in time of peace, and with the knowledge and the consent of the Government, details must necessarily be given It consists of honours, inviolability, and exterritoriality

(1) In consequence of his character of sovereign, his home State has the right to demand that certain ceremonial honours shall be rendered to him, to the members of his family, and to the members of his retinue He must be addressed by his usual predicates Military salutes must be paid to him, and the like

(2) As his person is sacrosanct, his home State has a right to insist that he shall be afforded special protection as regards personal safety, the maintenance of personal

[1] Details as regards the predicates of monarchs are given above, § 119

dignity, and unrestrained intercourse with his Government at home Every offence against him must be visited with specially severe penalties On the other hand, he must be exempt from every kind of criminal jurisdiction The wife of a sovereign must be accorded the same protection and exemption

(3) He must be granted so-called exterritoriality conformably with the principle *par in parem non habet imperium*, according to which one sovereign cannot have any power over another sovereign He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff [1] The house in which he has taken up residence must enjoy the same exterritoriality as the official residence of an ambassador , no policeman, or other official, must be allowed to enter it without his permission Even if a criminal takes refuge there, the police must be prevented from entering it, although, if the surrender of the criminal is deliberately refused, the Government may request the recalcitrant sovereign to leave the country, and then arrest the criminal If a foreign sovereign has immovable property in a country, such property is under the jurisdiction of that country But as soon as such sovereign takes up his residence on the property, it must become exterritorial for the time being [2] The wife of a sovereign must likewise be granted exterritoriality, but not other members of a sovereign's family [3]

[1] *Hullet* v *King of Spain* (1828) 2 Bligh, N S 310 See also above, § 115, and the cases there quoted, Phillimore, II § 113*a*, Loening, *Die Gerichtsbarkeit über fremde Staaten und Souverane* (1903), and the *Projet de règlement international sur la compétence des tribunaux dans les procès contre les États souverains ou chefs d'État étrangers*, adopted by the Institute of International Law in 1891 (*Annuaire*, 11 (1892), p 436) It appears that French and Italian courts do not recognise immunity from civil jurisdiction in case of obligations incurred in the sovereign's private capacity See *Tribunal Civil de la Seine* in *Wiercinski* v *Seyyid Ali Ben Hamond*, July 25, 1916, 44 *Clunet* (1917), p 1465, and the Italian *Cassazione* in *Nobili* v *Charles I of Austria*, March 11, 1921, 48 *Clunet* (1921), p 626, *Annual Digest*, 1919-1922, Case No 90

[2] A celebrated case happened on November 10, 1657, in France, when Christina, Queen of Sweden, although she had already abdicated, sentenced her grand equerry, Monaldeschi, to death, and had him executed by her bodyguard

[3] See Rivier, I p 421, and Bluntschli, § 154, but, according to Bluntschli, exterritoriality need not in strict law be granted even to the wife of a sovereign

The Retinue of Monarchs Abroad

§ 349. The position of individuals who accompany a monarch during his stay abroad is a matter of some dispute Several writers maintain that the home State can claim the privilege of extraterritoriality for members of his suite as well as for the sovereign himself, but others deny this [1] The opinion of the former is probably correct, since it is difficult to see why a sovereign abroad should, as regards the members of his suite, be in an inferior position to a diplomatic envoy [2]

Monarchs travelling *Incognito*.

§ 350 Hitherto only the case where a monarch is staying in a foreign country with the official knowledge of the Government of the latter has been discussed Such knowledge may be possessed in the case of a monarch travelling *incognito*, and then he enjoys the same privileges as if travelling not *incognito* The only difference is that many ceremonial observances, which are due to a monarch, are not rendered to him when travelling *incognito* But the case may happen that a monarch is travelling in a foreign country *incognito* without the Government of the latter having the slightest knowledge thereof He cannot then, of course, be treated otherwise than as any other foreign individual, but he can at any time make known his real character, whereupon he assumes the privileges [3] due to him Thus King William of Holland, when travelling *incognito* in Switzerland in 1873, was condemned to a fine for some slight contravention, but the sentence was not carried out, as he gave up his *incognito* [4]

Deposed and Abdicated Monarchs.

§ 351 All privileges mentioned must be granted to a monarch only as long as he is really the Head of a State As soon as he is deposed or has abdicated, he is no longer a sovereign. Therefore in 1870 and 1872 the French courts permitted, because she was deposed, civil actions against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs Nothing, of course, prevents the Municipal Law of a State from granting the same privileges

[1] See Bluntschli, § 154, and Hall, § 49, in contradistinction to Martens, § 1 83

[2] See below, §§ 401 405

[3] See *Mighell* v *Sultan of Johore* [1894] 1 Q B 149

[4] See Lawrence, *Commentaire sur Wheaton*, in p 428, Pradier-Fodéré, in § 1582, and in *R I*, 5 (1873), p 246

to a foreign deposed or abdicated monarch as to a foreign sovereign, but the Law of Nations does not exact any such courtesy [1]

Regents

§ 352 All privileges due to a monarch are also due to a regent, at home or abroad, whilst he governs on behalf of an infant, or of a king who is, through illness, incapable of exercising his powers And it matters not whether the regent is a member of the king's family and a prince of royal blood or not.

Monarchs in the Service of Foreign Powers

§ 353 When a monarch accepts any office in a foreign State—when, for instance, he serves in a foreign army, as did formerly many monarchs of the small German States—he submits to such State as far as the duties of the office are concerned, and his home State cannot claim any privileges for him that otherwise would be due to him [2]

III

PRESIDENTS OF REPUBLICS

Bluntschli, § 134—Stoerk in *Holtzendorff*, II p 661—Ullmann, § 42—Rivier, I § 33—Martens, I § 80—Walther, *Das Staatshaupt in den Republiken* (1907), pp 190 204—Praag, § 192—Satow, § 11

Presidents not Sovereigns

§ 354 In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and, accordingly, the people styles itself the sovereign of the State And it will be remembered that the Head of a republic may consist of a body of individuals, such as the Bundesrath in Switzerland But in case the Head is a president, as in France and the United States of America,[3] the president represents the State, at any rate in the totality

[1] See Travers, II § 877 As to the legal position of the former German Emperor in Holland and the Dutch refusal to surrender him see below, vol II § 253

[2] As to responsibility for his acts when a monarch is at the same time the subject of another State see the third edition of this volume, § 353, and *Duke of Brunswick* v *King of Hanover* (1844), 6 Beav 1, 2 H L C. 1, and Phillimore, II § 109

[3] See Hyde, I § 408

of its international relations He is, however, not a sovereign, but a citizen, and a subject of the very State of which, as president, he is Head

Position of Presidents in general

§ 355 Consequently, his position at home and abroad cannot be compared with that of monarchs, and International Law does not empower his home State to claim for him the same, but only similar, consideration as that due to a monarch Neither at home nor abroad, therefore, does a president of a republic appear as a peer of monarchs Whereas all monarchs are in the style of the court phraseology considered as though they were members of the same family, and therefore address each other in letters as 'my brother,' a president of a republic is usually addressed in letters from monarchs as 'my friend' His home State can certainly claim for him such honours as are due to its dignity, but no such honours as must be granted to a sovereign monarch

Position of Presidents Abroad

§ 356 As to the position of a president when abroad, writers on the Law of Nations do not agree Some[1] maintain that, since a president is not a sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of exterritoriality Others[2] distinguish between a president staying abroad in his official capacity as Head of a State and one who is abroad for his private purposes, and they maintain that his home State could only in the first case claim exterritoriality for him Others[3] again will not admit any difference in the position of a president abroad from that of a monarch abroad When the President of the United States visited England in December 1918 he received such ceremonial honours as are due to a monarch As regards exterritoriality, there seems to be no good reason for distinguishing between the position of a monarch and that of presidents or other heads of States.

[1] Ullmann, § 42, Rivier, I p 423, Stoerk in *Holtzendorff*, II p 658

[2] Martens, I § 80, Bluntschli, § 134, Despagnet, § 254, Hall, § 97

[3] Fauchille, § 639, Nys, II p 338, Mérignhac, II p 298, Liszt, § 22 (II), Walther, *op cit*, p 195

IV

FOREIGN OFFICES

Heffter, § 201—Geffcken in *Holtzendorff*, III p 688—Ullmann, § 43—Anzilotti, pp 262, 263—Rivier, I § 34—Fauchille, §§ 648 651—Nys, II pp 383 387—Hershey, § 257—Tilley and Gaselee, *The Foreign Office* (1933)—Hyde, I § 410—Satow, §§ 17 28—Genet, I pp 43 74, II pp 77-189—Malkin in *L Q R*, 49 (1933), pp 489 510

Position of the Secretary for Foreign Affairs

§ 357 As a rule, nowadays no Head of a State, be he a monarch or a president, negotiates directly, and in person, with a foreign Power, although this happens occasionally The necessary negotiations are regularly conducted by the Foreign Office, an office which, since the Westphalian Peace, has, in one form or other, been in existence in practically every civilised State The chief of this office, the Secretary for Foreign Affairs, who is a Cabinet Minister, directs the foreign affairs of the State in the name of the Head and with his consent, he is the middleman between the Head of the State and other States [1] And although many a Head of a State in fact directs all the foreign affairs himself, the Secretary for Foreign Affairs is nevertheless the person through whose hands all transactions must pass His position at home is regulated by Municipal Law But International Law defines his position regarding international intercourse with other States He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in international matters It is he who, either in person or through the envoys of his State, approaches foreign States for the purpose of negotiating international matters And, again, it is he whom foreign States, through their Foreign Secretaries or their envoys, approach for the like purpose As representing his State, he may, in proper cases, make binding declarations Thus in the case concerning the *Legal Status of Eastern Greenland*, decided on April 5, 1933, by the Permanent Court

[1] On the question how far an undertaking by a Foreign Minister binds his successors see a Danish complaint against Norway in the matter of Greenland, mentioned by Castberg in *R I* 3rd ser, 5 (1924), pp 261 263

of International Justice it was held, in effect unanimously, that a declaration by the Norwegian Foreign Minister recorded by him in a minute and informing the Danish Minister that the Norwegian Government would not make any difficulties in the settlement of the recognition of Danish sovereignty over Eastern Greenland, was binding upon Norway The Court attached importance to the fact that the declaration was made on behalf of the Government in regard to a question falling within the province of the Foreign Minister in reply to a request of the diplomatic representative of Denmark [1]

The Foreign Minister is present when ministers hand in their credentials to the Head of the State All documents of importance regarding foreign matters are signed by him or his substitute, the Under-Secretary for Foreign Affairs It is, therefore, usual to notify the appointment of a new Foreign Secretary of a State to such foreign States as are represented by diplomatic envoys, the new Foreign Secretary himself makes this notification [2] With the increased facilities for travel ministers of foreign affairs have tended to take a more direct part in the joint conduct of

[1] P C I J, Series A/B, No 53, p 73 And see p 91 for the observations of Judge Anzilotti In *State of Russia* v *National City Bank of New York* the United States Circuit Court of Appeals held that the minister for foreign affairs of a State has the right to alienate State property by the execution of an assignment in his name (1934) 69 F (2d) 44 For comment see *Z o V*, 4 (1934), p 695

[2] As to the organisation of the British Foreign Office see Tilley and Gaselee, *The Foreign Office* (1933) See also Foreign Service Act, 1943 (6 & 7 Geo VI c 36) giving effect to the proposals of the White Paper Cmd 6420 As to the United States of America see Stuart, *American Diplomatic and Consular Practice* (1936), pp 41-161, Hulen, *Inside the Department of State* (1939), Leaves and Wilcox in *American Political Science Review*, 38 (1944), pp 289-301, Stowell in *A J*, 25 (1931), pp 516 520, Miller, *ibid*, 33 (1939), pp 500 518 See also Wriston, *Executive Agents in American Foreign Relations* (1929) For the United States Act of 1945 concerning the Foreign Service see *A J*, 39 (1945), Suppl, p 159, Atwater in *A J*, 39 (1945), pp 559 565, and 41 (1947), pp 73 102 As to Japan see Colegrove in *A J*, 30 (1936), pp 585 613 As to Germany see Kraus, *Der auswartige Dienst des Deutschen Reiches* (1931) The independent conduct of foreign relations in the last two States was suspended as the result of the outcome of the Second World War And see generally Genet, II pp 77-188, for a useful survey of the organisation of the Foreign Offices of the principal countries See also Gachet, *Memento à l'usage des chancelleries diplomatiques et consulaires* (1933) (a practical handbook of diplomatic practice published under the auspices of the French Foreign Office), Allard, *Le Quai-d'Orsay* (1938) On parliamentary control of foreign relations see Mirkine-Guetzévitch in *Hague Recueil*, 56 (1936) (II), pp 219-297

international affairs Thus since 1939 the Foreign Ministers of the American Republics have held meetings for the purpose of framing common policies expressed in formal declarations and resolutions (whose legal character is not quite clear) and in conventions [1] By a decision of the Great Powers taken at Potsdam in August 1945 a permanent Council of their Foreign Ministers was set up in London [2]

Conclusiveness of Statements of Foreign Offices before Municipal Courts

§ 357a It is the practice of British Courts to accept as conclusive statements of the Foreign Office relating to certain categories of questions of fact in the field of international affairs These include (a) the question whether a foreign State or Government has been recognised by this country either *de facto* or *de jure* [3], (b) the question whether recognition has been granted to conquest by another State or to other changes of territorial title,[4] and, generally, whether certain territory is under the sovereignty of one foreign State or another [5], (c) the sovereign status of a foreign State or its monarch [6], (d) the commencement and termination of a state of war against another country [7], (e) the question whether a state of war exists with a foreign country [8] or between two foreign countries [9], (f) the

[1] For the Final Act of the Meeting at Panama in 1939 see *A J*, 34 (1940), Suppl, pp 1 20, for the Final Act and Convention adopted at the meeting in July 1940 see *ibid*, 35 (1941), Suppl, pp 1 32

[2] Cmd 6689 (1945)

[3] *The Annette*, *The Dora* [1919] P 105, *The Gagara* [1919] P 35, *Luther* v *Sagor* [1921] 1 K B 456, [1921] 3 K B 532 And see, generally, Lyons in *B Y*, 23 (1946), pp 240 281, for a valuable survey

[4] *Bank of Ethiopia* v *National Bank of Egypt and Liguori* [1937] Ch 513

[5] *Foster* v *Globe Venture Syndicate* [1900] 1 Ch D 811 According to § 15 (2) of the Trading with the Enemy Act, 1939, the certificate of a Secretary of State was made decisive, for the purpose of the Act, on the question whether any area is or was under the sovereignty or in the occupation of any State as well as on the question of the time at which any such area became or ceased to be under the sovereignty or occupation of a State In *The Fagernes* [1927] P 311, the Court of Appeal considered itself bound by the statement of the Attorney General that a particular spot in the Bristol Channel was not within the territorial jurisdiction of the Crown The majority of the Court considered that this was a statement of fact upon a matter particularly within the cognisance of the Crown

[6] *Mighell* v *Sultan of Johore* [1894] 1 Q B 149, *Duff Development Co* v *Government of Kelantan* [1924] A C 797 In the former case Lord Esher disapproved of Lord Phillimore's judgment in *The Charkieh* (L R 4 A E 59) in so far as the latter undertook an independent examination of the status of the Khedive of Egypt

[7] *Janson* v *Driefontein Consolidated Mines* [1902] 2 A C at p 500

[8] See *R* v *Bottrill*, [1947] K B 41

[9] *Kawasaki Kisen Kabushiki Kaisha of Kobe* v *Bantham S S Co* [1938] 3 All E R 80 (King's Bench Division) and, with some hesitation, [1939] 2 K B. 544 (Court of Appeal).

existence of a case for reprisals in maritime war [1], (*g*) the question whether a person is entitled to diplomatic status [2], and (*h*) the existence or extent of British jurisdiction in a foreign country [3]

That practice does not seem to be open to objection It is clear that with regard to the various questions coming within the scope of its functions the executive organ charged with the conduct of foreign relations is in the position to supply authoritative [4] information as to facts of which courts, in consequence, take judicial notice. Yet, notwithstanding their reliance on the statements of the executive as to these questions of fact, courts are free to draw the proper conclusions of law from the position as ascertained by the executive [5] Although, for instance, the statement of the Foreign Office is conclusive on the question whether a foreign authority is or is not a recognised sovereign State or Government, it is for the Court to draw the appropriate legal conclusions from the information thus supplied for it [6] On the other hand in the United States courts have tended

[1] *The Zamora* [1916] 2 A C at p 98, *The Stigstad* [1919] A C 279

[2] *Musmann* v *Engelke* [1928] A C 433 See below, § 401 (n)

[3] *North Charterland Exploration Company* (1910) *Limited* v *The King* [1931], 1 Ch 169, and note in *Annual Digest*, 1929 1930, Case No 13

[4] This circumstance, as distinguished from any necessity of avoiding an embarrassment to the executive, supplies an adequate explanation of the existing practice It is convenient, when the question arises whether a foreign authority possesses the necessary requirements of statehood or governmental capacity, that the answer to that question be given by the executive in the form of a statement relating to the recognition or otherwise of such foreign authority as fulfilling the requisite conditions of fact Requirements of international intercourse demand that the judicial and executive organs of the State should not speak with two voices on questions of fact of interest to other States See also above, § 75, in connection with recognition

[5] When, as occasionally happens, the statement of the Foreign Office lacks clarity on account of the novelty or the complexity of the facts which it is requested to certify, the Court is presumed to have the power —and the duty—to interpret the certificate in accordance with the principles of International Law applicable to the situation See, on the form of Foreign Office certificates, Lauterpacht in *B Y*, 20 (1939), pp 125 128 See also the same in *Modern Law Review*, 3 (1939), pp 1 20 And see the observations of Greene M R in *Kawasaki Kisen, etc* v *Bantham S S Co* [1939] 2 K B 544 (at pp 552-556)

[6] Thus it is for the courts to determine to what extent recognition necessitates giving effect to the legislation of the recognised authority, to what extent it is retroactive, what are the effects of *de facto* recognition, and the like The Foreign Office does not consider itself to be under a duty to supply information on all relevant questions of fact Thus, for instance, in *White, Child & Beney Ltd* v *Simmons* (1922) 38 T L R. 367, the Foreign Office declined to answer the question as to the date from which the recognition of the Soviet Government should be considered to be retroactive

to accept as binding the conclusions of the State Department on substantive questions of law such as whether a claim to immunity put forward by a foreign State or Government is well founded [1] French courts have gone even further in that direction and have often relied on the executive Department as the exclusive agency for the interpretation of treaties which they have been called upon to construe [2]

[1] In *Ex parte Republic of Peru* (1943) 318 U S 578, the Supreme Court expressly laid down the rule that a foreign Government may present its claim to immunity either before the Court or before the Department of State, in which latter case the Court is bound by the 'recognition and allowance of the claim [to immunity] by the State Department and certification of its action pre sented to the court by the Attorney General' The same Court has held that once the State Department has certified a foreign public vessel to be immune from jurisdiction, courts may not assume jurisdiction so 'as to embarrass the executive arm of the Government in conducting foreign relations' *The Ucayali* (1943) 318 U S 578, *Annual Digest*, 1941 1942, Case No 53 See also, as to the statements of the Executive with regard to a claim to jurisdictional immunity put forward by a foreign Government, *Banco de España* v *Federal Reserve Bank of New York*, decided in 1940 by a United States Circuit Court of Appeals 114 F (2*d*) 438, *Annual Digest*, 1938 1940, Case No 6 The position in the United States was reviewed with some clarity by the United States Circuit Court of Appeals (Second Circuit) in *Sullivan* v *State of São Paulo* (1941) 122 F (2*d*) 355, *Annual Digest*, 1941 1942, Case No 50 It appears from this case that while courts will accept as accurate the recital of facts, submitted by the foreign State, underlying the claim to immunity and transmitted to the Court by the Executive, they will exercise discretion in applying the facts to the claim of immunity For a somewhat drastic affirmation by the Supreme Court of the right of the executive department to determine the question of immunity see *Republic of Mexico* v *Hoffmann* (1945), 324 U S 30, *A J*, 39 (1945), p 585, and see for a trenchant criticism of that decision Jessup, *ibid*, 40 (1946), pp 168-172 However, see *Miller et Al* v *Ferrocarril del Pacífico de Nicaragua* where the Supreme Judicial Court of Maine accepted as conclusive the 'suggestion' of the Attorney General of the United States to the effect that the defendant corporation, being an agency of a foreign sovereign Government, was entitled to im munity and that it has in fact been treated as such by the Executive Department (1941) 137 Maine, 251, *Annual Digest*, 1941-1942, Case No 51 It has been held by the New York Court of Appeals that the mere transmission—as distinguished from an affirmative pronouncement—by the Executive of a claim to immunity does not preclude the Court from examining the truth of the allegations of fact on which the claim is based *Lamont* v *Travelers Insurance Com pany* (1939) 281 N Y 362, *A J*, 34 (1940), p 349, *Annual Digest*, 1938-1940, Case No 73 See also Deák in *Columbia Law Review*, 40 (1940), p 453 As to the executive control of foreign relations in the United States see a memorandum in Hackworth, IV § 421 See also *United States* v *Curtiss Wright Export Corp* (1936) 299 U S 304, *Annual Digest*, 1935-1937, Case No 18, for an exposition, by the Supreme Court, of the principles of American constitutional law on the subject And see *United States* v *Belmont* (1937), 301 U S 324, *Annual Digest*, 1935 1937, Case No 15 See also Lyons in *B Y*, 24 (1947)

[2] See the literature referred to in Lauterpacht, *Function of Law*, p 389, n 1, and, in particular, Rousseau, I pp 411 414, and 648-675 See also *La Compagnie des Services Contractuels* v *Tito Landi*, *Annual Digest*, 1935 1937, Case No 216

CHAPTER II

DIPLOMATIC ENVOYS

I

THE INSTITUTION OF LEGATION

Grotius, II c 18—Phillimore, II §§ 148-153—Taylor, § 274—Twiss, § 199—Geffcken in *Holtzendorff*, III pp 605-618—Nys, II pp 393 395—Rivier, I § 35—Ullmann, § 44—Martens, II § 6—De Louter, II pp 17-21—Gentilis, *De legationibus libri III* (1585)—Wicquefort, *L'ambassadeur et ses fonctions* (1690)—De Callière, *De la manière de négocier avec les souverains* (1716) (English translation by White) (1919)—Bynkershoek, *De foro legatorum* (1721)—Garden, *Traité complet de diplomatie* (3 vols, 1833)—Miruss, *Das europaische Gesandtschaftsrecht* (2 vols, 1847)—Charles de Martens, *Le guide diplomatique* (2 vols, 1832, 5th ed by Geffcken, 1866)—Anonymous, *Embassies and Foreign Courts* (1855)—Montague Bernard, *Four Lectures on Subjects connected with Diplomacy* (1868), pp 111-162 (3rd Lecture)—Alt, *Handbuch des europaischen Gesandtschaftsrechts* (1870)—Pradier Fodéré, *Cours de droit diplomatique* (2 vols, 2nd ed, 1899)—Krauske, *Die Entwickelung der standigen Diplomatie*, etc (1855)—Lehr, *Manuel théorique et pratique des agents diplomatiques* (1888)—Hill, *History of Diplomacy in the International Development of Europe*, I (1905), II (1906), III (1914)—Foster, *The Practice of Diplomacy* (1906)—Genet, I pp 3 72, 75-98, II pp 613 645—Satow, pp 55-71, 87 117—Heatley, *Diplomacy and the Study of International Relations* (1919)—Wynen, *Die papstliche Diplomatie* (1922), pp 45 63—Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929)—Mowat, *Diplomacy and Peace* (1935)—Ogdon, *Juridical Basis of Diplomatic Immunity* (1936)—Vaughan Williams in *Hague Recueil*, 1924 (III), pp 230 288—Dupuis, *ibid*, I pp 287-321—Behrens in *English Historical Review*, 49 (1934), pp 640 656—Stuart in *Hague Recueil*, vol 48 (1934) (II), pp 463 482

Development of Legations

§ 358 Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations And it is remarkable that even in antiquity, where no such law as the modern International Law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as

sacrosanct Yet permanent legations were unknown till very late in the Middle Ages The fact that the Popes had permanent representatives—so-called *apocrisiarii* or *responsales*—at the court of the Frankish kings and at Constantinople until the final separation of the Eastern from the Western Church, ought not to be considered as the first example of permanent legations, as the task of these papal representatives had nothing to do with international affairs, but with those of the Church only [1] It was not until the thirteenth century that the first permanent legations made their appearance The Italian republics, and Venice in particular, set the example [2] by keeping representatives stationed at one another's capitals for the better negotiation of their international affairs And in the fifteenth century these republics began to keep permanent representatives in Spain, Germany, France, and England. Other States followed the example Special treaties were often concluded stipulating for permanent legations, such as one in 1520, for instance, between the King of England and the Emperor of Germany From the end of the fifteenth century England, France, Spain, and Germany kept up permanent legations at one another's courts But it was not until the second half of the seventeenth century that permanent legations became a general institution, the Powers following the example of France under Louis XIV and Richelieu It ought to be specially mentioned that Grotius [3] thought permanent legations to be wholly unnecessary The course of events has, however, shown that Grotius' views as regards permanent legations were short-sighted Nowadays the Family of Nations could not exist without them, as they are the channel through which nearly the whole, and certainly all important, official intercourse of the States flows.[4]

[1] See Wynen, *op cit* And see Duffo, *Les envoyés du pape en France, le nonce et le légat* (1937)

[2] See Nys, *Les origines du droit international* (1894), p 295

[3] *De jure belli ac pacis*, II c 18, § 3 'Optimo autem jure rejici possunt, quae nunc in usu sunt legationes assiduae, quibus quam non sit opus docet mos antiquus, cui illae ignoratae'

[4] For a list of diplomatic representatives since 1648 see *Repertorium der diplomatischen Vertreter aller Lander seit dem Westfalischen Frieden (1648)* (1936) (published in Berlin)

§ 359 The rise of permanent legations created the necessity for a new class of State officials, the so-called diplomatists, yet it was not until the end of the eighteenth century that the terms 'diplomatist' and 'diplomacy' came into general use. And although the art of diplomacy is as old as official intercourse between States, such a special class of officials as are now called diplomatists did not, and could not, exist until permanent legations had become a general institution In this, as in other cases, the office has created the class of men necessary for it International Law has nothing to do with the education and general character of these officials Every State is naturally competent to create its own rules,[1] if any, as regards these points Nor has International Law anything to do with *diplomatic usages*, although these are more or less of importance, as they may occasionally grow into customary rules of International Law

Diplomacy

§ 359a Of the diplomatic usages the one relating to the language of diplomatic intercourse requires special consideration. This language was formerly Latin, but through the political ascendancy of France under Louis XIV it became French However, this was a usage of diplomacy only, and not a rule of International Law [2] Each State can use its own language in all official communications to other States, and States which have the same language regularly do so in their intercourse with each other But between States of different tongues and, further, at conferences and

The Language of Diplomacy

[1] As to these see *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, edited by Feller and Hudson, 2 vols (1933) See also Strupp in *Z I*, 25 (1915), pp 55-129, Zorn, *Deutsches Gesandtschafts- und Konsularrecht*, in Stier Somlo's *Handbuch* (1920), Lay, *Foreign Service of the United States* (1925), with special reference to the reorganisation under the Rogers Act of 1924, Stuart, *American Diplomatic and Consular Practice* (1936) And see above, p 683, n 2

[2] See Miruss, *Das europaische Gesandtschaftsrecht* (1847), 1 §§ 266 268, and Scott, *Le Français, langue diplomatique moderne* (1924) For a translation of an interesting letter by Grotius on the training of an ambassador see *A J*, 23 (1929), pp 619 625 (with an introduction by Reeves) And see 'Etienne Dolet on the Functions of the Ambassador, 1541,' *ibid*, 27 (1933), pp 80 95 (with an introduction by Reeves), and Behrens in *English Historical Review*, 51 (1936), pp 616 627, for a learned survey of treaties on the Ambassador written in the fifteenth and early sixteenth centuries See also Wilson, *The Education of a Diplomat* (1938), and Nicolson, *Diplomacy* (1939)

congresses, it is convenient to make use of a language which is generally known. This was for a time almost exclusively French, but nothing could prevent diplomatists from dropping French at any moment and adopting another language instead Article 120 of the General Treaty of the Vienna Congress of 1815 expressly observes that the fact of the French language having been exclusively employed in all the copies of that treaty is not to be construed into a precedent for the future, and that every Power reserves to itself the right to adopt, in future negotiations and conventions, the language which it had previously employed in its diplomatic relations At the Peace Conference at Paris in 1919 the English and French languages were treated on a footing of equality, and the English and French texts of the Treaty of Peace with Germany, which included the Covenant of the League of Nations, were both authentic [1] At the Conference at San Francisco in 1945 English and French were the working languages Other languages used at the Conference were translated into English and French The text of the Charter of the United Nations adopted at San Francisco was drawn up in English, French, Russian, Chinese and Spanish All five texts were declared to be equally authentic The First General Assembly of the United Nations adopted detailed rules concerning languages [2] According to these rules, in all organs of the United Nations, other than the International Court of Justice, Chinese, French, English, Russian and Spanish are to be the official languages, and English and French the working languages.[3]

[1] For a useful synopsis of languages used in treaties see Hudson in *A J*, 26 (1932), pp 368 372 See also Roumiguière, *Le Français dans les relations internationales* (1926), Weck in *Juristische Wochenschrift*, 57 (1928), p 1962, Métall in *Z o R*, 9 (1930), pp 356 389 And see Sherton, *Cosmopolitan Conversation The Language Problems of International Conversation* (1933), Gaselee, *The Language of Diplomacy* (1939)

[2] *Journal of the General Assembly, First Session*, p 660

[3] This means, in particular that (1) speeches made in either of the working languages must be interpreted into the other working language, (2) speeches made in any of the other three official languages must be interpreted into both working languages, (3) any delegate may make a speech in a language other than the official languages, in which case he must himself provide for interpretation into one of the working languages, (4) *verbatim* records are to be drawn in both working languages, (5) summary records as well as all resolutions and other important documents must be made available in the official languages

II

RIGHT OF LEGATION

Grotius, II c 18—Vattel, IV §§ 56 68—Hall, § 98—Phillimore, II §§ 115-139—Taylor, §§ 285 288—Twiss, §§ 201 202—Hershey, § 258—Wheaton, §§ 206 209—Genet, II pp 6 76—Bluntschli, §§ 159-165—Heffter, § 200—Geffcken in *Holtzendorff*, III pp 620 631—Ullmann, § 45—Rivier, I § 35—Nys, II p 392—Fauchille, §§ 658-667—Pradier-Fodéré, III §§ 1225-1256—Fiore, II §§ 1112-1117—Calvo, III §§ 1321 1325—Martens, II §§ 7, 8—De Louter, II pp 21 25—Cruchaga, §§ 593, 606, 607—Satow, §§ 184-211—Preuss in *New York University Law Quarterly Review*, 10 (1932-1933), pp 170-187

Conception of the Right of Legation

§ 360 Right of legation is the right of a State to send and receive diplomatic envoys The right to send such envoys is termed *active* right of legation, in contradistinction to the *passive* right of legation, as the right to receive such envoys is termed Some writers [1] on International Law assert that no right, but a mere competence, to send and receive diplomatic envoys exists according to International Law, maintaining, that no State is bound by International Law to send or receive such envoys But this is certainly wrong in its generality Obviously a State is not bound to send diplomatic envoys or to receive *permanent* envoys But, on the other hand, the very existence [2] of the Family of Nations makes it necessary for the members, or some of the members, to negotiate occasionally on certain points Such negotiation would be impossible in case one member could always, and in all circumstances, refuse to receive an envoy from the other members The duty of every member to listen, in ordinary circumstances, to a message from another member brought by a diplomatic envoy is, therefore, an outcome of its very membership of the Family of Nations, and this duty corresponds to the right of every member to send such envoys But the exercise of the active right of legation is discretionary No State need send diplomatic envoys at all, although practically all States do at least occasionally send such envoys, and most States send permanent envoys to many other States. The

[1] See, for instance, Wheaton, § 207, Heilborn, *System*, p 182
[2] See above, § 141.

passive right of legation is discretionary as regards the reception of *permanent* envoys only.

The United Nations, being an International Person *sui generis*, possesses the right of legation, although it is not a State [1]

What States possess the Right of Legation

§ 361 Not every State possesses the right of legation This right belongs chiefly to full sovereign States,[2] for other States possess it under certain conditions only

(1) Half sovereign States, such as States under the suzerainty, or the protectorate, of another State, can, as a rule, neither send nor receive diplomatic envoys But there may be exceptions to this rule Thus, according to the Peace Treaty of Kaïnardji of 1774 between Russia and Turkey, the two half sovereign principalities of Moldavia and Wallachia had the right of sending chargés d'affaires to foreign Powers Thus, further, before the Boer War, the South African Republic, which was, in the opinion of Great Britain, a State under British suzerainty, used to keep permanent diplomatic envoys in several foreign States

(2) Part sovereign member-States of a Federal State may, or may not, have the right of legation as well as the Federal State It is the constitution of the Federal State which regulates this point Thus, the member-States of Switzerland and of the United States of America have no right of legation, but those of the German Empire before the First World War certainly had Bavaria, for example, used to send and receive diplomatic envoys [3]

(3) Since the First World War the British Self-Governing Dominions have acquired, and, whenever they find it convenient, do exercise, the right of legation [4] The representatives which Great Britain and the Dominions send to one another as High Commissioners or under some other title do not enjoy diplomatic status [5]

[1] As to the League see Corbett in *B Y*, 1924, pp 122, 123, and see below, § 417*a*

[2] As to the Holy See, see above, § 106

[3] See above, § 89

[4] Keith, *Responsible Government in the Dominions* (2nd ed, 1928), II pp 1251-1253 See above, § 94*bb*

[5] Nevertheless the British Finance Acts of 1923, s 19, and 1925, 2 25, confer upon the High Commissioners of the Dominions and of India and members of their staffs resident in Great Britain, the same immunity from income tax, super-tax, and land tax as is enjoyed by the accredited

By whom the Right of Legation is exercised.

§ 362 As, according to International Law, a State is represented in its international relations by its Head, its right of legation is exercised through him But just as Municipal Law designates the person who is the Head of the State, so it may impose certain conditions and restrictions upon him as regards the exercise of this right And the Head himself may, provided that it is sanctioned by the Municipal Law of his State, delegate [1] the exercise of this right to any representative he chooses

A revolutionary party which is recognised as a belligerent Power has nevertheless no right of legation, although foreign States may negotiate with it in an informal way through political agents without diplomatic character,[2] to provide for the temporary security of the persons and property of their subjects within the territory under the actual sway of such a party International practice abounds in instances of various forms of intercourse not intended as and not amounting to recognition as a Government or a State [3]

It should further be mentioned that neither an abdicated nor a deposed Head has a right to send or receive diplomatic envoys [4]

Rupture of Diplomatic Relations

§ 362a No State is legally obliged to continue diplomatic relations with another when the latter is abusing the opportunities afforded thereby or when acute disagreement has arisen between the two States In such circumstances a State may break off diplomatic relations by recalling its own envoy and either requesting the other State to do the same or presenting its envoy with his passport It must be noted that, however prolonged, interruption of diplomatic relations is not tantamount to withdrawal of recognition or a refusal to grant recognition [5]

minister of a foreign State so resident, see also as to packages imported, *Ham's Year Book, 1928*, II (Customs), p 106 And see above, § 94*b* For an instance of an action for libel brought against a Dominion High Commissioner see *M Isaacs and Sons* v *Cook* [1925] 2 K B 391

[1] See Phillimore, II §§ 126-129

[2] Some information as to the quasi-diplomatic character of such agents will be found in the literature upon the case of the *Trent* in 1861, see below, vol II § 408

[3] See Lauterpacht in *B Y*, 21 (1944), pp 131 141

[4] See Phillimore, II §§ 124-125, on the case of *Bishop Ross*, ambassador of Mary Queen of Scots

[5] See *Princess Olga Paley* v *Weisz*, [1929] 1 K B 718 On the effect of the severance of diplomatic relations on treaties see *Harvard Research* (1935, Part III), pp. 1055-1066.

The outbreak of war, if it has not already been preceded by the rupture of diplomatic relations, causes such rupture to occur [1]

III

KINDS AND CLASSES OF DIPLOMATIC ENVOYS

Vattel, IV §§ 69 75—Phillimore, II §§ 211 226—Twiss, I §§ 204 209—Hershey, § 261—Moore, IV § 624—Hackworth, IV §§ 370, 371—Hyde, I § 411—Fenwick, pp 354 358—Heffter, § 208—Geffcken in *Holtzendorff*, III pp 635 646—Calvo, III §§ 1326 1336—Fauchille, §§ 668 676—Pradier Fodéré, III §§ 1277-1290—Rivier, I pp 443 453—Nys, II pp 396 400—De Louter, II pp 27 31—Suarez, §§ 237-244—Satow, §§ 276-305—Keith's Wheaton, pp 444 449—Baty, pp 39 42—Genet, I pp 266 415—*B Y*, 1920 1921, pp 97-108 (as to the British service)—Baty in *Grotius Society*, 8 (1923), pp 21-38—Hill in *A J*, 21 (1927), pp 737-742—Deák in *R I*, 3rd ser, 9 (1928), pp 173-192—Behrens in *Transactions of the Royal Historical Society*, 1933, pp 161 195

Envoys Ceremonial and Political

§ 363 Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations, and such as are sent for the purpose of ceremonial function or notification of changes in the headship For States very often send special envoys to one another on occasions of coronations, weddings, funerals, jubilees, and the like, and it is also usual to send envoys to announce a fresh accession to the throne Such envoys ceremonial have the same standing as envoys political for real State negotiations Among the envoys political, again, two kinds are to be distinguished—namely, (1) such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and (2) such as are sent to represent the sending State at a congress or conference The latter are not, or need not be, accredited to the State on whose territory the congress or conference takes place, but they are nevertheless diplomatic envoys, and enjoy all the privileges of such envoys as regards exterritoriality and the like which concern the inviolability and safety of their persons and the members of their suites

Classes of Diplomatic Envoys

§ 364 Diplomatic envoys accredited to a State or to the United Nations differ in class. These classes did not

[1] See below, vol II § 98

exist in the early stages of International Law. But during the sixteenth century a distinction between two classes of diplomatic envoys gradually arose, and at about the middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognised—namely, extraordinary envoys, called Ambassadors, and ordinary envoys, called Residents, Ambassadors being received with higher honours and taking precedence of the other envoys Disputes arose frequently regarding precedence, and the States tried in vain to avoid them by introducing during the eighteenth century another class—namely, the so-called Ministers Plenipotentiary At last the Powers assembled at the Vienna Congress came to the conclusion that the matter ought to be settled by an international understanding, and they agreed, therefore, on March 19, 1815, upon the establishment of three different classes—namely, first, Ambassadors, second, Ministers Plenipotentiary and Envoys Extraordinary, third, Chargés d'Affaires And the five Powers assembled at the Congress of Aix-la-Chapelle in 1818 agreed upon a fourth class—namely, Ministers Resident, to rank between Ministers Plenipotentiary and Chargés d'Affaires All the other States either expressly or tacitly accepted these arrangements, so that nowadays the four classes are an established order [1] Although their privileges are materially the same, they differ in rank and honours, and they must therefore be treated separately

Ambassadors

§ 365 Ambassadors form the first class Only the United Nations and States enjoying royal honours [2] are entitled to send and to receive Ambassadors, as also is the Holy

[1] The League Codification Committee considered the desirability and feasibility of a revision of this classification, see above, § 36 (n) The Russian Soviet Government in June 1918 abolished the distinction as regards their own diplomatic envoys and substituted a single class of 'Plenipotentiary Representatives', nevertheless, that Government in accrediting an envoy indicates in brackets his class in accordance with the 1815 1818 classification, see Sabinine in *Bulletin de l'Institut Intermédiare International*, 8 (1923), pp 214, 215 It appears that the Soviet Law in question is not always observed in practice Thus in December 1928, in view of the friendly relations between the Soviet Union and Afghanistan, the diplomatic representatives of the two countries were elevated to the rank of ambassador see Taracouzio, *The Soviet Union and International Law* (1935), p 181

[2] See above, § 117 (1)

See, whose first-class envoys are called *Nuncios*, or *Legati a latere* or *de latere*[1] Ambassadors are considered to be personal representatives of the Heads of their States, and enjoy, for this reason, special honours Their chief privilege—namely, that of negotiating with the Head of the State personally—has, however, little value nowadays, as all States have, to a certain extent, constitutional government, and this necessitates that all the important business should go through the hands of a Foreign Secretary. Ambassadors can also claim the title of 'Excellency,' and it is asserted that they can at all times ask for an audience from the Head of the State to whom they are accredited

Ministers Plenipotentiary and Envoys Extraordinary

§ 366 The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States Therefore they do not enjoy all the special honours of the Ambassadors, have not the privilege of treating with the Head of the State personally, and cannot at all times ask for an audience with him But otherwise there is no difference between these two classes, except that Ministers Plenipotentiary receive the title of 'Excellency' by courtesy only, and not by right

Ministers Resident

§ 367 The third class, the Ministers Resident, enjoy fewer honours, and rank below the Ministers Plenipotentiary But beyond the fact that Ministers Resident do not enjoy the title 'Excellency,' even by courtesy, there is no difference between them and the Ministers Plenipotentiary

Chargés d'Affaires

§ 368 The fourth class, the Chargés d'Affaires, differ chiefly in one point from the first, second, and third classes—namely, in that they are accredited from Foreign Office to Foreign Office, whereas the other classes are accredited from Head of State to Head of State Chargés d'Affaires do not enjoy, therefore, so many honours as other diplomatic envoys

A distinction ought to be made between a Chargé d'Affaires who is the head of a legation, and who, therefore, is

[1] There is no difference in rank between *Nuncios* and *Legati a latere* or *de latere* A *legatus a latere* or *de latere* is a Papal envoy who is a Cardinal, whereas a *Nuncio* is not a Cardinal.

accredited from Foreign Office to Foreign Office, and a Chargé d'Affaires *ad interim* The latter is a member of a legation whom the head of the legation delegates for the purpose of taking his place during absence on leave Such Chargé d'Affaires *ad interim*, who had better be called a Chargé *des Affaires*,[1] ranks below the ordinary Chargé d'Affaires, he is not accredited from Foreign Office to Foreign Office, but is simply a delegate of the absent head of the legation.

The Diplomatic Corps

§ 369 All the diplomatic envoys accredited to the same State form, according to a diplomatic usage, a body which is styled the 'Diplomatic Corps' The head of this body, the so-called 'Doyen,' is the Papal Nuncio, or, in case there is no Nuncio accredited, the oldest Ambassador, or, failing Ambassadors, the oldest Minister Plenipotentiary, and so on[2] As the Diplomatic Corps is not a body legally constituted, it performs no legal functions, but it is nevertheless of great importance, as it watches over the privileges and honours due to diplomatic envoys.[3]

IV

APPOINTMENT OF DIPLOMATIC ENVOYS

Vattel, iv §§ 76, 77—Phillimore, ii §§ 227 231—Twiss, i §§ 212-214—Ullmann, § 48—Calvo, iii §§ 1343 1345—Nys, ii p 402—Fauchille, §§ 677-680—Wheaton, §§ 217-220—Moore, iv §§ 632 635—Hackworth, iv §§ 381 383—Hershey, §§ 262-265—De Louter, ii pp 25 27—Suarez, §§ 245 249—Satow, §§ 212 224—Genet, i pp 149 265, ii pp 190 272—*Harvard Research* (1932), pp 67-77

Person and Qualification of the Envoy

§ 370 International Law has no rules as regards the qualification of the individuals whom a State can appoint as diplomatic envoys, States being naturally competent to act according to discretion, although of course there are many qualifications a diplomatic envoy must possess to fill

[1] See Rivier, i pp 451-452

[2] In a Note accompanying the Treaty of Alliance between Great Britain and Egypt of August 26, 1936, the latter undertook to consider the British Ambassador as senior to the other diplomatic representatives accredited to the King of Egypt Treaty Series, No 6 (1937), Cmd 5360, p 18 As to the rules of precedence observed in the United States see Hackworth, iv § 419

[3] With regard to the diplomatic status of certain non-diplomatic persons see below, § 417*a*

his office successfully. The Municipal Laws of many States comprise, therefore, many details as regards the knowledge and training which a candidate for a permanent diplomatic post must possess, whereas, regarding envoys ceremonial, even the Municipal Laws have no provisions at all The question is sometimes discussed whether females [1] might be appointed envoys History relates a few cases of female diplomatists Thus, for example, Louis XIV of France accredited in 1646 Madame de Guébriant as ambassador to the Court of Poland During the eighteenth and nineteenth centuries no such cases have, it appears, occurred However, since the First World War women have been appointed in a few instances [2]

Letters of Credence, Full Powers, Passports

§ 371 The appointment of an individual as a diplomatic envoy is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the receiving State *Letter of Credence* (*lettre de créance*) is the designation of the document in which the Head of the State accredits a permanent ambassador or minister to a foreign State Every such envoy receives a sealed letter of credence, and an open copy As soon as he arrives at his destination, he sends the copy to the Foreign Office in order to make his arrival known The sealed original, however, is handed personally by the envoy to the Head of the State to whom he is accredited Chargés d'affaires receive a letter of credence too, but as they are accredited from Foreign Office to Foreign Office, their letter of credence

[1] See Miruss, *Das europaische Gesandtschraftsrecht*, I §§ 127, 128, *Embassies and Foreign Courts* (Anon), pp 102 109, Phillimore, II § 134, and Focherini, *Le Signore Ambasciatrici dei Secoli XVII e XVIII e loro Posizione nel Diritto diplomatico* (1909)

[2] Thus Madame Kollontai was received successively by Mexico (see below, § 398 (n)), Norway (in 1926) and Sweden as the diplomatic representative of Russia In 1921 Soviet Russia received a woman as the diplomatic representative of the Far Eastern Republic In 1935 the United States appointed Mrs Ruth Bryan Owen as Minister to Denmark On February 17, 1928, the French Government announced in the *Journal Officiel* that women would be admitted to compete in the entrance examinations for the Diplomatic Service on the same terms as men Following upon a majority report of an Inter-Departmental Committee, the British Government announced in April 1936 that 'the general interest of the State' would not be better served if women were admitted to the Diplomatic and Consular Services Misc No 5 (1936), Cmd 5166 This decision was reversed as the result of a report of a Government committee in March 1946

is signed, not by the Head of their home State, but by its Foreign Office Now a permanent diplomatic envoy needs no other empowering document if he is not entrusted with any task outside the limits of the ordinary business of a permanent legation But in case he is entrusted with any such task, as, for instance, if any special treaty or convention is to be negotiated, he requires a special empowering document—namely, so-called *Full Powers* (*pleins pouvoirs*) These are given in letters-patent signed by the Head of the State,[1] and they are either limited or unlimited full powers, according to the requirements of the case

Combined Legations

§ 372 As a rule, a State appoints different individuals as permanent diplomatic envoys to different States, but sometimes a State appoints the same individual as permanent diplomatic envoy to several States Moreover, as a rule, a diplomatic envoy represents one State only But occasionally several States appoint the same individual as their envoy, so that one envoy represents several States

Appointment of Several Envoys

§ 373 In former times States used frequently [2] to appoint more than one permanent diplomatic envoy as their representative in a foreign State That practice is not altogether obsolete Thus during the Second World War Great Britain was represented in the United States, in addition to the Ambassador, by one or more persons of the rank of minister It happens frequently that States appoint several envoys for the purpose of representing them at congresses and conferences In such cases one of the several envoys is appointed senior, and the others are subordinate to him

V

RECEPTION OF DIPLOMATIC ENVOYS

Vattel, iv §§ 65 67—Hall, § 98—Phillimore, ii §§ 133-139—Twiss, i §§ 202, 203—Taylor, §§ 285-290—Moore, iv §§ 635, 637, 638—Hackworth, iv §§ 383, 385, 386—Hershey, §§ 259, 266—Hyde, i §§ 420, 422, 425—Martens,

[1] As to Full Powers issued to the representatives of the British Dominions see above, § 94*b*

[2] See Miruss, *op cit*, i §§ 117-119

II § 8—Calvo, III §§ 1353-1356—Pradier-Fodéré, III §§ 1253-1260—Fiore, II §§ 1118 1120, 1124—Rivier, I pp 455 457—Nys, II pp 400 402—Suarez, §§ 245 250—Genet, II pp 273-312—Satow, §§ 225-274

Duty to receive Diplomatic Envoys.

§ 374 Every member of the Family of Nations that possesses the passive right of legation is, in ordinary circumstances, bound to receive diplomatic envoys accredited to itself from other States for the purpose of negotiation. But this duty extends neither to the reception of permanent envoys nor to the reception of temporary envoys under all circumstances

(1) As regards permanent envoys, it is generally recognised that a State is as little bound to receive them as it is to send them In practice, however, every full sovereign State which desires its voice to be heard among the States receives, and sends, permanent envoys, as without such it would, in present circumstances, be impossible for a State to have any influence whatever in international affairs It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice, and nowadays sends, and receives, several

But a State may receive a permanent envoy from one State, and refuse to do so from another Thus, the Protestant States never received a permanent envoy from the Popes, even when the latter were Heads of a State, and they still observe this rule, although some keep a permanent envoy at the Vatican

(2) As regards temporary envoys, it is likewise generally recognised among those writers who assert the duty of a State to receive temporary envoys in ordinary circumstances that there are exceptions to that rule Thus, for example, a State which knows beforehand the object of a mission, and does not wish to negotiate thereon, can refuse to receive the mission Thus, further, a belligerent can refuse [1] to receive an envoy from the other belligerent, as war involves the rupture of all peaceable relations

Refusal to receive a certain Individual.

§ 375 But the refusal to receive an envoy must not be

[1] But this is not generally recognised See Vattel, IV § 67, Phillimore, II § 138, and Pradier-Fodéré, III. § 1255

confused with the refusal to receive a certain individual as envoy A State may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose International Law gives no right to a State to insist upon the reception of an individual appointed by it as diplomatic envoy Every State can refuse to receive as envoy a person objectionable to itself And a State refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection Thus, for example, most States refuse to receive one of their own subjects as an envoy from a foreign State [1] Italy refused in 1885 to receive Mr Keiley as ambassador of the United States of America, because he had, in 1871, protested against the annexation of the Papal States And when the United States sent the same gentleman as ambassador to Austria, the latter refused him reception on the ground that his wife was said to be a Jewess Although, as is apparent from these examples, no State has a right to insist upon the reception of a certain individual as envoy, in practice States are often offended when reception is refused Thus, in 1832, England did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant In 1885, when, as above mentioned, Austria refused reception to Mr Keiley as ambassador, the United States did not appoint another, although Mr Keiley resigned, and the legation was for several years left to the care of a chargé d'affaires [2] To avoid such conflicts, many States adopt the good practice of never appointing an individual as envoy without having ascertained beforehand whether he would

[1] In case a State receives one of its own subjects as diplomatic envoy of a foreign State, it must grant him all the privileges of such envoys, including exterritoriality, see the case of *Macartney* v *Garbutt* (1890) 24 Q B D 368 See, however, Article 15 of the 'Règlement sur les immunités diplomatiques,' adopted in 1895 by the Institute of International Law (*Annuaire*, 14, p. 244), which denies to such an individual exemption from jurisdiction And see below, § 394, with regard to taxation See also Phillimore, II § 135, Twiss, I § 203, Praag, § 70, and Marmo in *Rivista*, 19 (1940), pp 54 89

[2] See Moore, IV § 638, p 480 And see for a somewhat different account Satow, §§ 231, 232.

be *persona grata* And it is a customary rule of International Law that a State which does not object to the appointment of a certain individual, when its opinion has been asked beforehand, is bound to receive such individual[1] The acceptance of a proposal to appoint a certain individual as envoy is called *agréation*

Mode and Solemnity of Reception

§ 376. In case a State does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he has arrived at the place of his designation But the mode of reception differs according to the class to which the envoy belongs If he be one of the first, second, or third class, it is the duty of the Head of the State to receive him solemnly in an audience with all the usual ceremonies For that purpose the envoy sends a copy of his credentials to the Foreign Office, which arranges for him a special audience with the Head of the State, when he delivers in person his sealed credentials[2] If the envoy be a chargé d'affaires only, he is received in audience by the Secretary for Foreign Affairs, to whom he hands his credentials Through formal reception the envoy becomes officially recognised, and can officially commence to exercise his functions But those of his privileges (exterritoriality and the like) which concern the safety and inviolability of his person must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home State, his passports furnishing sufficient proof of his diplomatic character

Reception of Envoys to Congresses and Conferences, and to the United Nations

§ 377 It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a State do not apply to the reception of envoys sent to represent the several States at a congress or conference As such envoys are not accredited to the State on whose

[1] The question is of interest whether the privileges due to envoys must be granted on his journey home to an individual to whom reception as an envoy is refused The question, it is believed, ought to be answered in the affirmative, see, however, Moore, IV § 666, p 668

[2] Details concerning reception of envoys are given by Twiss, I § 215, and Rivier, I p 467

territory the congress or conference takes place, that State has no competence to refuse [1] the reception of the appointed envoys, and no formal and official reception of the latter by the Head of the State need take place.

VI

FUNCTIONS OF DIPLOMATIC ENVOYS

Rivier, I § 37—Ullmann, § 49—Fauchille, §§ 681 683—Pradier-Fodéré, III §§ 1346 1376—Hershey, § 260—Hyde, I §§ 444 453—Hackworth, IV §§ 389 397—Fenwick, pp 358 360—De Louter, II pp 37 39—Suarez, §§ 262-265—Genet, I pp 75 147, II pp 358 430—Stuart, *American Diplomatic and Consular Practice* (1936), pp 236 284—Wolgast in *Hague Recueil*, vol 60 (1937) (II), pp 314 350

On Diplomatic Functions in general

§ 378 A distinction must be made between the functions of permanent envoys and those of envoys for temporary purposes The functions of the latter, who are either envoys ceremonial or envoys political only temporarily accredited for the purpose of some definite negotiations, or as representatives at congresses and conferences, are clearly demonstrated by the very purpose of their appointment But the functions of the permanent envoys demand closer consideration Their regular functions may be grouped together under the heads of negotiation,[2] observation, and protection But besides these regular functions, a diplomatic envoy may be charged with other and more miscellaneous functions

Negotiation

§ 379 A permanent ambassador or other envoy represents his home State in the totality of its international relations, not only with the State to which he is accredited but also with other States He is the mouthpiece of the head of his home State and its Foreign Secretary, as regards communications to be made to the State to which he is accredited He likewise receives communications from the latter, and reports them to his home State

Observation

§ 380 But these are not all the functions of permanent diplomatic envoys Their task is, further, to observe atten-

[1] As to the attitude of the Swiss Government towards Russian 'observers' at League of Nations conferences see Toynbee, *Survey*, 1924, p 259

[2] For the narrower sense of this term see below, § 477

tively every occurrence which might affect the interest of their home States, and to report such observations to their Governments

Protection

§ 381 A third task of diplomatic envoys is the protection of the persons, property, and interests of such subjects of their home States [1] as are within the boundaries of the State to which they are accredited If such subjects are wronged without being able to find redress in the ordinary way of justice, and if they ask help of the diplomatic envoy of their home State, he must be allowed to afford them protection It is, however, for the Municipal Law and regulations of his home State, and not for International Law, to prescribe the limits within which an envoy should afford protection to his compatriots

Miscellaneous Functions

§ 382 Negotiation, observation, and protection are tasks common to all diplomatic envoys of every State But a State may order its permanent envoys to perform other tasks, such as the registration of deaths, births, and marriages of subjects of the home State, legalisation of their signatures, issue of passports for them, and the like But in doing this, a State must be careful not to order its envoys to perform tasks which are by the law of the receiving State exclusively reserved to its own officials Thus, for instance, a State whose laws compel persons who intend marriage to conclude it in the presence of its registrars, need not allow a foreign envoy to legalise a marriage of compatriots before its registration by the official registrar So, too, a State need not allow a foreign envoy to perform an act which is reserved for its jurisdiction, as, for instance, the examination of witnesses on oath [2]

Envoys not to interfere in Internal Politics.

§ 383 But it must be specially emphasised that envoys must not interfere with the internal political life of the State to which they are accredited It certainly belongs to their functions to watch political events and political parties with a vigilant eye, and to report their observations to their home States But they have no right whatever to take

[1] And, sometimes, of the subjects of other States, see above, § 295

[2] On these matters see Morelli in *Rivista*, 3rd ser, 1 (1921-1922), pp 315-341, 538-541

part in that political life, to encourage one political party,[1] or to threaten another If they do so, they abuse their position It matters not whether an envoy acts thus on his own account, or on instructions from his home State No self-respecting State will allow a foreign envoy to exercise such interference, but will either request his home State to recall him and appoint another individual in his place, or, in case his interference is very flagrant, hand him his passports and therewith dismiss him History records many instances of this kind,[2] although in many cases it is doubtful whether the envoy concerned really abused his office for the purpose of interfering with internal politics

VII

POSITION OF DIPLOMATIC ENVOYS

Diplomatic Envoys Objects International Law

§ 384 Diplomatic envoys are just as little subjects of International Law as are Heads of States, and the arguments used regarding the position of such Heads[3] must also be applied to the position of diplomatic envoys This position is given to them by International Law, not as individuals but as representative agents of their States It is derived not from personal rights but from rights and duties of their home States and the receiving States All the privileges which, according to International Law, are possessed by diplomatic envoys are not rights given to them by International Law, but rights given by the Municipal

[1] See Grose in *English Historical Review*, 44 (1929), pp 625 628, on the French Ambassadors' Reports on financial relations with members of the British Parliament, 1677 1681

[2] See Hall (§ 98**), Taylor (§ 322), Moore (IV § 640), Hackworth (IV § 393), and Satow (p 271), who discuss a number of cases, especially that of Lord Sackville who received his passports in 1888 from the United States of America for an alleged interference in the presidential election In October 1927 the Russian Soviet Government was requested by the French Government to recall its ambassador, *Rakovsky*, from Paris, on the ground of a political manifesto signed by him, and did so London *Times* newspaper, October 10, 1927 See also the case of *Volhine*, First Secretary to the Russian Soviet Embassy in Paris, reported in London *Times* newspaper, May 12, 1925 See above, § 127*a* On propaganda by diplomats see Akzin in *International Law and Relations Digest* (Washington), V (1936) No 7 On the Chinese occupation of the Russian embassy buildings in Peking in April 1927, on account of alleged communist propaganda, see Yoshitomi in *R G*, 35 (1928), pp 184 192

[3] See above, § 344

Law of the receiving States in compliance with an international right belonging to their home States [1] For International Law gives a right to every State to demand for its diplomatic envoys certain privileges from the Municipal Law of a foreign State Thus, a diplomatic envoy is not a subject but an object of International Law, and is, in this regard, like any other individual [2]

Privileges due to Diplomatic Envoys.

§ 385 Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and to their so-called exterritoriality The reasons why these privileges must be granted are that diplomatic envoys are representatives of States and of their dignity,[3] and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges For it is obvious that, were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the goodwill of the Government, they might be influenced by personal considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions It is equally clear that if their full and free intercourse with their home States through letters, telegrams, and couriers were liable to interference, the objects of their mission could not be fulfilled In this case it would be impossible for them to send independent and secret reports to, or receive similar instructions from, their home States From the consideration of these and various cognate reasons, their privileges seem to be inseparable attributes of the very existence of diplomatic envoys [4]

[1] That diplomatic privilege is a right of the envoy's home State rather than of the envoy himself is recognised in a number of cases, for instance, *In re Suarez, Suarez* v *Suarez* [1918] 1 Ch 176

[2] The amalgamation of the diplomatic and consular services into one combined service which has taken place in some countries, for instance, Germany, makes the questions which arise upon the right to diplomatic privileges more complex, see, for instance, *Musmann* v *Engelke* [1928] 1 K B 90, in which the decision of the Court of Appeal was reversed by the House of Lords [1928] A C 433 See below, § 419, n

[3] See above, § 121

[4] The Institute of International Law, at its meeting at Cambridge in 1895, discussed the privileges of diplomatic envoys, and drafted a body of seventeen rules in regard thereto, see *Annuaire*, 14, p 240 Note Grotius, II c 18, § 9 'omnis coactio abesse a legato debet'

VIII

INVIOLABILITY OF DIPLOMATIC ENVOYS

Grotius, II c 18, § 4—Vattel, IV §§ 80 107—Hall, §§ 50, 98*—Phillimore, II §§ 154 175—Twiss, I §§ 216, 217—Moore, IV §§ 657-659—Hackworth, IV §§ 400 405—Hershey, §§ 271 274—Ullmann, § 50—Geffcken in *Holtzendorff*, III pp 648 653—Rivier, I § 38—Nys, II pp 425 428—Fauchille, §§ 684 694 (1)—Pradier Fodéré, III §§ 1382 1393—Mérignhac, II pp 264-273—Fiore, II §§ 1127 1143—Calvo, III §§ 1480 1498—Martens, II § 11—De Louter, II pp 44-49—Suarez, §§ 277-281—Travers, II §§ 837-875, 1326 1342—Crouzet, *De l'inviolabilité des agents diplomatiques* (1875)—Praag, § 205—Satow, §§ 312 322—Genet, I pp 417 426, 540 561—*Harvard Research* (1932), pp 99-107, 122-133—Eagleton in *A J*, 19 (1925), pp 293-314—Giese and Strupp in *Z V*, 13 (1926), Suppl—Report by Diena and Mastny for League Codification Committee in *A J*, 20 (1926), Special Suppl, pp 151-175, and comment by Stowell in *A J*, 20 (1926), pp 735-738—Hurst in *Hague Recueil*, 1926 (II), pp 124-151

Protection due to Diplomatic Envoys.

§ 386 Diplomatic envoys [1] are just as sacrosanct as heads of States [2] They must, therefore, be afforded special protection as regards the safety of their persons, and be exempted from every kind of criminal jurisdiction by the receiving States The protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments for offenders Thus, according to English Criminal Law,[3] everyone is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries, or who sues forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country, or the person of a servant

[1] The agents of unrecognised Governments and the agents of Governments only recognised *de facto* are not, at any rate in Great Britain, entitled to diplomatic privileges and immunities see *Fenton Textile Association* v *Krassin* (1922) 38 T L R 259, and Hurst, *op cit*, p 160 An Italian Court declined to concede them to the agent of an unrecognised Government see the action against Vorovsky, reported in 49 *Clunet* (1922) p 189

[2] As to attacks upon them in newspapers see Hurst, *op cit*, pp 132, 133 For an affirmation of the duty of protection of foreign diplomatic representatives from intimidation see the decision of the United States Court of Appeals, District of Columbia, in 1938, in *Frend* v *United States Annual Digest*, 1938 1940, Case No 161

[3] See Stephen's *Digest of Criminal Law*, Articles 96, 97.

of any such representative, is arrested or imprisoned [1] The protection of diplomatic envoys is not restricted to their own persons, but must be extended to the members of their family and suite, to their official residence,[2] their furniture, carriages, papers,[3] and likewise to their intercourse with their home States by letters, telegrams, and special messengers [4] Even after a diplomatic mission has come to an end, the archives of an embassy must not be touched, provided they have been put under seal and confided to the protection of another envoy [5]

Exemption from Criminal Jurisdiction

§ 387 As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of International Law agree nowadays [6] that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys For a diplomatic envoy must in no respect be considered to be under the legal authority of the receiving State But this does not mean that a diplomatic envoy must have a right to do what he likes The presupposition of the privileges he

[1] 7 Anne, c 12, §§ 3 6 This statute, which was passed in 1708 in consequence of the Russian ambassador in London having been arrested for a debt of £300, has always been considered as declaratory of the existing law in England, and not as creating new law Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp 237 242, criticises this view, but the evidence which he adduces cannot be regarded as proving his contention The law of many States punishes infractions of the inviolability of diplomatic agents as 'infractions of the law of nations' *Respublica* v *De Longchamps* (1784) 1 Dall 111, Dickinson, *Cases*, p 810, *United States* v *Benner* (1830) Baldw 234, Hudson, *Cases*, p 780, Hackworth, iv § 398, and Hurst, *op cit*, pp 128 130

[2] On the protection of foreign diplomatic and consular premises against picketing see Preuss in *A J*, 31 (1937), pp 705 713 In 1938 the United States Congress passed legislation prohibiting the display of banners and the commission of specified offensive or intimidating acts in the neighbourhood of foreign diplomatic or consular buildings within the District of Columbia *A J*, 32 (1938), Suppl, p 100 And see for comment thereon Stowell in *A J*, 32 (1938), pp 344-346

[3] See Travers, iii §§ 1337 1359

[4] On April 17, 1944, the British Government announced, as a precautionary measure prior to the invasion of the Continent, the suspension of certain diplomatic privileges and facilities such as transmission or receipt of telegrams in code, despatch and receipt of diplomatic bags unless censored, the departure of official couriers or consular or diplomatic representatives or of their staff The measure did not apply to the United States, Soviet Russia, and the fighting Dominions It was removed on June 19, 1944 For comment thereon see Schwelb in *Modern Law Review*, 7 (1944), pp 223-227

[5] See below, § 411.

[6] In former times there was no unanimity amongst writers See Phillimore, ii § 156

enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do not restrict him in the effective exercise of his functions.[1] In case he acts and behaves otherwise, and disturbs the internal order of the State, the latter will certainly request his recall, or send him back at once

History records many cases of diplomatic envoys who have conspired against the receiving States, but have nevertheless not been prosecuted Thus, in 1584 the Spanish ambassador in England, Mendoza, plotted to depose Queen Elizabeth , he was ordered to leave the country In 1587 the French ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth , he was simply warned not to commit a similar act again In 1654 the French ambassador in England, De Bass, conspired against the life of Cromwell , he was ordered to leave the country within twenty-four hours [2]

Limitation of Inviolability

§ 388 As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised But there is one exception For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving State and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home Thus in 1717 the Swedish ambassador, Gyllenburg, in London, who was an accomplice in a plot against King George I , was arrested

[1] In November 1935, police officers at Elkton, United States of America, stopped the car of the Iranian Minister to the United States for exceeding the speed limit and arrested the occupants of the car, including the Minister The latter protested and offered some resistance One of the police officers then put handcuffs upon the Minister and had all the occupants taken to the police station They were immediately released In answer to the protest of the Minister, the Government of the United States, while expressing formal regret, intimated that the privilege of diplomatic immunity imposes upon the person in question the obligation of observing meticulously the laws and regulations of the country to which he is accredited see Reeves in *A J*, 30 (1936), pp 95, 96

[2] See Phillimore, II. §§ 160-165

and his papers were searched In 1718 the Spanish ambassador in France, Prince Cellamare, was placed in custody because he organised a conspiracy against the French Government [1] It must be emphasised that a diplomatic envoy cannot complain if he is injured in consequence of his own unjustifiable behaviour, as for instance in attacking an individual who in self-defence retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd [2]

IX

EXTERRITORIALITY OF DIPLOMATIC ENVOYS

Grotius, II c 18, §§ 9, 10—Vattel, IV §§ 80-119—Hall, §§ 50, 52, 53—Westlake, I pp 273 283—Phillimore, II §§ 176-210—Taylor, §§ 299 315—Twiss, I §§ 217 221—Moore, II §§ 291-304, and IV §§ 660 669—Hackworth, IV §§ 400 411—Hershey, §§ 270, 275 280—Hyde, I §§ 426 428, 430, 431, 433 437, 439 443—Fenwick, pp 369 377—Ullmann, § 50—Geffcken in *Holtzendorff*, III pp 654 659—Kohler, pp 59 64—Liszt, § 23 (VIII)—Nys, II pp 406 433—Rivier, I § 38—Fauchille, §§ 695 721 (1)—Travers, II §§ 837 875—Pradier-Fodéré, III §§ 1396 1495—Mérignhac, II pp 249 294—Fiore, II §§ 1145 1163—Calvo, III §§ 1499 1531—Martens, II §§ 12 14—De Louter, II pp 39 44, 49-59—Cruchaga, §§ 621-637—Gemma, pp 137-144—Suarez, §§ 266 276—Keith's Wheaton, pp 453 470—Baty, pp 30 35, 42 48—Balladore Pallieri, pp 375 386—Genet, I pp 423 593—Goulé in *Répertoire*, I pp 327 340, 343 354—*Harvard Research* (1932), pp 49 137—Resolution of the Institute of International Law, 1929—*Annuaire*, vol 35 (1929) (II), pp 307 311—Gottschalck, *Die Exterritorialitat der Gesandten* (1878)—Odier, *Des privilèges et immunités des agents diplomatiques* (1890)—Vercamer, *Des franchises diplomatiques et specialement de l'exterritorialité* (1891)—Droin, *L'exterritorialité des agents diplomatiques* (1895)—Mirre, *Die Stellung der volkerrechtlichen Literatur zur Lehre von den sogenannten Nebenrechten der gesandtschaftlichen Funktionare* (1904)—Ozanam, *L'immunité civile de juridiction des agents diplomatiques* (1912)—Praag, §§ 49 68, 163, 203 226—Satow, §§ 307 423—Frisch, *Der volkerrechtliche Begriff der Exterritorialitat* (1917), pp 4 32, 63 100, and in *Strupp, Wort*, I pp 394 403—Adair, *The Exterritoriality of Ambassadors n the Sixteenth and Seventeenth Centuries* (1929)—Heddaya, *Les immunités des agents diplomatiques* (1932)—Ogdon, *Juridical Basis of Diplomatic Immunity* (1936), and in *A J*, 31 (1937), pp 449 465—Strisower in *Hague Recueil*, 1923, pp 237 262—Hurst, *ibid*, 1926 (II), pp 124-200—Heyking,

[1] See Phillimore, II §§ 166 and 170, and Hall, § 50, who suggests that the ground of justification is either (1) an act of self defence against the State whose representative has offended, or (2) that there is a reservation of the right to exercise jurisdiction over an envoy 'upon sufficient emergency', Hall prefers (2)

[2] See Article 6 of the rules adopted by the Institute of International Law in 1895 (*Annuaire*, 14, p 241).

L'exterritorialité (1926)—Report for League Codification Committee, cited above, § 386—Deák in *R I*, 3rd ser, 9 (1928), pp 192 206, 522 567—*Annuaire*, 35 (2) (1929), pp 307 311—Hurst in *B Y*, 10 (1929), pp 1 13—Hill in *A J*, 25 (1931), pp 252 269—Preuss in *New York University Law Quarterly Review*, 10 (1932-1933), pp 170 187, and in *R I (Geneva)*, 10 (1932), pp 1 18

Reason and Fictional Character of Exterritoriality

§ 389 The exterritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members of the Family of Nations is not, as in the case of sovereign Heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, control, and the like, of the receiving States Exterritoriality, in this as in every other case, is a fiction [1] only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States [2] The term 'exterritoriality' is nevertheless valuable, because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States [3] The so-called exterritoriality of envoys takes practical form in a body of privileges which must be severally discussed

[1] See Praag, §§ 49 54

[2] They are exempt not from legal liability, but from the jurisdiction of the courts of the country to which they are accredited See *Dickinson* v *Del Solar* [1930] 1 K B 376 See also *Rekstin* v *Severo Sibirsko Gosudarstvennoe* [1933] 1 K B 47 for an unsuccessful attempt to invoke diplomatic immunity in order to evade a garnishee order

[3] The modern tendency among writers is towards rejecting the fiction of exterritoriality, see Frisch *op cit*, and Hurst, *op cit*, at p 146 See also Noel-Henry in 54 *Clunet* (1927), pp 983 987 The Court of Rome held in 1935 that although the Lateran Treaty of 1929 (see above, § 106) conferred upon certain buildings belonging to the Holy See but situated outside the Vatican City 'immunities granted by international law to the premises of diplomatic representatives,' these premises were not to be deemed as situated outside Italy so as to exclude the application of Italian law in an inheritance action *Trenta* v *Ragonesi*, *Annual Digest* 1935 1937, Case No 93 The French Court of Cassation held in 1934 that an offence committed by a French subject within premises covered by the privilege of extraterritoriality could not be considered as having been committed outside France *Ministère public* v *Dame veuve Pacory*, *Dalloz Hebd*, 1934, p 367 In a decision given in 1934 the German Supreme Court declined to accept the plea of the accused, who had murdered the Afghan Minister on the premises of the Afghan Legation, that German courts had no jurisdiction on the ground that the act was committed outside German territory *Afghan Embassy Case*, *Annual Digest*, 1933-1934, Case No 166 For a rejection of the fiction of extraterritoriality see also the decisions of the Italian Court of Cassation in *In re Moriggi* (*Annual Digest*, 1938-1940, Case No 172) and *Trenta* v *Ragonesi* (*ibid*, Case No 173) This was an appeal from the case referred to above in this note

Immunity of Domicile

§ 390 The first of these privileges is immunity of domicile, the so-called *Franchise de l'hôtel* The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every respect considered to be outside the territory of the receiving States, and when this exterritoriality was, in many cases, even extended to the whole quarter of the town in which such a residence was situated One used then to speak of the *Franchise du quartier* or the *Jus quarteriorum* And an inference from this *Franchise du quartier* was the so-called right of asylum, envoys claiming the right to grant asylum, within the boundaries of their residential quarters, to every individual who took refuge there [1] But already in the seventeenth century most States opposed this *Franchise du quartier*, and it totally disappeared in the eighteenth century, leaving behind, however, the claim of envoys to grant asylum within their official residences [2] During the nineteenth century all remains of this so-called right of asylum vanished, and when in 1867 the French envoy in Lima claimed it the Peruvian Government refused to concede it [3]

[1] See, however, Grotius, II c 18, § 8 'Ex concessione pendet ejuss apud quem agit Istud enim juris gentium non est' See also Bynkershoek, *De foro legatorum*, c 21

[2] Thus, when in 1726 the Duke of Ripperda, first minister to Philip v of Spain, who was accused of high treason and had taken refuge in the residence of the British ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law (see Martens, *Causes célèbres*, I p 178) Twenty-one years later, in 1747, a similar case occurred in Sweden A merchant named Springer was accused of high treason, and took refuge in the house of the British ambassador at Stockholm On the refusal of the British envoy to surrender Springer, the Swedish Government surrounded the embassy with troops, and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers At last Springer was handed over to the Swedish Government under protest, but Great Britain complained and recalled her ambassador, as Sweden refused to make the required reparation (see Martens, *Causes célèbres*, II p 52) As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless not universally recognised

[3] The South American States, Peru excepted, still grant to foreign envoys the right to afford asylum to political refugees in time of revolution It is, however, acknowledged that this right is not based upon a rule of International Law, but merely upon *local* usage See Hall, § 52, Westlake, I p 282, Moore, II §§ 291 304, Hackworth, II §§ 192, 193, Gilbert in *A J*, 3 (1909), pp 562 595, Robin in *R G*, 15 (1908), pp 461 508, Scelle in *R G*, 19 (1912), pp 623 634, Moore, *Asylum in Legations and Consulates, and in Vessels* (1892) (a reprint from the *Political Science Quarterly*, 7), Tobar y Borgono, *L'asile interne devant le droit international* (1912), Hurst, *op cit*, pp 214 221, Alcindor in *Répertoire*, II

Nowadays the official residences of envoys are, *in a sense and in some respects only*, considered as though they were outside the territory of the receiving States For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences [1] to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys [2] Therefore, no act of jurisdiction [3] or administration of the receiving Governments can take place within these residences, except by special permission of the envoys And the stables and carriages of envoys are considered to be parts of their residences But such immunity of domicile

pp 34 44, *Harvard Research* (1932), pp 62 66, Genet, 1 pp 550 556, *Fontes Juris Gentium*, Series B, Section 1, vol 1 (Part 1) Nos 1238-1250, Nervo in *Académie Diplomatique Internationale*, 1932, pp 99 *et seq*, Reale in *Hague Recueil*, vol 63 (1938) (1), pp 511 540 That in practice in times of revolution and of perse cution of certain classes of the popula tion asylum is occasionally granted to refugees, and respected by the local authorities, there is no doubt, but this occasional practice does not shake the validity of the general rule of International Law, according to which there is no obligation on the part of the receiving State to grant to envoys the right of affording asylum to individuals not belonging to their suites, see, however, Moore, II § 293 See Scott in *A J*, 21 (1927), at p 444 The Sixth International American Conference adopted, in February 1928, a Convention on Asylum which laid down that asylum granted to political offenders in legations shall be respected subject to some specified conditions *A J*, Suppl, 22 (1928), p 158, Hudson, *Legislation*, VI p 607 The Convention forbids the granting of asylum to persons accused or condemned for common crimes, or to deserters from the army or the navy The United States, in an express reservation, refused to recognise or to subscribe to the so called doctrine of asylum as part of International Law See also Bestieu, *Droit d'asile dans les ambassades et légations au cours de la guerre d'Espagne (1936 1939)* (1942)

[1] As to the absence of immunity in the case of non diplomatic premises such as the office of a foreign State Railway or Trade Delegation see below, § 454*a*

[2] Can the official residence of an envoy, if the property of his home State, be confiscated after his de parture by the State on the territory of which it is situated as a measure of reprisals? During the First World War, on August 25, 1916, the Italian Government confiscated the Palais de Venice in Rome which was the seat of the Austrian Legation at the Holy See, as a measure of reprisals against the bombardment of Venice by Austrian aircraft See Scelle in *R G*, 24 (1917), pp 244 255, and below, vol II § 247

[3] This includes jurisdiction in the form of enforcement of judgments against the immovable property of a foreign State if such property is identical with the legation buildings or official residence of the diplomatic representative of that foreign State See the judgment of the Supreme Court of Czecho Slovakia of December 28, 1929 (*Annual Digest*, 1927-1928, Case No 251), reversing, in effect, the decision of that Court of April 26, 1928 (*ibid*, Case No 111) This was a case of enforcing an award rendered against Hungary by the Mixed Arbitral Tribunal established by the Treaty of Versailles. For an account and criticism of the first stage of the case see Deák in *A J*, 23 (1929), pp 582-594

is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official documents and archives If an envoy abuses this immunity, the receiving Government need not bear it passively There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals, or to other individuals not belonging to his suite Of course, an envoy need not deny entrance to criminals who want to take refuge in the embassy But he must surrender them to the prosecuting Government at its request, and if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been required to surrender the criminal Further, if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of exterritoriality, the criminal must be surrendered to the local Government [1] Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the receiving State, and keep him under arrest inside the embassy with the intention of handing him over to his home State [2]

[1] The case of Nikitschenkow, which occurred in Paris in 1867, is an instance thereof Nikitschenkow, a Russian subject not belonging to the Russian legation, made an attempt on, and wounded, a member of that legation within the precincts of the embassy The French police were called in, and arrested the criminal The Russian Government required his extradition maintaining that, as the crime was committed inside the Russian embassy, it fell exclusively under Russian jurisdiction, but the French Government refused extradition, and Russia dropped her claim

[2] An instance thereof is the case of the Chinese, Sun Yat Sen, which occurred in London in 1896 He was a political refugee from China, living in London, and was induced to enter the house of the Chinese legation and kept under arrest there in order to be conveyed forcibly to China The Chinese envoy contended that, as the house of the legation was Chinese territory, the British Government had no right to interfere But the latter did interfere, and Sun Yat Sen was released after several days In contrast to this case may be mentioned that of Kalkstein, which occurred on the Continent in 1670 Colonel von Kalkstein, a Prussian subject, had fled to Poland for political reasons, since he was accused of high treason against the Prussian Government Frederick William, the great Elector of Brandenburg, ordered his diplomatic envoy at Warsaw, the capital of Poland, to obtain possession

Exemption from Criminal and Civil Jurisdiction

§ 391 The second privilege of envoys in reference to their exterritoriality is their exemption from criminal and civil jurisdiction [1] As their exemption from criminal jurisdiction is also a consequence of their inviolability, it has already been discussed,[2] and we have here only to deal with their exemption from civil [3] jurisdiction No civil action of any kind as regards debts and the like can be brought against them in the civil courts of the receiving States [4] They cannot be arrested for debts, nor can their furniture, their carriages, their horses, and the like, be seized for debts They cannot be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on this account [5] But the rule that an envoy is exempt from civil jurisdiction has certain exceptions · namely, (*a*) if an envoy enters an appearance to an action against himself and allows the action to proceed without pleading his immunity [6], or (*b*) if he himself

of the person of Kalkstein On November 28, 1670, this order was carried out Kalkstein was secretly seized, and, wrapped up in a carpet, was carried across the frontier He was afterwards executed at Memel

[1] See Dicey, pp 207 215, and Westlake, *Private International Law* (7th ed , 1925), pp 266 280

[2] See above, §§ 387, 388

[3] See Ozanam, *op cit* , pp 110-188

[4] In England even the issue of a writ of summons commencing an action, apart from any question of service of it or of obtaining judgment upon it, is apparently within the prohibition of the statute of Anne, c 12, and is null and void *Musurus Bey* v *Gadban* [1894] 2 Q B 352

The immunity applies equally to debts and other obligations incurred before the beginning of the diplomatic mission see Hurst, *op cit* , p 177

[5] Thus, when in 1772 the French Government refused passports to Baron de Wrech, the envoy of the Landgrave of Hesse Cassel at Paris, for not having paid his debts, all the other envoys in Paris complained of this act of the French Government as a violation of International Law (see Martens, *Causes célèbres*, ii p 282)

[6] But even when he has waived his immunity down to judgment, he can still, so long as his diplomatic mission continues and for a reasonable period after its termination (see below, § 406 (n)), plead his immunity as a bar to the execution of the judgment *In re Suarez*, *Suarez* v *Suarez* [1917] 2 Ch 131, [1918] 1 Ch 176 The immunity being the right of the sending State, its waiver is said to require the consent of the Government of that State or of the diplomatic person's official superior, but it is not clear what steps an English court will take to ascertain whether or not that consent has been waived *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch 139 , *In re Suarez*, supra See also Bobrik, *Die Bedeutung der Exterritorialitat der Gesandten für den Zivilprozess* (1934) At the time of the passing of the Diplomatic Privileges (Extension) Act, 1944, it was stated in the House of Commons on the part of the Government that the immunities granted to the various international organisations would be capable of being waived by the senior official of the organisation It was

brings an action under the jurisdiction of the receiving State, whereupon the courts of the latter have civil jurisdiction over him to the extent, it is submitted, of enforcing the ordinary incidents of procedure, including a set-off or counterclaim by the defendant arising out of the same matter, but even then not so as to enable the latter to recover from the envoy an excess over and above the latter's claim [1] (*c*) The local courts also have jurisdiction as regards immovable property held within the boundaries of the receiving State by an envoy, not in his official character but as a private individual,[2] and (*d*) in some countries (but not in Great Britain), as regards mercantile [3] ventures in which he might engage on the territory of the receiving State [4]

Exemption from Subpœna as Wit-

§ 392 The third privilege of envoys in reference to their

also stated that undertakings would be given on behalf of these organisations acknowledging the principle that immunities were conferred upon the officials for the protection of the organisation and that the organisation would waive them where this could be done without prejudice to the interests of the organisation Contracts concluded by the organisation would contain a clause providing for settlement of disputes by arbitration

[1] This is mainly based upon inference from the position of a foreign monarch or State when suing as plaintiff, see above, § 115*a*, n

[2] There does not appear to be any English decision which is authority for this proposition, but note in *Magdalena Steam Navigation Co* v *Martin* (1859) 2 E and E 94, at p 111, that the envoy is referred to by Lord Campbell, C J, as 'having no real property in England,' an allegation which it was considered necessary to plead, and, more explicitly, in *In re Suarez* [1917] 2 Ch at p 138 See Vattel, IV § 115

As to the duration of immunity from civil process for a reasonable period after termination of the diplomatic mission see below, § 406 (n 2) Immunity extends not only to actions affecting uncontested property but also to those in which the title in goods is in dispute *The Amazone* [1940] P 40

[3] The statute of 7 Anne, c 12, does not exclude an envoy who embarks on mercantile ventures from the benefit of the Act, see the case of *Magdalena Steam Navigation Co* v *Martin*, *supra*, removing a doubt left in *Taylor* v *Best* (1854) 14 C B 487 But that exemption does not, according to the Act, apply to the envoy's servants See also Westlake, 1 227, and Praag, §§ 85 87

[4] As to the recent tendency of Italian courts to distinguish between immunity from jurisdiction for acts done in the exercise of the diplomatic mission and that for acts done in the envoy's private capacity see the case *Comina* v *Kite* before the Cassazione on January 31, 1922, in *Rivista*, 16 (1924), p 173, but note the protest of the doyen of the diplomatic corps at Rome in *Z I*, 32 (1924), p 474 (n), and *Annual Digest*, 1919 1922, Case No 202 A comparison of two, not easily reconcilable, decisions of the Court of Rome —*Harrie Lurie* v *Steinmann* and *Perrucchetti* v *Puig y Cassayro* (*Annual Digest*, 1927-1928, Cases Nos 246, 247)—shows the difficulties inherent in the attempt to distinguish between activities of a public and of a private character

exterritoriality is exemption from subpœna as
No envoy can be obliged, or even requested, to appear as a witness in a civil or criminal or administrative court,[1] nor is an envoy obliged to give evidence before a commissioner sent to his house. But if he chooses for himself to appear as a witness, the courts can make use of his evidence Thus in 1881, at the trial of Guiteau for the murder of President Garfield, the Venezuelan envoy, Señor Comancho, who was present when the crime was committed, appeared as a witness for the prosecution, the Venezuelan Government having authorised him to do so.[2]

Exemption from Police

§ 393 The fourth privilege of envoys in reference to their exterritoriality is exemption from the police of the receiving States Orders and regulations of the police do not in any way bind them On the other hand, this exemption from police does not carry with it any privilege for an envoy to do what he likes as regards matters which are regulated by the police He is expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall, or even be justified in taking other measures of such a kind as do not injure his inviolability [3]

Exemption from Taxes and the like.

§ 394 The fifth privilege of envoys in reference to their exterritoriality is exemption from taxes and the like. As

[1] A remarkable case of this kind is that of the Dutch envoy, Dubois, in Washington, which happened in 1856 A case of homicide occurred in the presence of M Dubois, and as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the court as a witness, recognising the fact that Dubois had no duty to do so When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch Government The latter approved of Dubois' refusal, but authorised him to give evidence under oath before the American Foreign Secretary As, however, such evidence would have had no value at all according to the local law, Dubois' evidence was not taken, and the Government of the United States asked the Dutch Government to recall him (see Wharton, I § 98, Moore, IV § 662, and Calvo, III § 1520)

[2] See Moore, IV § 662, Scott, *Cases*, p 299, n 18

[3] See Hill in *A J*, 25 (1931), pp 253, 254, 261-265

an envoy, through his exterritoriality, is considered not to be subject to the territorial supremacy of the receiving State, he must be exempt from all direct personal taxation, and, therefore, need not pay either income tax or other direct taxes As regards rates, it is necessary to draw a distinction Payment of rates imposed for local objects from which an envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although often [1] this is not done Other rates, however, such as poor-rates and the like, he cannot be requested to pay As regards customs duties, International Law does not claim the exemption of envoys therefrom In practice, and by courtesy, however, the Municipal Laws of many States allow diplomatic envoys, within certain limits, to receive free of duty goods intended for their own private use [2] If the house of an envoy is the property of his home State, or his own property, the house need not be exempt from property tax, although it is often so by the courtesy of the receiving State Such property tax is not a personal and direct, but an indirect, tax [3]

[1] As, for instance, in England, where the payment of local rates cannot be enforced by suit or distress against a member of a legation, see *Parkinson* v *Potter* (1885) 16 Q B D 152, and *Macartney* v *Garbutt* (1890) 24 Q B D 368 See also Westlake, 1 p 278 It should be noted that the two cases mentioned in this note rest on a local Act, 35 Geo 3, c 73, s 190, relating to the parish of St Marylebone in London As to the exemption from taxation in the United States see the detailed survey in Hackworth, IV §§ 406 412 See also the *Matter of a Reference as to the Powers of the Corporation of the City of Ottawa*, etc , where the Supreme Court of Canada held that no rates could be levied on buildings owned and occupied by foreign legations The minority of the Court held that rates could be imposed, but that their payment could not be enforced. *Canada Law Reports* [1943] S C R 208, *Annual Digest*, 1941-1942, Case No 106

[2] See *Harvard Research* (1932), pp 107-113 For the British practice of admitting the baggage of envoys into the country without examination and for the departmental machinery giving effect to this practice, together with particulars as to the quantities of wine, cigars, and tobacco considered adequate for ambassadors and for envoys of inferior rank respectively see *Ham's Year Book* (Customs), 1928, II pp 50, 51, 106

For an alleged abuse of privilege by attempting to ship from Greece objects of archæological value packed in an envoy's luggage see London *Times* newspaper, November 5, 1927 On diplomatic immunity with regard to the prohibition laws in the United States see Preuss in *R I*, 3rd ser, 13 (1932), pp 184 202, and in *Michigan Law Review*, 30 (1931 1932), pp 333 348

[3] In matters of taxation the French Court of Cassation clearly distinguishes between income derived from commercial activities and that from other sources The first is subject to taxation See *Thams* v *Minister of Finance*, *Annual Digest*, 1929-1930,

Right of Chapel.

§ 395 A sixth privilege of envoys in reference to their exterritoriality is the so-called Right of Chapel (*droit de chapelle* or *droit du culte*) This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State [1]

Self jurisdiction

§ 396 The seventh and last privilege of envoys in reference to their exterritoriality is self-jurisdiction within certain limits As the members of an envoy's retinue are considered exterritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate civil and criminal jurisdiction to the envoy But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like But no civilised State would nowadays allow an envoy himself to try a member of his retinue, though in former centuries this used to happen [2]

Case No 191 The Italian Central Commission for Direct Taxes held in 1941 that Italian nationals on the staff of foreign legations did not enjoy immunity from taxation *In re di Sorbello, Annual Digest*, 1941 1942, Case No 108

[1] A privilege of great worth in former times, when freedom of religious worship was unknown in most States, it has at present a historical value only But it has not disappeared, and might become again of practical importance in case a State should in the future give way to reactionary intolerance It must, however, be emphasised that the right of chapel need only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy No right of having and tolling bells need be granted The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service But the receiving State need not allow its own subjects to take part therein

[2] The Duc de Sully, then Marquis de Rosny, was sent in 1603 by Henri IV of France on a special mission to England, as a ceremonial envoy to congratulate James I upon his accession to the throne On the very day of his arrival, some members of his retinue fell into a brawl with some Englishmen, and one of the latter was killed Sully had the murderer seized, and called together a jury of some Frenchmen who had accompanied him to London This jury condemned the culprit to death for murder, and he was handed over to the Mayor of London to be executed However, the Count of Beaumont-Harley, the permanent French ambassador in London, obtained from James I a pardon for the convicted man (see Martens, *Causes célèbres*, 1 p 331, and Satow, § 359. See also the two cases reported by Calvo, in § 1545)

X

POSITION OF DIPLOMATIC ENVOYS AS REGARDS THIRD STATES

Grotius, II c 18, § 5—Vattel, IV §§ 84 86—Hall, §§ 99 101—Phillimore, II §§ 172 175—Taylor, §§ 293 295—Moore, IV §§ 643, 644—Twiss, I § 222—Hershey, § 272—Wheaton, §§ 244 247—Fenwick pp 366, 367—Hyde, I § 432—Ullmann, § 52—Geffcken in *Holtzendorff*, III pp 665 668—Heffter, § 207—Rivier, I § 39—Nys, II p 445—Pradier Fodéré, III § 1394—Fiore, II §§ 1143, 1144—Calvo, III §§ 1532-1539—Praag, § 227—Satow, pp 226 237—Travers, II § 870—Hurst in *Hague Recueil*, 1926 (II), pp 222-229, 234 236—Yeh Sao hang, *Les privilèges et les immunités des agents diplomatique à l'égard des États tiers* (1938)—*Harvard Research* (1932),

Possible Cases

§ 397 Although, when an individual is accredited as diplomatic envoy by one State to another, these two States alone are directly concerned in his appointment, yet the position of an envoy must be considered in those cases in which he comes in contact with third States Several such cases are possible An envoy may travel through the territory of a third State to reach the territory of the receiving State Or again, an envoy accredited to a belligerent State and living on the territory of the latter may be found there by the other belligerent who is in military occupation of such territory Thirdly, an envoy accredited to a certain State might interfere with the affairs of a third State

Envoy travelling through Territory of Third State

§ 398 If an envoy travels through the territory of a third State *incognito* or for his pleasure only, there is no doubt that he cannot claim any special privileges whatever He is in exactly the same position as any other foreign individual travelling there, although by courtesy he might be treated with particular attention But matters are different when an envoy, on his way from his own State to the State of his destination, travels through the territory of a third State, as may happen when the sending and the receiving States are not neighbours Now, as the institution of legation is necessary for the intercourse of States, and is firmly established by International Law, there ought to be no doubt that such third State must grant the right

of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State [1] But other privileges,[2] especially those of inviolability and exterritoriality, need not be granted to the envoy. Moreover, the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage [3]

But no right of passage need be granted if the third State is at war with the sending or receiving State The envoy of a belligerent, who travels through the territory of the other belligerent to reach the place of his destination, may be seized and treated as a prisoner of war. Thus, in 1744, when the French ambassador, Maréchal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with England,

[1] It was reported in the *United States Daily* of November 6, 1926, that the United States Government refused to grant a *visa* to a diplomatic representative of the Russian Soviet Government to enable her to travel through the United States to Mexico (to which State she was accredited), on account of her association with communist propaganda

[2] The matter, which has always been disputed, is fully discussed by Twiss, I § 222, who also quotes the opinion of Grotius, Bynkershoek, and Vattel See also Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp 110-114 See *New Chile Gold Mining Co* v *Blanco* (1888) 4 T L R 346 (*obiter dictum* by Manisty J in favour of immunity from civil process), *Wilson* v *Blanco* (1889) 4 N Y Supp 714, Scott, *Cases*, 293 (immunity from civil process granted by the Superior Court of the City of New York), and *Carbone* v *Carbone* (1924) 206 N Y Supp 40 (where the same court, while vacating an order for arrest in divorce proceedings, declined to grant immunity from civil process not involving arrest) See *Rush* v *Rush, Bailey and Pimenta* [1920] P 242, where one of the co respondents was the secretary of a foreign embassy in a third State, but the question of immunity was not argued

[3] Thus, in 1854, Soule, the envoy of the United States of America at Madrid, who had landed at Calais intending to return to Madrid *via* Paris, was provisionally stopped at Calais for the purpose of ascertaining whether he intended to make a stay in Paris, which the French Government wanted to prevent because he was a French refugee naturalised in America and was reported to have made speeches against the Emperor Napoleon Soule at once left Calais, and the French Government declared, during the correspondence with the United States in the matter, that there was no objection to Soulé traversing France on his way to Madrid, but that they would not allow him to make a sojourn in Paris, or anywhere else in France See Wharton, I § 97, and Moore, IV § 643 See also Wheaton, § 247 American practice would seem to grant inviolability and exterritoriality in such cases Article 12 of the Treaty of February 11, 1929, between Italy and the Holy See (the Lateran Treaty, see above, § 106) provides that representatives accredited by foreign States to the Holy See shall continue to enjoy in Italy all the privileges of immunity enjoyed by diplomatic agents under International Law

at war with France, he was made a prisoner of war and sent to England Again, in August 1917, after Cuba had entered the First World War as an Allied Power, Herr von Heinrichs, formerly secretary to the German embassy at Madrid, was arrested and made a prisoner of war when landing at Havana from a Spanish steamer on which he was proceeding to Mexico, whither he was being transferred On the other hand, the envoy of a belligerent who travels to his neutral destination on a neutral vessel may not be forcibly removed and made a prisoner of war while the vessel is on the open sea [1] But should the vessel enter the territorial waters, or a port, of the other belligerent, the envoy could be seized Therefore when, in November 1914, during the First World War, Count Tarnowski, the Austrian envoy to the United States, then neutral, intended to travel from Rotterdam to America, it was necessary to ask Great Britain for a safe-conduct [2] Otherwise he could have been made a prisoner of war when the vessel on which he was travelling entered British territorial waters [3] The same procedure was necessary, for the same reason, when in 1915 the Austrian ambassador at Washington, Dr Dumba, and in 1917 the German ambassador at Washington, Count Bernstorff, desired to return to their home States

Envoy found by Belligerent on Occupied Enemy Territory

§ 399 When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence [4]

Envoy interfering with Affairs of a Third State

§ 400 There is no doubt that an envoy must not interfere in matters with regard to which the State to which he is accredited is involved with a third State If he does interfere, he enjoys no privileges whatever against such third

[1] See *The Trent* case, below, vol II § 408, p 693, n 1

[2] See vol II § 218

[3] Similarly a member of the suite of an envoy may be made a prisoner of war if apprehended in a third State which is at war with his home State Therefore, when in February 1918, during the First World War, Captain von Krohn, the so-called naval attaché to the German legation at Madrid, desired to return to Germany by crossing France, he had to possess a safe conduct from the French Government On the case of *von Papen* see below, vol II § 218

[4] See below, vol II § 157, and Wharton, I § 97

State. Thus, in 1734, the Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the Russians, and was not released till 1736, although France protested [1]

XI

THE RETINUE OF DIPLOMATIC ENVOYS

Grotius, II c 18, § 8—Vattel, IV §§ 120 124—Hall, § 51—Phillimore, II, §§ 186 193—Twiss, I § 218—Moore, IV §§ 664 665—Hackworth, IV §§ 371, 372—Hershey, § 279—Hyde, I §§ 412, 413, 429, 438—Ullmann, §§ 47, 51—Geffcken, in *Holtzendorff*, III pp 660, 661—Heffter, § 221—Rivier, I pp 458 461—Nys, II pp 440 444—Pradier Fodéré, III §§ 1472-1486—Fiore, II §§ 1164 1168—Calvo, III §§ 1348 1350—Martens, II § 16—Suarez, §§ 251 261—Baty, pp 35 39—Genet, II pp 313 356—Goulé in *Répertoire*, I pp 340, 341, 354 356—*Harvard Research* (1932), pp 67-77—Roederer, *De l'application des immunités de l'ambassadeur au personnel de l'ambassade* (1904), pp 22 84—Lilienstein, *Die Exterritorialität des Personals der Gesandtschaft* (1934)—Praag, §§ 229-236—Satow, §§ 357 359—Travers, II §§ 851 864—Hurst in *Hague Recueil*, 1926 (II), pp 152-159, 200 207—Makino in *Japanese Review of International Law* (January 1922)—Wehberg in *R I*, 3rd ser, 7 (1926), pp 360 370—Brookfield in *B Y*, 19 (1938), pp 151-160—Mervyn Jones in *J C L*, vol 22 (3rd ser, 1940), pp 19 31

Different Classes of Members of

§ 401 The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue The members of the retinue viduals who are officially attached to an envoy are members of the legation,[2] and are appointed by the home State of the envoy To this first class belong the counsellors, attachés,[3] and secretaries of the legation, the chancellor of the legation and his assistants, the interpreters, and the like, the chaplain, the doctor, and the legal advisers, provided that they are appointed by the home State, and are sent specially as members of the legation A list of these members of a legation is handed by the envoy to the

[1] See Martens, *Causes célèbres*, I p 207

[2] For instance, the chief of the Mail Department of the American embassy in London (*Assurantie Compagnie Excelsior* v *Smith* (1923) 40 T L R 105)

[3] See Beauvais, *Attachés militaires, attachés navales, et attachés de l'air* (1937), La Terza in *Annuario Italiano di diritto internazionale*, II. (1939), pp 1-32.

Secretary for Foreign Affairs of the receiving State, and is revised from time to time [1] The counsellors and secretaries of a legation are personally presented to the Secretary for Foreign Affairs, and very often also to the Head of the receiving State The second class comprises all those individuals who are in the private service of the envoy, such as servants of all kinds, the private secretary of the envoy, the tutor and the governess of his children The third class consists of the members of the family of the envoy—namely, his wife, children, and such of his other near relatives as live within his family, and under his roof And, lastly, the fourth class consists of the so-called couriers They are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy Such couriers are attached to most legations to guarantee the safety and secrecy of the despatches

Privileges of Members of Legation

§ 402 It is a universally recognised [2] rule of International Law that all [3] members of a legation are as inviolable and exterritorial as the envoy himself They must, therefore, be granted by the receiving State exemption from criminal and civil jurisdiction, exemption from police,[4] subpœna as

In *Musmann* v *Engelke* [1928] 1 K B 90 the Court of Appeal by majority declined to accept as conclusive and binding upon them the statement of the Attorney General, upon the instructions of the Foreign Office, that the defendant was included as 'consular secretary' in the list of members of the staff of the German embassy sent to the Foreign Office and was performing services there 'on the right side of the line between consular service and ambassadorial service', whereupon the Court directed that the plaintiff should have leave to cross examine the defendant as to the precise nature of his employment, the plaintiff alleging that it was consular, the defendant that it was diplomatic But on July 18, 1928, the House of Lords reversed this decision and treated the Attorney General's statement as conclusive As to the conclusiveness in judicial proceedings of statements made by or on behalf of the Crown in international matters see above, § 357*a*

[2] Some authors, however, plead for an abrogation of this rule see Martens, II § 16 The Statute of 7 Anne, c 12, s 5, denies immunity to any person in 'the service of an ambassador or other public minister' who engages in trading see Dicey, p 215 It is believed that this provision coincides with and is declaratory of the common law Contrast the immunity of the envoy himself, above, § 391, p 624, n 5

[3] That is, *bona fide* members and not persons appointed merely for the purpose of conferring immunity upon them *In re Cloete* (1891) 7 T L R 565

[4] A case of this kind occurred in 1904 in the United States Mr Gurney, Secretary to the British embassy at Washington, was fined by the police magistrate of Lee, in Massachusetts, for furiously driving a motor car. But the judgment was

witnesses, and taxes They are considered, like the envoy himself, to retain their domicile within their home State. Children born to them during their stay within the receiving State are considered as born on the territory of the home State While in matters of private law it is within the envoy's power to waive these privileges belonging to members of a legation,[1] in criminal matters, it is probably only the home State itself that waives them [2]

Privileges of Private Servants.

§ 403 It is a customary rule of International Law that the receiving State must grant to all persons in the private service of the envoy, whether such persons are subjects of the receiving State or not,[3] exemption from civil and criminal jurisdiction [4] But the envoy can disclaim these exemptions,

afterwards annulled, and the fine remitted Another case of interest occurred in London in May 1913 The body of a young man was re covered from the river Thames, and identified as that of Mogen Schested, a secretary to the Danish legation The inquest necessary in such cases, according to English Law, could not be held, because the Danish legation claimed exemption for Schested as one of its members The body was therefore conveyed to Copenhagen without further interference by the police Again, when in February 1916 Roberto Centaro, the first secretary to the Italian embassy in London, committed suicide by shooting himself in a hotel, the coroner, on the demand of the Italian ambassador, refrained from holding an inquest, and the police did not further interfere

[1] See *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch 139, *Dickinson* v *Del Solar* [1930] 1 K B 376, and Baty in *Law Magazine and Review*, 39, p 349

[2] Thus when, in 1909, Wilhelm Beckert, the chancellor of the German legation at Santiago in Chile, murdered the porter of this legation, a Chilean subject, and then set fire to the chancery in order to conceal his embezzlement of money belonging to the legation, the German Government consented to his being prosecuted in Chile, he was tried, found guilty, and executed at Santiago on July 5, 1910 On the other hand, when in 1915 Gottfried Ruh, a registrar of the Swiss legation in Berlin, embezzled monies entrusted to the legation, the Swiss Govern ment asked the German Government to arrest and extradite him to Switzer land, he was tried at Berne in June 1916, and condemned to penal servitude

[3] Some countries, not including Great Britain, do not concede jurisdic tional immunities to their own subjects

[4] This rule seems to be recognised everywhere except that in Great Britain it does not apply to servants of the subordinate members of the diplomatic mission When, in 1827, a coachman of Mr Gallatin, the American minister in London, committed an assault outside the embassy, he was arrested in the stable of the embassy and charged before a local magistrate, and the British Foreign Office refused to recognise the exemption of the coachman from the local jurisdiction However, the present practice of Great Britain is to grant immunity to the dom estic servants of the Head of the Mission See Wharton, 1 § 94, and Hall, § 51 The statute 7 Anne, c 12, § 3, makes 'utterly null and void' 'all writs and processes sued forth or prosecuted whereby . the domestic servant or servants of any such ambassador or other public minister may be arrested or im prisoned, or his or their goods or chattels may be distrained, seized or attached,' provided that (§ 6) the names of the servants are registered

and these persons cannot then claim exemption from police, immunity of domicile, and exemption from taxes Thus, for instance, if such a private servant commits a crime outside the residence of his employer, the police can arrest him, he must, however, be at once released if the envoy does not waive the exemption from criminal jurisdiction.

Privileges of Family of Envoy

§ 404 Although the wife of the envoy, his children, and such of his near relatives as live within his family and under his roof belong to his retinue, there is a distinction to be made as regards their privileges His wife must certainly be granted all his privileges in so far as they concern inviolability and exterritoriality As regards, however, his children and other relatives, no other general rule of International Law can safely be said to be generally recognised, than that they must be granted exemption from civil and criminal jurisdiction But even this rule was formerly not generally recognised Thus, when in 1653 Don Pantaleon Sà, the brother of the Portuguese ambassador in London and a member of his suite, killed an Englishman named Greenaway, he was arrested, tried in England, found guilty, and executed [1] Nowadays the exemption from civil and criminal jurisdiction of such members of an envoy's family as live under his roof is always granted Thus, when in 1906 Carlos Waddington,[2] the son of the Chilean envoy at Brussels, murdered the secretary of the Chilean legation, the Belgian authorities did not take any steps to arrest him Two days afterwards, however, the Chilean envoy waived the privilege of the immunity of his son, and on March 2 the Chilean Government likewise agreed to the murderer being prosecuted in Belgium The trial took place in July 1907, but Waddington was acquitted by the Belgian jury [3]

with the Foreign Office, moreover, it does not apply to servants engaged in trading In the case of Mr Gallatin's coachman the Law Officers of the Crown appear to have taken the view that this statute does not apply to the arrest of servants upon criminal charges, see Satow, p 199 And see generally M Jones in *J C L*, vol 22 (3rd ser, 1940), pp 19-31

[1] The case is discussed by Phillimore, II § 169

[2] See *R G*, 14 (1907), pp 159-165

[3] In *Herman* v *Apetz* (*Annual Digest*, 1927 1928, Case No 244) the Supreme Court of New York adopted the view that the consent of the home State is not necessary to enable the envoy to waive the immunity of his wife, family, or domestic servants.

§ 405. To ensure the safety and secrecy of the diplomatic despatches they bear, couriers [1] must be granted exemption from civil and criminal jurisdiction, and afforded special protection during the exercise of their office It is therefore usual to provide them with special passports It is particularly important to observe that they must have the right of innocent passage through *third* States, and that, according to general usage, those parts of their luggage which contain diplomatic despatches, and are sealed with the official seal, must not be opened and searched [2]

Privileges of Couriers of Envoy

XII

TERMINATION OF DIPLOMATIC MISSION

Vattel, iv §§ 125, 126—Hall, § 98**—Phillimore, ii §§ 237 242—Moore, iv §§ 636, 639, 640, 666—Hackworth, iv §§ 377 387—Hershey, §§ 267 269—Taylor, §§ 320 323—Wheaton, §§ 250, 251—Hyde, i §§ 421, 423, 424—Fenwick, pp 368 371—Ullmann, § 53—Heffter, §§ 223 226—Rivier, i § 40—Nys, ii pp 447 449—Fauchille, §§ 730 732—Pradier Fodéré, iii §§ 1515 1535—Fiore, ii §§ 1169-1175—Calvo, iii §§ 1363 1367—Martens, ii § 17—Suarez, §§ 283 292—Keith's Wheaton, pp 471 480—Goulé in *Répertoire*, i pp 341 343, 356 358—*Harvard Research* (1932), pp 133 138—Genet, ii pp 432 524—Foster, *Practice of Diplomacy* (1906), ch 9—Satow, §§ 487 528—Hurst in *Hague Recueil*, 1926 (ii), pp 237 240

§ 406 A diplomatic mission may come to an end from eleven different causes — namely, accomplishment of the object for which the mission was sent , expiration of letters of credence given to an envoy for a specific time only , recall of the envoy by the sending State , his promotion to a higher class , the delivery of passports to him by the

Termination in contradistinction to Suspension.

[1] See *Embassies and Foreign Courts* (1855), pp 178 199 See also Hackworth, iv §§ 415 418, on diplomatic pouches, couriers, and immunity of correspondence in time of war In answer to a request from the United States Department of State that instructions be issued to British censorship officials directing them to abstain from interference with the diplomatic and consular mails of the United States it was stated, in February 1940, that (*a*) both diplomatic and consular correspondence, if addressed to a State department and if certified as emanating from a diplomatic mission or consulate, were exempt from examination , and (*b*) the censorship examiners must be left free to determine whether a particular governmental institution was ' to be regarded as a State Department for the purposes of examination ' (*ibid* , p 632)

[2] This usage was abused during the First World War, when couriers in the service of the German legations in Norway and Switzerland carried explosives concealed in their sealed luggage

receiving State, request of the envoy for his passports, war between the sending and the receiving State, constitutional changes in the headship of the sending or receiving State, revolutionary change of government in the sending or receiving State, extinction of the sending or receiving State, and, lastly, death of the envoy These events must be treated singly on account of their peculiarities [1] But the termination of diplomatic missions must not be confused with their suspension

Accomplishment of Object of Mission

§ 407 A mission comes to an end through the fulfilment of its objects in all cases of missions sent for special purposes, such as ceremonial functions like representations at weddings, funerals, and coronations, or notification of changes in the headship of a State, or representation of a State at conferences and congresses, and the like Although the mission is terminated through the accomplishment of its object, the envoys enjoy all their privileges on their way home

Expiration of Letter of Credence

§ 408 If a letter of credence of a limited duration is given to an envoy, his mission terminates at the expiration of the period A temporary letter of credence may, for instance, be given to an individual for the purpose of representing a State diplomatically during the interval

[1] It may be stated as a general principle that, at any rate according to English law, the immunity of an envoy from civil process continues after the termination of his diplomatic mission for such reasonable period as is necessary to enable him to wind up his official business, consequently the statutes of limitation will not begin to run in respect of a cause of action which accrues against him during the period of his diplomatic immunity until that reasonable period expires *Musurus Bey* v *Gadban* [1894] 2 Q B 352, see also *In re Suarez, Suarez* v *Suarez* [1918] 1 Ch 176 It was held in *Rex* v *Kent* that that principle does not apply to an official of the embassy after his dismissal and waiver of his diplomatic privilege by the ambassador or by his State [1941] 1 K B. 454 Kent was a code clerk in the United States embassy in London He was convicted of offences against the Official Secrets Act and also of larceny He had been previously dismissed from his post in the embassy On the day of his dismissal his immunity was waived by the ambassador and the waiver confirmed by the United States Government He was arrested on the same day As to other States see Hill in *A J*, 25 (1931), pp 258 260, *Harvard Research* (1932), pp 134 137 And see *Salm* v *Frazier, Annual Digest*, 1933-1934, Case No 161, *A J*, 28 (1934), pp 382, 383, for a decision of the Court of Appeals of Rouen to the effect that a French court would not enforce the decision of an Austrian court against a former representative of the United States in Vienna, rendered after he had ceased to exercise the diplomatic mission, in respect of acts connected with the mission

between the recall of an ambassador and the appointment of his successor

Recall

§ 409 The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending State If this recall is not caused by unfriendly acts of the receiving State, but by other circumstances, the envoy receives a letter of recall from the Head, or, in case he is only a chargé d'affaires, from the Foreign Secretary of his home State, and he [1] hands this letter to the Head of the receiving State in a solemn audience, or in the case of a chargé d'affaires to the Foreign Secretary In exchange for the letter of recall the envoy receives his passports and a so-called *Lettre de récréance*, a letter in which the Head of the receiving State (or the Foreign Secretary) acknowledges the letter of recall Although therewith his mission ends, he enjoys nevertheless all his privileges on his home journey [2] A recall may be caused by the resignation of the envoy, by his transference to another post, and the like It may, secondly, be caused by the outbreak of a conflict between the sending and the receiving State which leads to a rupture of diplomatic intercourse,[3] and under these circumstances the sending State may order its envoy to ask for his passports and depart at once without handing in a letter of recall And, thirdly, a recall may result from a request of the receiving State by reason of real or alleged misconduct of the envoy [4] Such request for recall may lead to a rupture of diplomatic intercourse, if the receiving State insists upon the recall, and the

[1] But sometimes his successor presents the letter recalling his predecessor to the Head of the receiving State, or to the Foreign Secretary in the case of chargés d'affaires

[2] See the interesting cases discussed by Moore, iv § 666 See also *In re Suarez, Suarez* v *Suarez* [1917] 2 Ch 131, [1918] 1 Ch 176

[3] But not necessarily In 1936 the Iranian Government withdrew its minister from the United States as a sign of disapproval in connection with an alleged insult to the person of the ruler of Iran It was, however, explained that that step in no way affected the status of the American Legation at Teheran and that the Iranian Government would continue to transact business with it Hackworth, iv p 459

[4] The Pan American Convention of February 20, 1928, concerning the Rights and Duties of Diplomatic Officers (see above, § 36, n) provides, in Article 8, that a State may request the recall of a foreign diplomatic representative without being obliged to state the reasons for the request This is an innovation which many will regard as undesirable See Satow, § 528

sending State does not recognise the act of its envoy as misconduct [1]

Examples of requests by a receiving State for the recall of diplomatic envoys occurred during the First World War [2] On September 8, 1915, the United States requested the Austro-Hungarian Government to recall its ambassador at Washington, Dr Dumba, for proposing plans to instigate strikes in American munition factories, and for employing an American citizen with an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary On December 4, 1915, the United States requested Germany to recall Captain Boy-Ed, naval attaché, and Captain von Papen, military attaché, to the German embassy at Washington, on account of their 'connection with the illegal and questionable acts of certain persons within the United States' [3]

Promotion to a Higher Class

§ 410 When an envoy remains at his post, but is promoted to a higher class—for instance, when a chargé d'affaires is created a minister resident, or a minister plenipotentiary is created an ambassador—his original mission technically ends, and he therefore receives a new letter of credence

Dismissal

§ 411 A mission may terminate, further, through the dismissal of the envoy by the receiving State The reason for such dismissal may be either gross misconduct on his part,[4] or a quarrel between the sending and the receiving

[1] As to the threatened expulsion of Mr Cummins, the British diplomatic agent in Mexico City, by the Government of Mexico in June 1924 and his withdrawal by the British Government resulting in a rupture of diplomatic relations for more than a year see the London *Times* newspaper, June 16, 17, 1924, and *Parl Papers*, Mexico No 1 (1924), Cmd 2225 The British Government approved the action of Mr Cummins which gained for him the displeasure of the Mexican Government See also above, § 383

[2] Earlier cases of request of recall of envoys are reported by Taylor, § 322, Hall, § 98**, Moore, IV § 639, Hershey, § 269, and Satow, pp 260 275

[3] See *A J*, 10 (1916), Special Suppl, pp 361, 363 For a Selection from Papers found in the possession of Captain von Papen see *Parl Papers*, Misc No 6 (1916), Cmd 8174

[4] On the expulsion, in June 1931, of the apostolic *nuncio* accredited to Lithuania and the resulting severance of diplomatic relations with the Vatican City see *R G*, 38 (1931), pp 663 665 It is sometimes difficult to say whether the termination of the mission is the result of dismissal or of recall by the sending State Thus, for instance, M Suritz, the Russian ambassador to France, was recalled in March 1940 after the French Government declared him to be a *persona non grata* following upon the dispatch by him of a public telegram to his Government insulting to the Allies See *The Times* newspaper, March 28, 1940

State which leads to a rupture of diplomatic intercourse. Whenever such rupture takes place, diplomatic relations between the two States come to an end, and all diplomatic privileges cease when the envoy departs and crosses the frontier If the archives of the legation are not removed, they must be put under seal by the departing envoy, and confided to the protection [1] of some other foreign legation

Request for Passport

§ 412 Without being recalled, an envoy may, on his own account, ask for his passport and depart, in consequence of ill-treatment by the receiving State This may, or may not, lead to a rupture of diplomatic intercourse

Outbreak of War

§ 413 When war breaks out between the sending and the receiving State before their envoys accredited to each other are recalled, their mission nevertheless comes to an end They receive their passports, but they must be granted their privileges [2] on their way home

Constitutional Changes

§ 414 If the Head of the sending or receiving State is a sovereign, his death or abdication terminates the missions sent and received by him, and all envoys remaining at their posts must receive new letters of credence But though they receive new letters of credence, their place in order of seniority remains as before Moreover, during the time between the termination of their mission and the arrival of new letters of credence they enjoy all the privileges of diplomatic envoys

As regards the effect of constitutional changes in the headship of republics on the missions sent or received, this general rule can be laid down When, as in France or the United States of America, the President is considered to be the Head of the republic, and it is he who sends and receives diplomatic envoys, a constitutional change in the headship through death, abdication or expiration of office must necessarily terminate the missions sent and received by the former Head, and new letters of credence must be provided. But when, as in Switzerland, the Bundesrath, a body of individuals, is considered to be the Head of the republic, the death or abdication of the President, or

[1] As regards the case of *Montagnini* see p 229, n 1, of the fourth edition of this work.

[2] See below, vol. II. § 98.

the expiration of his term of office, does not terminate the missions, and no new letters of credence are necessary.

Revolutionary Changes of Government

§ 415 A revolutionary movement in the sending or receiving State which creates a new Government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing one sovereign and enthroning another, terminates the missions All envoys remaining at their posts must receive new letters of credence, but no change in seniority takes place if they do receive them It may happen that in cases of revolutionary changes of government foreign States for some time neither send new letters of credence to their envoys nor recall them, watching the course of events in the meantime, and waiting for more proof of a real settlement In such cases the envoys are, according to an international usage, granted all privileges of diplomatic envoys, although in strict law they have ceased to be such [1] In cases of recall subsequent to revolutionary changes, the protection of subjects of the recalling States remains in the hands of their consuls, since the consular office [2] does not come to an end through constitutional or revolutionary changes in the headship of a State [3]

Extinction of sending or receiving State

§ 416 If the State sending or receiving a mission is extinguished by voluntary merger into another State, or through annexation in consequence of conquest, the mission terminates *ipso facto* In case of annexation of the receiving State there can be no doubt that, although the annexing State will not consider the envoys received by the annexed State as accredited to itself, it must grant those envoys the right to leave the territory of the annexed State unmolested, and to take their archives away with them In case of annexation of the sending State, the question arises

[1] As to the continued recognition by the United States of the representative of the Kerensky Government of Russia after its fall see Hershey in *A J*, 16 (1922), pp 426-428, and Fraenkel in *Columbia Law Review*, 25 (1925), pp 551, 552 When in 1933 the United States recognised the Soviet Government the United States withdrew the authority of the consuls appointed by the former Russian régime See *A J*, 28 (1934), Suppl, p 13

[2] See below, § 438

[3] As to the position of the agents of Governments which are unrecognised or only recognised *de facto* see above, § 74, n See also Hackworth, IV § 377, on representatives of unrecognised and fallen Governments

what becomes of the archives and official property belonging to the missions of the annexed State accredited to foreign States This question is one on the so-called succession [1] of States The annexing State acquires, *ipso facto*, by the annexation the property in those archives and other official property, such as the hotels, furniture, and the like But as long as the annexation is not notified and recognised *de jure*,[2] the receiving States have no duty to interfere

Death of Envoy

§ 417 A mission ends, lastly, by the death of the envoy. As soon as an envoy is dead, his effects, and especially his papers, must be sealed This is done by a member of the legation of the dead envoy, or, if there be no such members, by a member of another legation accredited to the same State The local Government must not interfere, unless at the special request of the home State of the deceased envoy.

Although the mission, and therefore the privileges, of the envoy, come to an end by his death, the members of his family who resided under his roof, and the members of his suite, enjoy their privileges until they leave the country But a certain time may be fixed for them to depart, and on its expiration they lose their privilege of exterritoriality It must be specially mentioned that the courts of the receiving State have no jurisdiction whatever over the goods and effects of the deceased envoy, and that no death duties can be demanded

[1] See above, § 82

[2] It must be noted that the mere fact of closing the legation or the embassy does not amount to such recognition Thus when, in December 1936, Great Britain closed her legation in Addis Ababa, it was announced that that step did not constitute a recognition *de jure* of the Italian annexation of Abyssinia When in 1939 Great Britain and the United States closed their legations at Prague, that measure did not in itself amount to a recognition of the German protectorate over Czecho-Slovakia This was also the case with regard to the purported annexation of Austria by Germany in 1938 On that occasion the Government of the United States informed Germany that it found itself 'under the necessity as a practical measure' of closing its legation in Vienna and of establishing a consulate in its place *Documents*, 1938, vol II p 76 See *U S* ex rel *Zdunic* v *Uhl*, *Annual Digest*, 1941 1942, Case No 164 (p 534), for a statement of the Secretary of State deprecating any intention of recognition on that occasion

XIII

DIPLOMATIC PRIVILEGES OF NON-DIPLOMATIC PERSONS

Fauchille, § 685 (1)—Schucking und Wehberg, pp 383 388—Hyde, I § 416—Hackworth, IV § 378—Rey, *Les immunités des fonctionnaires internationaux* (1928)—Posega, *Die Vorrechte der internationalen Funktionare* (1929)—Balz, *Die besonderen Staatenvertreter und ihre volkerrechtliche Stellung* (1931)—Basdevant (Suzanne), *Les fonctionnaires internationaux* (1931), pp 290 *et seq*—Kaufmann, *Die Immunitat der Nicht Diplomaten* (1932)—Hill, *Immunities and Privileges of International Officials* (1947)—Rougier in *R G*, 28 (1921), pp 277 279—Borsi in *Rivista*, 3rd ser, II (1923), pp 437, 438—*Annuaire*, 31 (1924), pp 1 15—van Vollenhoven in *A J*, 19 (1925), pp 469 474—Committee of Experts for the Progressive Codification of International Law C 196 M 70 1927 V, pp 77 *et seq*—Hill in *Annuaire*, 33 (1) (1927), pp 420 427—Rey in *Revue de droit international privé*, 23 (1928), p 257—Preuss in *A J*, 25 (1931), pp 694-710—Hammarskjold in *Annuaire*, 38 (1934), pp 358 397, and in *R I*, 3rd ser, 16 (1935), pp 5 31—Secrétan in *B Y*, 16 (1935), pp 56 78, and in *Répertoire*, I pp 317 325—Hammarskjold in *Hague Recueil*, vol 56 (1936) (II), pp 112 206—McKinnon Wood in *Grotius Society*, 30 (1944), pp 141-164—Jenks in *B Y*, 22 (1945), pp 58 60—Parry in *Modern Law Review*, 10 (1947), pp 97 121—Kunz in *A J*, 41 (1947), pp 828 862

Diplomatic Privileges of Non-Diplomatic Persons [1]

§ 417*a* In addition to the diplomatic persons upon whom customary International Law confers certain immunities and privileges, there are several classes of officials whom States have agreed by treaty to invest with the same, or at any rate a similar, status These persons may be classified as (*a*) international officials, and (*b*) certain national officials and agents of a miscellaneous character

(*a*) *International Officials*—Among these [2] may be mentioned—

(1) *The United Nations and its Officials* The Charter of the United Nations lays down, in Article 105, that officials of the Organisation—as well as representatives of the Members of the United Nations—shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation The details of these privileges and immunities are left for determination as the result of recom-

[1] As to the normal position of non-diplomatic State agents in foreign countries see below, §§ 452-457

[2] See also above, § 178, as to the members of the two Danube Commissions, and below, § 458, as to the members of International Commissions generally As to the members of the Mixed Arbitral Tribunals see Fauchille, § 685 (1), p 61

mendations of the Assembly or of special conventions made with the Members of the United Nations. Unlike the corresponding Article 7 of the Covenant of the League,[1] the Charter does not refer to *diplomatic* privileges and immunities The probable reason of that change was the intention to leave room for a substantial measure of elasticity suggested by the experience of the League The First General Assembly approved, in February 1946, a convention on the privileges and immunities of the United Nations and proposed it for accession by each member of the United Nations [2] The Convention embodies detailed provisions concerning the juridical personality of the United Nations, the immunity and inviolability of its property, its premises, and its archives, exemption from taxation and customs

Officials of the League when n the business of the League shall enjoy diplomatic privileges and immunities' It seems that these privileges and immunities attached to these persons, even when they were in the territory of the State whose nationals they were, provided that they were 'engaged on the business of the League' See Schucking und Weh berg, *op cit*, Rougier, *op cit*, Borsi, *op cit*, *Annuaire, loc cit*, as to the probable meaning of 'officials' and the scope of the privilege For a number of cases bearing on the diplomatic immunities of the officials of the International Labour Organisation and for some instructive notes on the subject see *Annual Digest*, 1929-1930, Cases Nos 205 207 See also Canadian Treaties of Peace (Status of International Labour Office) Order, 1941, sections 2 and 3. The *Cour de Justice Civile* of Geneva held, in March 1929, that although an official of the League of Nations was not, because of his Swiss nationality, en titled to immunity, his salary could not be attached while it was in the hands of the League because the premises of the League were inviolable by virtue of Article 7 of the Covenant *Annual Digest*, 1929-1930, Case No 204

The position of persons covered by Article 7 of the Covenant was regu lated by two agreements concluded in 1921 and 1926 by the Secretary-General of the League with the Swiss Government *Off J*, 1926, pp 1422 *et seq* This included not only the officials of the International Labour Organisation but probably members of the Mandates Commission, the High Commissioner for Danzig, members of Commissions of Enquiry and of arbi tral tribunals appointed by the League (see Secrétan, *op cit*, pp 42 43, and the same in *Répertoire*, 1 pp 319 320, *Off J*, 1924, pp 1349, 1594), and of some of the associated organisations of the League See Internal Regulations of the International Institute for Intellectual Co operation, *Off J*, 1925, p 1466, of the Institute for the Unification of Private Law, *ibid*, 1928, p 1753, of the International Educational Cinematograph Institute, *ibid*, 1929, p 160 As to the fiscal exemptions of League officials of Swiss nationality see Deák in *Southern California Law Review*, 1 (1928), pp 333 336 In 1935 a Paris court held that the Secretary General of the League was not immune from the jurisdiction of French courts in respect of an action for maintenance brought by his wife from whom he was separated *Avenol* v *Avenol*, *Annual Digest*, 1935 1937, Case No 185.

See also Article 46 of Hague Convention No I for the Pacific Settlement of International Disputes with regard to members of Tribunals constituted under the Convention

[2] *Journal of General Assembly*, First Session, p 687, Cmd. 6753.

duties, facilities in respect of communications, and various jurisdictional and other immunities and privileges for the representatives of Members of the United Nations, and its officials and experts on missions for the United Nations [1]

(ii) *The Judges of the International Court of Justice*, who by Article 19 of the Statute of the Court 'when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities' These are regulated in an Exchange of Letters between the President of the Court and the Dutch Government of June 26, 1946 The Agreement provides that the members of the Court and the Registrar shall, generally, be accorded the same treatment as heads of diplomatic missions accredited to the Queen of the Netherlands [2] The higher officials of the Court are to be accorded the same treatment as Secretaries attached to diplomatic missions at The Hague, other officials are to be treated as officials of comparable rank attached to diplomatic missions at The Hague Judges and officials who are of Dutch nationality are to be exempt from the jurisdiction of Dutch courts with regard to acts performed by them in their official capacity, they are also exempt from direct taxation with regard to their official salaries

[1] Article VIII of the Convention lays down that the United Nations shall make provision for appropriate modes of settlement of disputes involving the United Nations and its officials in respect of which immunity is claimed

It will be noticed that there was no provision in the Covenant for different treatment of the nationals of the States concerned See on this Preuss, *op cit*, pp 708-710, P C I J, Series E, No 4, pp 53 63, Benet in *J C L*, 13 (3rd ser, 1931), pp 84 *et seq*, Genet in *R I*, 3rd ser, 14 (1933), pp 254-281, Aubain, *ibid*, 15 (1934), pp 129-143, Warganeus in *Nordisk T A*, 4 (1933), pp 158 165

See also Secrétan, *Les immunités diplomatiques des représentants des États Membres et des Agents de la Société des Nations* (1928) Briggs in *A J*, 33 (1939), pp 563 566 In a judgment of the Swiss *Assises Fédérales* of January 25, 1927, it was held that offences against representatives of members of the League were punishable under Article 43 of the Swiss Penal Code as if they were representatives of foreign States accredited to the Swiss Government (see *Bulletin de l'institut Intermédiare International*, 18 (1) (1928), p 98)

[2] First General Assembly, *Journal* No 75, Suppl, A 64, Add 1, p 936 See also *ibid*, p 933, for the recommendation of the General Assembly approving the Agreement and providing for the immunities and privileges of the members and officials of the Court when outside the Nether lands and for the recognition as a valid travel document of the *laisser-passer* issued by the Court to its members and officials And see the British Diplomatic Privileges (Extension) Act, 1946, which makes provision for the privileges and immunities of the judges of the Court, and of suitors and their agents, counsel and advocates, as may be required to give effect to the Resolution of the General Assembly

(iii) *International Organisations and their Officials.* The constitutions of various international organisations set up since the Second World War contain provisions claiming and regulating immunities for themselves and their officials [1] In Great Britain, the Diplomatic Privileges (Extension) Act, 1944,[2] gives His Majesty in Council the power to confer various immunities and privileges, laid down in the Act, upon international organisations of which the Government of the United Kingdom and foreign Governments are members [3] The Act enumerates the maximum of such privileges and immunities and leaves it to an Order in Council to apply its provisions to the several international organisations According to the Act and subject to the Order in Council to be issued in any specific case, such organisations may be given the legal capacities of a body corporate in respect of holding property, concluding contracts and suing in courts, they may be granted immunity from suit and their archives and property may be made inviolable, the representatives of foreign Governments on its governing body and a limited number of its higher officials may be granted diplomatic immunity—a provision which, since the Diplomatic Privileges (Extension) Act, 1946,

[1] See *e g* the Constitution of the Food and Agriculture Organisation of the United Nations (Arts VIII (4) and XV (2), Misc No 4 (1945) Cmd 6590), Articles of Agreement of the International Monetary Fund (Art IX), Draft Articles of Agreement of an International Bank for Reconstruction and Development (Art VII) (Final Act of the United Nations Monetary and Financial Conference, Cmd 6546 (1944)), Resolutions 32, 34 and 36 of the First Session of the Council of United Nations Relief and Rehabilitation Administration in 1943 (Cmd 6497 (1943)) See also Cmd 6566 (1944) as to the relevant Resolutions of the Second Session, Article VIII (13-17) of the Agreement of September 27, 1945, concerning the establishment of a European Central Inland Transport Organisation (Cmd 6685), Article 15 of the Final Act of the Paris Conference on Reparations of December 21, 1945, setting up the Inter Allied Reparation Agency (Cmd 6721), Article VIII of the Agreement of January 4, 1946, establishing the European Coal Organisation (Cmd 6732) See on the subject Jenks in *Grotius Society*, 28 (1942), pp 113 *et seq*, Friedmann in *Modern Law Review*, 6 (1943), pp 193 *et seq*, Schwelb, *ibid*, 8 (1945), pp 56 63, Jessup in *A J*, 38 (1944), pp 658 662, Kuhn, *ibid*, pp 662 667

[2] 7 & 8 Geo 6, c 44

[3] In introducing the Bill the Attorney-General expressed the view that when a number of States joined in creating an international organisation for fulfilling a public purpose, it was proper, under International Law, that the Governments members of the organisation should collectively enjoy the same immunities which they would enjoy individually

applies also to British subjects [1] Certain other classes of their officials, whether British subjects or not, may be granted diplomatic immunity in respect of their official acts [2] All officials and employees of the Organisation may be granted exemption from income tax in respect of their official salaries By Orders in Council these provisions were made applicable to a number of international agencies [3] In 1945 the United States Congress approved an Act to extend certain privileges, exemptions and immunities to international organisations and their officers and employees [4] In 1946 a similar Act was passed in Great

[1] 9 & 10 Geo 6, c 66, First Schedule For an analysis of the Act see Parry in *Modern Law Review*, 10 (1947), pp 97-121 For a criticism of the tendency to exempt the State's own nationals from the benefits of diplomatic immunity see Hurst in *B Y*, 10 (1929), p 10, Hammarskjöld in *Hague Recueil*, 56 (1936) (II), p 204, Jenks in *B Y*, 22 (1945), p 160, n 2

[2] This provision was adopted in order to prevent actions which, inasmuch as they bear upon official activities of the personnel not entitled to immunities, might in fact derogate from the immunity enjoyed by the Organisation as such The Act makes it obligatory upon the Secretary of State to issue lists of the officials on whom diplomatic status is conferred He *may* issue such lists in respect of persons who are entitled to immunity only in respect of their official acts See above, p 715, n 6, on the undertakings, given in this connection, as to the waiver of immunities See also the instructive debate in the House of Commons, *Hansard*, vol 403, cols 349, 2086, and 2770 *et seq*, and vol 404, cols 94 *et seq*, Corbett, *Post War Worlds* (1942), p 183, Friedmann in *Modern Law Review*, 6 (1943), p 198, who suggests an International Administrative Tribunal as a necessary counterpart to immunity from municipal jurisdiction And see Hackworth, IV § 378

[3] See Parry, *op cit*, p 105, for an enumeration of the various orders

[4] Public Law 291 (79th Congress, ch 652, 1st Session) Section 2 of the Act provides that international organisations shall possess the capacity to contract, to acquire and to dispose of property, and to institute legal proceedings, that they shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, that their property shall be immune from search, that their archives shall be inviolable, and that with regard to customs duties and internal revenue taxes as well as the treatment of their official communications they shall be entitled to immunities accorded to foreign governments Section 3 lays down that the baggage and effects of alien officers and employees of international organisations, or of aliens designated by foreign governments to serve as their representatives in or to such organisations, or of the families, suites and servants of such persons shall be free of customs duties Section 4 provides for exemption from taxation (*a*) of the income of foreign governments or international organisations from any source within the United States, (*b*) of wages and salaries of their officials other than citizens of the United States provided that the State of which these persons are nationals grant similar exemption to citizens of the United States See Preuss in *A J*, 40 (1946), pp 332 345 And see the same, *ibid*, 41 (1947), pp 555 578, for lucid comment on the case of *Westchester County* v *Ranollo* (*ibid*, p 690), which came before the City Court of New Rochelle, New York, in November 1946 and which provided the first judicial construction of the Act of 1945. The Court held that the defendant was not necessarily immune from prosecution

Britain,[1] in connection with the general convention on privileges and immunities of the United Nations approved at the First General Assembly [2] The general effect of the Act of 1946 is to extend to the United Nations and the International Court of Justice the privileges as laid down in the Act of 1944

(*b*) *National Officials* —By treaty national officials, other than diplomatic representatives, sent to transact business in a foreign State, are occasionally granted a degree of diplomatic immunity This has been the case, for instance, with various Trade Delegations acting on behalf of the Soviet Government [3] National officials sent to international organisations—such as the League of Nations [4] or the United Nations [5]—and international congresses and conferences enjoy by virtue of special provisions either customary or specially defined diplomatic immunities Thus, the British Diplomatic Privileges (Extension) Act, 1944, authorises the Secretary of State, whenever a conference is held in the United Kingdom and is attended by representatives of the United Kingdom and of one or more foreign sovereign Powers, to compile a list of such foreign representatives, who, together with their retinue, shall be entitled to ordinary diplomatic immunities [6] Finally, during the Second World War the presence in Great Britain of a number of Governments of countries invaded by Germany gave occasion for the Diplomatic Privileges (Extension) Act, 1941, which extended diplomatic immunities to members and high officials of Governments of foreign States allied with Great Britain and established there Similar rights were accorded to members of any national committee or other foreign authority established in Great Britain and recognised as

for driving a car in excess of the speed limit for the mere reason that he was an employee of the United Nations, and was driving the Secretary-General of the United Nations at the material time The action in respect of which immunity was sought had to bear some relation ' to the importance or the success of the Organisation's deliberations '—a question which could not be decided without a trial of the issue of fact The claim for immunity was subsequently withdrawn

[1] 9 & 10 Geo 6, c 66

[2] See above, p 735

[3] As to Great Britain see below, § 454*a* (n) As to France see, for instance, *De Fallois* v *Piatiakoff*, *Annual Digest*, 1935 1937, Case No 84 And see generally Stoupnitzky, *Statut international de l'U S S R* (1936), pp 255-300.

[4] Article 7 of the Covenant And see above, p 735, n 1

[5] Article 105 of the Charter

[6] § 3.

competent to maintain armed forces for service in association with British forces [1]

[1] The Diplomatic Privileges (Extension) Act, 1944, s 5, provided that such immunities shall continue, in respect of members and officials of such foreign Governments and authorities as perform their functions wholly or in part in Great Britain, even though such Governments or authorities had transferred their seat elsewhere The first two General Assemblies called upon member States to exempt from national income taxation salaries and allowances paid by the United Nations (Doc A/487) In November 1947 the Second General Assembly approved a Convention on the Privileges and Immunities of the Specialised Agencies and proposed it for acceptance by the Specialised Agencies and for accession by all members of the United Nations and by any other State member of a Specialised Agency (Doc A/503, pp 22-42)

CHAPTER III

CONSULS

I

THE INSTITUTION OF CONSULS

Hall, § 105—Phillimore, II §§ 243 246—Halleck, I pp 396, 397—Taylor, §§ 325 326—Fenwick, pp 371 377—Twiss, I § 223—Ullmann, §§ 54, 55—Bulmerincq in *Holtzendorff*, III pp 687 695—Heffter, § 241, 242—Rivier, I § 41—Nys, II pp 450-460—Calvo, III §§ 1368-1372—Fauchille, §§ 733 742—Pradier Fodéré, IV §§ 2034 2043—Martens, II §§ 18, 19—Fiore, II §§ 1176-1178—De Louter, II pp 59 65—Warden, *A Treatise on the Origin, Nature, etc, of the Consular Establishment* (1814)—Miltitz, *Manuel des consuls*, 5 vols (1837-1839)—Cussy, *Règlements consulaires des principaux états maritimes* (1851)—H B Oppenheim, *Handbuch der Consulate aller Lander* (1854)—Clercq et Vallat, *Guide pratique des consulats* (5th ed, 1898)—Salles, *L'institution des consulats, son origine*, etc (1898)—Chester Lloyd Jones, *The Consular Service of the United States Its History and Activities* (1906)—Stowell, *Le consul* (1909), and *Consular Cases and Opinions*, etc (1909)—Pillaut, *Manuel de droit consulaire*, 2 vols (1910, 1912)—Contuzzi, *Trattato teoricopratico di diritto consulare e diplomatico*, 2 vols (1910, 1911)—Candioti, *Historia de la institución consular en la antigüedad y en la edad media* (1925)—Puente, *The Foreign Consul* (1926)—Torroba, *Derecho Consular* (1927)—Desaint, *Essai de classification juridique des actes et des attributions des consuls* (1927)—Heyking, *Les principes et la pratique des services consulaires* (1928), the same in *Hague Recueil*, vol 34 (1930) (IV), pp 816 829—Ferrara, *Manuale di diritto consolare* (1936)—Jordan in *R I*, 2nd ser, 8 (1906), pp 479 507 and 717-750, and in *Répertoire*, I pp 284-302—*Harvard Research* (1932), pp 201 216—Stuart in *Hague Recueil*, vol 48 (1934) (II), pp 483 501

Development of the Institution of Consuls

§ 418 The roots of the institution of consuls go back to the second half of the Middle Ages In the commercial towns of Italy, Spain, and France the merchants used to appoint by election one or more of their fellow-merchants as arbitrators in commercial disputes, who were called *Juges Consuls* or *Consuls Marchands* When, between and after the Crusades, Italian, Spanish, and French merchants settled down in the Eastern countries and founded factories,

they brought the institution of consuls with them, the merchants belonging to the same nation electing their own consul The competence of these consuls became, however, more and more enlarged through treaties called 'Capitulations' between the home States of the merchants and the Mohammedan monarchs on whose territories these merchants had settled down.[1] The competence of consuls came to comprise the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen. From the East the institution of consuls was transferred to the West Thus, in the fifteenth century Italian consuls existed in the Netherlands and in London, English consuls in the Netherlands, Sweden, Norway, Denmark, and Italy (Pisa) These consuls in the West exercised, just as did those in the East, exclusive civil and criminal jurisdiction over the merchants of their nationality. But the position o the consuls in the West decayed in the beginning of the seventeenth century through the influence of the rising permanent legations on the one hand, and, on the other, from the fact that everywhere foreign merchants were brought under the civil and criminal jurisdiction of the State in which they resided This change in their competence altered the position of consuls in the Christian States of the West altogether Their functions now shrank into a general supervision of the commerce and navigation of their home States, and into a kind of protection of the commercial interests of their countrymen Consequently, they did not receive much notice in the seventeenth [2] and eighteenth centuries, and it was not until the nineteenth century that the general development of international commerce, navigation, and shipping again drew the attention of the Governments to the value and importance of the institution of consuls It was now systematically developed. The position of the consuls, their functions, and their privileges were the subject of stipulations, either in commercial treaties or in special

[1] See Twiss, 1 §§ 253-263

[2] See Barbour in *American Historical Review*, 33 (1927-1928), pp. 553 578, on consular service in the reign of Charles II.

consular treaties,[1] and a number of States enacted statutes regarding the duties of their consuls abroad, such as the Consular Act passed by Great Britain in 1825

General Character of Consuls

§ 419 Nowadays consuls are agents of States residing abroad for purposes of various kinds, but mainly in the interests of the commerce and navigation of the appointing State As they are not diplomatic representatives, they do not enjoy diplomatic privileges Nor have they, ordinarily, anything to do with intercourse between their home State and the State in which they reside But these rules have exceptions Until quite recently,[2] consuls of Christian Powers in certain non-Christian States have retained their former competence, and exercise full civil and criminal jurisdiction over their countrymen Sometimes consuls are charged with the tasks which are regularly fulfilled by diplomatic representatives Thus, too, on occasions small States, instead of accrediting diplomatic envoys to another State, send only a consul, who combines consular functions with those of a diplomatic envoy[3] It must, however, be emphasised that consuls thereby neither become diplomatic envoys, although they may have the title of 'Diplomatic Agents,' nor enjoy the privileges of diplomatic envoys if such privileges are not specially provided for by treaties between the home State and the State in which they reside Different, however, is the case in which a consul is at the same time accredited as chargé d'affaires, and in which, therefore, he combines two different offices, for as chargé d'affaires he is a diplomatic envoy, and enjoys all the privileges of a diplomatic representative, provided he has received a letter of credence

[1] Phillimore, II § 255, gives a list of such treaties

[2] See above, § 318

[3] As an instance of the difficulties which the amalgamation of the diplomatic and consular services into one service is apt to create see *Musmann* v *Engelke* [1928] 1 K B 90, [1928] A C 433, and above, § 401 (n) Soviet Russia in 1918 and the United States of America in 1924 each amalgamated their diplomatic and consular services into a common foreign service, see, as to the latter, Garner in *A J*, 18 (1924), pp 774 777, Rogers, *ibid*, pp 791-794, and Hackworth, IV § 379 In Great Britain the Foreign Service Act, 1943 (6 & 7 Geo 6, c 36) gives effect to the proposals of the White Paper (Cmd 6420) for a measure of unification of the diplomatic and consular services As to Soviet Russia, see Taracouzio, *The Soviet Union and International Law* (1935) pp 209 *et seq*

II

CONSULAR ORGANISATION

Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), § 13—Phillimore, II §§ 253, 254—Halleck, I p 398—Taylor, § 328—Moore, V § 696—Hackworth, IV § 423—Hershey, § 284—Hyde, I § 460—Ullmann, § 57—Bulmerincq in *Holtzendorff*, III pp 695-701—Rivier, I § 41—Calvo, III §§ 1373 1376—Fauchille, §§ 743-748—Pradier-Fodéré, IV §§ 2050 2055—Mérignhac, II pp 320 333—Martens, II § 20—De Louter, I pp 65-69—Stowell, *Le consul* (1909), pp 186 205—*General Instructions for His Majesty's Consular Officers* (1907), as revised from time to time—Heyking in *Hague Recueil*, vol 34 (1930) (4), pp 830 844—*Harvard Research* (1932), pp 207-209, 217 222—*A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* Edited by Feller and Hudson, 2 vols (1933)—Gachet, *Memento à l'usage des Chancelleries diplomatiques et consulaires* (published under the auspices of the French Ministry of Foreign Affairs, 2nd ed , 1933)

Different Kinds of Consuls.

§ 420 Consuls are of two kinds They are either specially sent and paid for the administration of their consular office (*Consules missi*),[1] or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*)[2] Consuls of the first kind, who are the so-called professional consuls, and are always subjects of the sending State, have to devote their whole time to the consular office Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings Some States, such as France, appoint professional consuls only , most States, however, appoint consuls of both kinds, according to the importance of the consular districts But there is a general tendency with most States to appoint professional consuls for important districts

No difference exists in the general position of the two kinds of consuls according to International Law. But, naturally, a professional consul enjoys in practice a greater authority, and a more important social position, and consular

[1] Sometimes called consuls de carrière

[2] To this distinction corresponds in the British Consular Service the distinction between 'Consular Officers' and 'Trading Consular Officers'

treaties often stipulate special privileges for professional consuls.

Consular Districts

§ 421. As the functions of consuls are of a more or less local character, most States appoint several consuls on the territory of other larger States, confining the duties of each to certain districts of such territories, or even to a certain town or port only Consular districts as a rule coincide with provinces of the State in which the consuls administer their offices Consuls in each consular district are independent of each other, and conduct their correspondence directly with the Foreign Office of their home State, the agents-consular excepted, who correspond only with the consul who appoints them The extent of the districts is agreed upon between the home State of the consul and the admitting State Only the consul appointed for a particular district is entitled to exercise consular functions within its boundaries, and to him alone the local authorities have to grant the consular privileges, if any.

Different Classes of Consuls

§ 422 Four classes of consuls are generally distinguished according to rank consuls-general, consuls, vice-consuls, and consular agents Consuls-general are appointed either as the head of several consular districts, and have then several consuls subordinate to themselves, or as the head of one very large consular district Consuls are usually appointed for smaller districts, and for towns or even ports only Vice-consuls are assistants of consuls-general and consuls who themselves possess consular character and so can take the consul's place in regard to all his duties, they are, according to the Municipal Law of some States, appointed by the consul, subject to the approbation of his home State Agents-consular are agents with consular character, appointed, subject to the approbation of the home Government, by a consul-general or consul for the exercise of certain parts of the consular functions in certain towns or other places of the consular district Agents-consular are not independent of the appointing consul, and do not correspond directly with the home State, since the appointing consul is responsible to his Government for them The so-called proconsul is not a consul, but a *locum*

tenens only during the temporary absence or illness of a consul, he possesses, therefore, consular character for such time only as he actually is the *locum tenens*

The British Consular Service [1] consists of the following five ranks (1) consuls-general, (2) consuls, (3) vice-consuls, (4) consular agents, (5) proconsuls In the British Consular Service proconsuls exercise, as a rule, only the notarial functions of a consular officer

Consuls subordinate to Diplomatic Envoys

§ 423 Although consuls conduct their correspondence directly with their home Government, they are nevertheless subordinate to the diplomatic envoy of their home Government accredited to the State in which they administer their consular office According to the Municipal Law of almost every State the diplomatic envoy has full authority and control over them He can give instructions and orders, which they have to execute In doubtful cases they have to ask his advice and instructions On the other hand, the diplomatic envoy has to protect the consuls in case they are injured by the local Government.

III

APPOINTMENT OF CONSULS

Hall, § 105—Phillimore, II § 250—Halleck, I pp 398, 399—Moore, V §§ 697-700—Hackworth, IV §§ 424, 425—Hershey, § 285—Hyde, I §§ 461 463—Ullmann, § 58—Bulmerincq in *Holtzendorff*, III pp 702 706—Rivier, I § 41—Nys, II p 457—Calvo, III §§ 1378 1384—Fauchille, §§ 749 752 (4)—Pradier-Fodéré, IV §§ 2056 2067—Fiore, II §§ 1181, 1182—Martens, II § 21—De Louter, II pp 69 71—Stowell, *Le consul*, pp 207 216—*Harvard Research* (1932), pp 226 243

Qualification of Candidates

§ 424 International Law has no rules in regard to the qualifications of an individual whom a State can appoint as consul Many States, however, by their Municipal Law require certain qualifications in professional consuls The question whether female consuls could be appointed cannot be answered in the negative, but, on the other hand, no

[1] See *Foreign Office List*, 1928

State is obliged to grant them the *exequatur*, and many States would at present certainly refuse it [1]

No State obliged to admit Consuls

§ 425 According to International Law a State is not obliged to admit any consuls [2] But the commercial interests of all States are so powerful, that in practice every State must admit consuls of foreign Powers, for a State which refused would in its turn not be allowed to have its own consuls abroad Commercial and consular treaties stipulate, as a rule, that the contracting States shall have the right to appoint consuls in all those parts of each other's country in which consuls of third States are already or may in future be admitted Consequently a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State But as long as a State has not admitted the consul of any State for any particular district, it can refuse to admit the consuls of all Thus, for instance, Russia refused for a long time for political reasons to admit consuls in Warsaw, now capital of Poland

What Kinds of States can appoint Consuls

§ 426 There is no doubt that it is within the competence of every full sovereign State to appoint consuls As regards not-full sovereign States, everything depends upon the special case The British Self-Governing Dominions have the right to appoint and to receive consuls In regard to member-States of a Federal State, it is the constitution of the Federal State which settles the question

Mode of Appointment and of Admittance

§ 427 Consuls are appointed through a patent or commission, the so-called *Lettre de provision*, of the State whose consular office they are intended to administer Vice-consuls are sometimes, and agents-consular are always, appointed by the consul, subject to the approval of the home State Admittance of consuls takes place through the grant of the so-called *exequatur* [3] by the Head of the

[1] See above, § 370 (n), as to female envoys

[2] See *Harvard Research* (1932), pp 241-243 And see the Pan American Convention of 1928 on Consular Agents (above, § 36, n), Articles 1 8

[3] *Exequatur*, which comes from *exsequor*, means 'let him perform,' and was originally the term used to describe a 'temporal sovereign's authorisation of a bishop under Papal authority, or of publication of Papal bulls' (*Concise Oxford Dictionary*) As to the question whether the *exequatur* is the source or merely the evidence of consular authority see *In re Dargie's Estate*, decided in 1941 by the California District Court of Appeal *Annual Digest*, 1941-1942, Case No 116

admitting State [1] The diplomatic envoy of the appointing State hands the patent of the appointed consul to the Secretary for Foreign Affairs for communication to the head of the State, and the *exequatur* is given either in a special document or by means of the word *exequatur* written across the patent

Exequaturs are only granted to consuls appointed to act in a British Dominion after reference by the British Foreign Office to the Government of the Dominion concerned, and upon the counter-signature of a Minister of that Dominion [2]

The *exequatur* can be refused for personal reasons Thus, in 1869 England refused the *exequatur* to an Irishman named Haggerty, who was naturalised in the United States and appointed American consul for Glasgow Similarly the *exequatur* can be withdrawn for personal reasons at any moment Thus, in 1834 France withdrew it from the Prussian consul at Bayonne for having helped in getting supplies of arms into Spain for the Carlists [3]

Appointment of Consuls and Recognition

§ 428 As the appointment of consuls takes place in the interests of commerce, industry, and navigation, and has merely local importance without political consequences, it is maintained [4] that a State does not indirectly recognise a newly created State merely by appointing a consul to a district in it There is much support in the practice of States for that view [5] On the other hand, some weight

[1] In *Foreign Office List* (1928), at p 506, it is stated that 'The King's Exequatur is granted to Foreign Consular Officers holding a Commission signed by the Supreme Sovereign Authority of the State appointing them In other cases a formal recognition is accorded' As to consuls appointed to protected States see above, § 92 (n)

[2] See Summary of Proceedings of the Imperial Conference of 1926 Cmd 2768, p 26

[3] The British Government withdrew the *exequatur* of the consul, and the recognition of the vice-consul, of the United States of America at Newcastle in August 1922, on the ground that they were using their authority to grant *visas* in such a way as to divert traffic from British to American vessels The American Government, after a local investigation, did not concur in the view taken by the British Government of the action of these officers and closed the consulate On April 2 1924, the British Government informed the American ambassador that it was 'prepared not to insist upon the charge' against these officers, and a new consul was appointed, see *A J*, 17 (1923), pp 344 and 546, *ibid*, 18 (1924), p 564

[4] Hall, §§ 26*, 105, Moore, I §§ 30, 72, Hackworth, IV § 427, and *Harvard Research* (1932), pp 238-241.

[5] See *Harvard Research* (1932), *loc. cit*

must be attached to the view that since no consul can exercise his functions before he has handed over his patent to the local State, and has received its *exequatur*, the appointing State thereby enters into such formal intercourse with the admitting State as indirectly [1] involves recognition. In any case it is only if consuls are formally appointed and formally receive the *exequatur* on the part of the receiving State, that indirect recognition has been said to be involved. If, on the other hand, no formal appointment is made, and no formal *exequatur* is asked for and received, foreign individuals may, with the consent of the local State, in fact exercise the functions of consuls without recognition following therefrom Such individuals are not really consuls, although the local State allows them, for political reasons, to exercise consular functions.

IV

FUNCTIONS OF CONSULS

Hall, § 105—Phillimore, II §§ 257 260—Taylor, § 327—Halleck, I pp 408 412—Moore, V §§ 717 731—Hackworth, IV §§ 439 459—Hershey, § 286—Hyde, I §§ 477 488—Ullmann, § 61—Bulmerincq in *Holtzendorff*, III pp 738 753—Rivier, I § 42—Calvo, III §§ 1421-1429—Fauchille, §§ 762-771—Pradier Fodéré, IV §§ 2069 2113—Fiore, II §§ 1184 1186—Martens, II § 23—De Louter, II pp 72-75—Stowell, *Le consul*, pp 15 136—*General Instructions to His Majesty's Consular Officers* (1907)—Bouffanais, *Les consuls en temps de guerres et de troubles* (1933)—Puente, *Traité sur les fonctions internationales des consuls* (1937)—Morelli in *Rivista*, 3rd ser, I (1921-1922) pp 315 341, 507 541—Van de Wetering in *R I* (*Geneva*), 2 (1924), pp 170 188, 363 374—Hrabar in 53 *Clunet* (1926), pp 578-583—Jordan in *Répertoire*, V pp 46 50, 65 185—*Harvard Research* (1932), pp 251 313—Heyking in *Hague Recueil*, vol 34 (1930) (IV), pp 845-888—Stuart, *ibid*, vol 48 (1934) (II), pp 545 565

On Consular Functions in general

§ 429 Although consuls are appointed chiefly in the interests of commerce, industry, and navigation, they are

[1] See above, § 75*d* The question is discussed in detail by Lauterpacht in *B Y*, 21 (1944), pp 133-136, where the view is expressed that while it is controversial whether a *request* for an *exequatur* implies recognition, such scant practice as exists on the subject suggests that the *issue* of an *exequatur* implies recognition as a State or Government

also charged with various functions for other purposes [1] Custom, commercial and consular treaties, Municipal Laws, and Municipal Consular Instructions prescribe detailed rules in regard to these functions [2] They may be grouped under the heads of promotion of commerce and industry, supervision of navigation, protection, notarial functions

Promotion of Commerce and Industry

§ 430 As consuls are appointed in the interests of commerce and industry, they must be allowed by the receiving State to watch over the execution of the commercial treaties of their home State, to send reports to the latter in regard to everything which can influence the development of its commerce and industry, and to give information to merchants and manufacturers of the appointing State necessary for the protection of their commercial interests

Supervision of Navigation

§ 431 Another task of consuls consists in supervising the navigation of the appointing State A consul at a port must be allowed to keep his eye on all merchantmen sailing under the flag of his home State which enter the port, to control and legalise their ship's papers, to inspect them on their arrival and departure, and to settle disputes between the master and crew or the passengers He assists sailors in distress, undertakes the sending home of shipwrecked crews and passengers,[3] and attests marine protests and surveys It is neither necessary, nor possible, to enumerate all the duties and powers of consuls in regard to supervision of navigation It should, however, be added that consuls must, upon the request of the commander, assist in every possible way any public vessel [4] of their home

[1] As to the position and functions of the 'commercial representatives' of Soviet Russia in foreign countries see Mirkine-Guetzévitch in *R G*, 33 (1926), pp 372 386 On some special functions of consuls in time of war see Bouffanais, *op cit*, Rousseau in *R G*, 40 (1933), pp 506-519 In February and March 1932, the Council of the League invited the consular officers of some members of the League at Shanghai to investigate and report on the hostilities between Japanese and Chinese troops see *Off J*, March 1932

[2] For a clear statement that while consular privileges are appropriate subjects of treaties it does not follow that every act of a consul must be based upon a specific provision of a treaty see *Blackmer* v *The United States of America*, 284 U S 421, *A J*, 26 (1932), p 611, at p 615

[3] As to the position of a consul who assists his fellow-nationals to return to their home State upon the outbreak of war between that State and the State to which he is appointed see *R* v *Ahlers* [1915] 1 K B 616, and below, vol II § 100, p 248, n 2

[4] See Lenain, *Rapports des consuls et de la marine de guerre* (1932)

State which enters their port, but they have no power of supervision over them

§ 432 In exercising the protection which they must be allowed by the receiving State to provide for subjects of the appointing State, consuls fulfil a very important task For that purpose they keep a register, in which these subjects can have their names and addresses recorded Consuls make out passports, and they have to render certain assistance and help to paupers and the sick, and to litigants before the courts If a foreign subject is wronged by the local authorities, his consul has to give him advice and help, and has eventually to interfere on his behalf If a foreigner dies, his consul may be approached for securing his property, and for rendering all kind of assistance and help to the family of the deceased Protection

As a rule, a consul exercises protective functions over subjects of the appointing State only, but the latter may charge him with the protection of subjects of other States which have not nominated a consul for his district

§ 433 Very important are the notarial and similar functions with which consuls are charged They attest and legalise signatures, examine witnesses and administer oaths for the purpose of procuring evidence for the courts and other authorities of the appointing State They conclude or register marriages [1] of the subjects of the State which they represent, take charge of their wills, legalise their adoptions, register their births and deaths They provide authorised translations for local and for home authorities, and furnish attestations of many kinds All consular functions of this kind are enumerated in detail by Municipal Laws and Consular Instructions But it should be specially observed that whereas promotion of commerce, supervision of navigation, and protection are functions the exercise of which must, according to a customary rule of International Law, be permitted to consuls by receiving States, many of their notarial functions need not be, in the absence of treaty stipulations Notarial Functions.

[1] See Clunet in 48 *Clunet* (1921), pp 813-824 See also Ketkitch, *Les mariages diplomatiques ou consulaires* (1931) As to functions of consuls in the matter of social insurance see Métall in *R G*, 45 (1938), pp 241 246

V

POSITION AND PRIVILEGES OF CONSULS

Hall, § 105—Phillimore, II §§ 261 271—Halleck, I pp 399 408—Taylor, §§ 326 333—Moore, V §§ 702 716—Hackworth, IV §§ 428 438—Hershey, §§ 287 289—Hyde, I §§ 464 476—Ullmann, §§ 60, 62—Bulmerincq in *Holtzendorff*, III pp 710-720—Rivier, I § 42—Calvo, III §§ 1385 1420—Fauchille, §§ 753 761—Pradier Fodéré, IV §§ 2114 2121—Fiore, II § 1183—Martens, II § 22—De Louter, II pp 75 79—Travers, II §§ 793 835—Bodin, *Les immunités consulaires* (1899)—Stowell, *Le consul*, pp 137 184—Ludwig, *Consular Treaty Rights* (1914)—Stewart, *Consular Privileges and Immunities* (1926), and *American Diplomatic and Consular Practice* (1936), pp 428 446—Report for League Codification Committee by Guerrero and Mastny in *A J*, 22 (1928), Special Suppl, pp 105-110, and comment by Brown in *A J*, 22 (1928), pp 135, 136—Heyking in *J C L*, New Ser, 13 (1913), pp 574 581—Lederle in *Z I*, 27 (1918), pp 154 176—Jordan in *Répertoire*, V pp 50 65—*Harvard Research* (1932), pp 313 359—Puente in *Columbia Law Review*, 30 (1930), pp 281-307 (as to Latin America)—Heyking in *Hague Recueil*, vol 34 (1930) (IV), pp 845 867—Beckett in *B Y*, 21 (1944), pp 34-50

Position

§ 434 Consuls do not enjoy the position of diplomatic envoys, since no State in practice grants to foreign consuls the privileges of diplomatic agents [1] On the other hand, it would be incorrect to maintain that their position is in no way different from that of any other individual living within the consular district Since they are appointed by foreign States, and have received the *exequatur*, they are publicly recognised by the admitting State as agents of the appointing State Of course, consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks, and for local purposes only. Yet they bear a recognised public character, in contradistinction to mere private individuals, and, consequently, their position is different, even though legally they may not be entitled to claim special privileges of any kind This is certainly the case with regard to professional consuls, who are officials of their home State, and are specially sent to the foreign State for the purpose of administering the consular office [2]

[1] *Barbuit's Case* (1737) Cas t Talbot, 281, Phillimore, II § 265, *Viveash* v *Becker* (1814) 3 M and S 284, *United States* v *Ravara* (1794) 2 Dall 299, *In re Baiz* (1890) 135 U S 403, *United States* v *Trumbull* (1891) 48 Fed 94

[2] For the position of a 'consular secretary' who had been transferred to the embassy from the consulate on its being closed see *Musmann* v *Engelke* [1928] 1 K B 90, [1928] A C 433, and above, § 401, p 724, n 1

But in regard to non-professional consuls it must likewise be maintained that the admitting State by granting the *exequatur* recognises their official position towards itself, and this demands at least a special protection [1] for their persons and residences The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the *local authorities* only If they want to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate

Consular Privileges

§ 435 From the undoubted official position of consuls no universally recognised privileges of importance have as yet been evolved Apart from the special protection due to consuls according to International Law, there is neither a custom nor a universal agreement between the Powers to grant them ordinary diplomatic privileges Such privileges of a diplomatic character as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations in a commercial or consular treaty between the sending and the admitting State However, consuls do in fact enjoy the jurisdictional immunities granted to diplomatic representatives inasmuch as, according to the generally accepted practice, they are not liable in civil and, perhaps, in criminal proceedings [2] in respect of acts which they perform in their official capacity on behalf of their States and which fall within the scope of consular functions as recognised by International Law [3] In view of

[1] As to trade with the enemy see below, vol II § 90

[2] See *R* v *Ahlers* [1915] 1 K B 616, where the Court of Appeal quashed the conviction of a German consul on a charge of treason for assisting German nationals of military age to return to Germany at the beginning of the war However, the decision is not conclusive as it was based on the absence of *mens rea*

[3] For a lucid exposition of the practice of Governments and of Courts, as well as of the opinions of writers, see Beckett in *B Y*, 21 (1944), pp 34 50 The basis of consular immunity in accordance with the rule stated in the text above is not the same as that underlying immunities of diplomatic representatives Unlike the latter, consuls do not enjoy immunity in respect of acts of a private law nature The immunity of consuls constitutes, upon analysis, one aspect of the jurisdictional immunity of States on whose behalf they act The same applies to the immunity of government property administered by consuls see *Auer* v *Costa, Annual Digest*, 1938-1940, Case No 174

this the time may be ripe for a general international convention with regard to the position and privileges of consuls [1] Meanwhile, it is of interest to notice some of the more important stipulations to be found in treaties between States in regard to consular privileges :

(1) A distinction is very often made between professional and non-professional consuls, more privileges being accorded to the former

(2) Although consuls are not exempt from the local civil and criminal jurisdiction, criminal jurisdiction over professional consuls is often limited to crimes of a more serious character

(3) In many treaties it is stipulated that consular archives shall be inviolable from search or seizure These treaties are declaratory of what may be regarded as a rule of International Law recognised by most States, including Great Britain [2] Consuls are therefore obliged to keep their official documents and correspondence separate from their private papers [3]

(4) Inviolability of the consular buildings is also sometimes stipulated, so that no officer of the local police, courts,

[1] The Institute of International Law at its meeting at Venice in 1896 adopted a 'Règlement sur les Immunités consulaires' comprising twenty one articles (*Annuaire*, 15, p 304) For a summary of American treaty provisions relating to the privileges and immunities of consuls see Stewart in *A J*, 20 (1926), pp 81-102, and *ibid*, 21 (1927), pp 257-267 See also above, § 36, n And see Articles 14 22 of the Pan American Convention of 1928 on Consular Agents (see above, § 36, n) The French Court of Cassation held in 1928, in the case of *Princess Zizianoff* v *Kahn and Bigelow*, that a United States consular officer was not immune from French jurisdiction in respect of a libel committed by giving information as to his reasons for refusing a visa to the plaintiff *Annual Digest*, 1927 1928, Case No 266 See also the decision of the Italian Court of Cassation in *In re Vuhotitch*, *Annual Digest*, 1933-1934, Case No 171, where the Court restored the conviction of the Yugoslav Consul General in Genoa who ran into and fatally injured a pedestrian

[2] It is occasionally stated by writers that the British practice in the matter constitutes an exception to the general rule See *e g* Fauchille, I (Part 3), § 760, Guerrero in *Dictionnaire Diplomatique*, vol 1 p 555, Morton, *Les privilèges et les immunités diplomatiques* (1927), p 114 There seems to be no substance in this view See Beckett, *op cit*, pp 37, 38

[3] See *Telkes* v *Hungarian National Museum* [No 1] where the Court, relying on a corresponding provision of the Treaty, held that a consul, acting as garnishee, was not entitled to refuse disclosure of property of third parties on consular premises In this case the Swedish Consul acted on behalf of Hungarian interests in the United States after the outbreak of war with Hungary *Annual Digest*, 1941-1942, Case No 389

etc , can enter these buildings without special permission from the consul But it is the duty of consuls to surrender criminals who have taken refuge in these buildings

(5) Professional consuls are often exempt from all kinds of rates and taxes, from the liability to have soldiers quartered in their houses, and from the duty of appearing in person as witnesses before the courts In the latter case consuls have either to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the consulate

(6) Consuls of all kinds have the right to put up the arms of the appointing State over the door of the consular building, and to hoist the national flag.

VI

TERMINATION OF CONSULAR OFFICE

Hall, § 105—Moore, v § 701—Hackworth, iv § 426—Hershey, § 290—Ullmann, § 59—Bulmerincq in *Holtzendorff*, iii p 708—Rivier, i pp 533, 534—Calvo, iii §§ 1382, 1383, 1450—Fauchille, § 775—Fiore, ii § 1187—Martens, ii § 21—De Louter, ii 79 81—Stowell, *Le consul*, pp 217 222—*Harvard Research* (1932), pp 247 251

Undoubted Causes of Termination

§ 436 Death of the consul, withdrawl of the *exequatur*,[1] recall or dismissal, and, lastly, war between the appointing and the admitting State, are universally recognised causes of the termination of the consular office When a consul dies, or war breaks out, the consular archives must not be touched by the local authorities They remain either under the care of an *employé* of the consulate, or under the charge of a consul of another State, until the successor of the deceased consul arrives, or peace is concluded

Doubtful Causes of Termination.

§ 437. It is not certain in practice whether the office of a consul terminates when his district, through cession, annexation following conquest, or revolt, becomes the property of another State The question ought to be answered in the affirmative, because the *exequatur* given to him originates from a Government which no longer possesses the territory In 1836, Belgium, which was then not yet

[1] See above, § 427

CHAPTER IV

MISCELLANEOUS AGENCIES

I

ARMED FORCES ON FOREIGN TERRITORY

Hall, §§ 54, 56, 103—Lawrence, § 107—Phillimore, I § 341—Taylor, § 131—Twiss, I § 165—Wheaton, § 99—Moore, II § 251—Hackworth, II § 171—Hyde, I §§ 247 249—Westlake, I p 265—Stoerk in *Holtzendorff*, II pp 664-666—Rivier, I pp 333 335—Calvo, III § 1560—Fiore, I. §§ 528, 529—Praag, §§ 245-250—Hatschek, pp 113-118—Travers, II §§ 879, 956-974—Frisch, *Der volkerrechtliche Begriff der Exterritorialitat* (1917), pp 44-47—Strisower in *Hague Recueil*, 1923, pp 270-273—Heyking, *Exterritorialité* (1926), pp 68, 69—Llewellyn Jones in *Grotius Society* (1923), 9, pp 149-162—Schwelb in *A J*, 38 (1944), pp 50-73—Fairman and King, *ibid*, pp 258-277—King, *ibid.*, 40 (1946), pp 257 279

Armed Forces State Organs

§ 443. Armed forces are organs of the State which maintains them, because they are created for the purpose of maintaining the independence, authority, and safety of the State. And in this respect it matters not whether armed forces are at home or abroad, for they are organs of their home State, even when on foreign territory, provided only that they are there in the service of their State, and not for their own purposes For if a body of armed soldiers enters foreign territory without orders from, or without being otherwise in the service of, its State, but on its own account, be it for pleasure or for the purpose of committing acts of violence, it is no longer an organ of its State

Occasions for Armed Forces Abroad.

§ 444 Besides war, there are several occasions for armed forces to be on foreign territory in the service of their home State[1] Thus, a State may have a right to keep troops in a foreign fortress, or to send troops through foreign territory Thus, further, a State which has been victorious in war with another may, after the conclusion of peace, occupy

[1] See Robin, *Des occupations militaires en dehors des occupations de guerre* (1913), pp 641-651 And see Chalufour, *Le statut juridique des troupes alliées pendant la Guerre 1914-1918* (1927)

a part of the territory of its former opponent as a guarantee for the execution of the treaty of peace. After the Franco-Prussian War, for example, the Germans in 1871 occupied a part of the territory of France until the final instalments of the indemnity for the war costs of five milliards of francs were paid. Or again, under Articles 428 to 432 of the Treaty of Peace with Germany of 1919, the German territory west of the Rhine and the Rhine bridgeheads were to be occupied by Allied and Associated troops as a guarantee for the execution of the Treaty [1] It may also be a case of necessity for the armed forces of a State to enter foreign territory and commit acts of violence there, as the British did in the case of the *Caroline* [2]

Position of Armed Forces Abroad

§ 445 Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State [3] This

[1] This occupation was regulated by a Treaty of June 28, 1919, between Great Britain, France, Belgium, and Germany British Treaty Series, No 7 (1919), note Article 3 (*d*) which subjects the allied troops exclusively 'to the military law and jurisdiction of such forces' On the evacuation of these territories in 1929 see Toynbee, *Survey*, 1929, pp 167-188, *Documents*, 1928, pp 33 50, and 1929, p 7 See also below, vol II § 277 (n 2), and Heyland in *Strupp, Wort*, II pp 371-378

[2] See above, § 133, and below, § 446

[3] This is the opinion of the vast majority of writers on International Law There are, however, still a few dissenting authorities, such as Bar, *Lehrbuch des internationalen Privat und Strafrechts* (1892), p 351, and Rivier, I p 333 See Hyde, I §§ 248, 249 For a recent instance of the principle see a judgment of the Supreme Court of Panama in *Republic of Panama* v *Schwartzfiger* (1925) in *A J*, 21 (1927), pp 182-187, *Annual Digest*, 1927 1928, Case No 114 For an application of the same principle to the case of an assault committed by an Italian sergeant on a British corporal, both members of the force sent to the Saar in 1935 to supervise the holding of the plebiscite, see the judgment of the military court of Rome given in 1935 *In re Polimeni, Foro*, 1935, II, 381 And see the *Visiting Forces (British Commonwealth) Act*, 1933 (23 & 24 Geo 5, c 6), which provides that a visiting force from a Dominion shall, when in the United Kingdom or a colony, a protectorate, or British mandated territory, be governed by its own military law and administration The provisions of that Act were, by the Allied Forces Act, 1940, made applicable to the military forces of any Allied Power present in the United Kingdom By § 1 of the latter Act the military courts and authorities of Allied Powers were authorised to exercise, within the United Kingdom in relation to the members of their armed forces in matters concerning discipline, the jurisdiction conferred upon them by the law of those

rule, however, applies only in case the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty, it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them [1] When in 1942 Great Britain conferred upon the military tribunals of the United States exclusive jurisdiction with regard to offences committed by members of the United States forces stationed in Great Britain, she made a concession going beyond the accepted rule of International Law in the matter [2]

The rule as to the jurisdictional immunity of armed forces does not apply if in time of war a belligerent captures members of the armed forces of the enemy who before their capture committed such violations of the laws and customs of war as are considered to be war crimes A belligerent may try prisoners of war, and punish them, as war criminals [3]

Powers Among the Orders in Council issued under the Act some laid down that § 154 of the Army Act relating to the apprehension of deserters should, in the United Kingdom, apply to deserters from allied forces Similar legislation was enacted in several British Dominions See *In re Amand* (No 1) [1941] 2 K B 239, *In re Amand* (No 2) [1942] 1 K B 445, *Allied Forces* (*Czechoslovakia*) *Case*, decided by the Czechoslovak Military Court of Appeal in London *Annual Digest*, 1941-1942, Case No 31 See also *Re de Bruijn* (as to Canada), *ibid*, Case No 29, and *Haak and Others* v *Minister of External Affairs* (as to South Africa), *ibid*, Case No 80 And see Schwelb in *Czechoslovak Year Book of International Law, 1942*, pp 174 171, Hartmann in *Modern Law Review*, 5 (1941 1942), pp 256-261, Kuratowski in *Grotius Society*, 28 (1942), pp 1 26, Oppenheimer in *A J*, 36 (1942), pp 589 594, Jessup, *ibid*, pp 653-657, Mann in *L Q R*, 59 (1943), pp 57, 155, *B Y*, 21 (1944), pp 190-194, Táborský, *The Czechoslovak Cause* (1944), pp 102-133 And see above, § 144*a* See also the Convention between Great Britain and Egypt of August 26, 1936, concerning the Privileges and Immunities of the British Forces in Egypt Treaty Series, No 6 (1937), Cmd 5360, p 23 And see Brinton in *A J*, 38 (1944), pp 375 382 See also Annex to Article 6 of the Anglo-Ethiopian Agreement of December 19, 1944 The Annex regulates the status of the British Military Mission in Ethiopia (Cmd 6584) And see the Treaty between Great Britain and Belgium of March 11, 1946, regarding the privileges and facilities for British forces in Belgium in connection with the occupation of Germany and Austria Cmd 6790

[1] See *Malero Manuel* v *Ministère Public*, decided in 1943 by the Court of Cassation of the Mixed Courts in Egypt *A J*, 39 (1945), p 349

[2] See above, § 144*a*

[3] See below, vol II § 251 When, during the First World War, the French tried by court-martial, and punished, German prisoners of war who had pillaged before their capture,

Case of *McLeod*

§ 446. An excellent example of the position of armed forces abroad is furnished by the case of *McLeod*,[1] which occurred in 1840 Alexander McLeod, who was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the *Caroline*, a boat equipped for crossing into Canadian territory, and taking help to the Canadian insurgents, came in 1840 on business to the State of New York, and was there arrested and indicted for the killing of one Amos Durfee, a citizen of the United States, on the occasion of the capture of the *Caroline* The British ambassador at Washington demanded the release of McLeod, on the ground that he was, at the time of the alleged crime, a member of a British armed force sent into the territory of the United States by the Canadian Government acting in a case of necessity McLeod was not released, but had to stand his trial in 1840, when he was acquitted on proof of an *alibi* However, in the reply of Mr Webster, the Secretary for Foreign Affairs of the United States, to a note from the British ambassador occurs the following passage 'The Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not . . to be holden personally responsible in the ordinary tribunals for their participation in it'[2]

some German writers—see Strupp in *Z I*, 25 (1915), p 359—asserted that since armed forces abroad remain under the exclusive jurisdiction of their home State, the French had no right to punish captured German soldiers for war crimes But this assertion is quite unfounded, since the very definition of war crimes as such acts of soldiers or other individuals *as may be punished by the enemy on capture of the offenders* —see below, vol II § 251—involves the right of a belligerent to punish prisoners of war for having previously violated the laws and customs of war See, however, Finch in *A J*, 14 (1920), pp 218 223, as to the attitude of American courts

[1] See Wharton, I § 21, Moore, II § 179, and Hyde, I §§ 66, 248, who points out that Mr Webster denied the justification of the expedition, while admitting the immunity of McLeod from American tribunals

[2] § 446*a* *The Casa Blanca Incident* As to the interesting case of the Casa Blanca incident, decided by the Hague Court of Arbitration on May 22, 1909, see Martens, *N R G*, 3rd ser, II p 19, an English translation of the award is printed in *A J*, 3 (1909), p 755, and in Wilson, *Hague Arbitration Cases* (1915), pp 86-101 And see *A J*, 3 (1909), pp 698-701, and Travers, II § 354

II

STATE SHIPS IN FOREIGN WATERS

Hall, §§ 54, 55—Lawrence, § 107—Phillimore, II §§ 344 350—Westlake, pp 266 269—Taylor, § 261—Moore, II §§ 252 256—Hackworth, II §§ 172, 173—Hyde, I §§ 250 257—Twiss, I § 165—Stephen, *History of the Criminal Law of England* (1883), II pp 43 58—Wheaton, § 100—Bluntschli, § 321—Stoerk in *Holtzendorff*, II pp 434 446—Perels, §§ 11, 14, 15—Heilborn, *System*, pp 248 278—Rivier, I pp 333 335—Fauchille, §§ 614 623 (9)—Mérignhac, II pp 554 565—Calvo, III §§ 1550 1559—Fiore, I §§ 547-550—Testa, p 86—Praag, §§ 251 259—Hatschek, pp 118 221—Travers, II §§ 921-943—Matsunami, *Immunity of State Ships* (1924)—Meurer, *Das Gastrecht der Schiffe im Krieg und Frieden* (1918)—Frisch, *Der völkerrechtliche Begriff der Exterritorialität* (1917), pp 54 62—Feine, *Die volkerrechtliche Stellung der Staatsschiffe* (1921)—Boger, *Die Immunität der Staatsschiffe* (1928)—Schroder, *Der Kriegsschiffskommandant* (1933)—Klein, *Staatsschiffe und Staatsluftfahrzeuge im Volkerrecht* (1934)—Strisower in *Hague Recueil*, 1923, pp 273 283—Jordan, *R I*, 2nd ser, 10 (1908), p 343—Keith's Wheaton, pp 231 241—Higgins and Colombos, §§ 213 242—Gidel, II pp 253 315—Baldoni in *Hague Recueil*, vol 65 (1938) (III), pp 189 302 For literature upon State Ships other than Men of war see below, § 451*a*

Men of-war State Organs

§ 447 Men-of-war are State organs just as armed forces are, a man-of-war being in fact a part of the armed forces of a State [1] And respecting their character as State organs, it matters not whether men-of-war are at home, or in foreign territorial waters, or on the high seas But it must be emphasised that men-of-war are State organs only so long as they are manned, and under the command of a responsible officer, and, further, so long as they are in the service of a State. A shipwrecked man-of-war, abandoned by her crew, is no longer a State organ, nor does a man-of-war in revolt against her State, and sailing for her own purposes, retain her character as an organ of a State On the other hand, public vessels in the service of the police and the customs of a State, private vessels chartered by a State for the transport of troops and war materials [2], and vessels carrying a Head of a State and his suite exclusively,

[1] Military aircraft in principle would seem to be in the same position as men of war when lawfully on or over the territory and territorial waters of a foreign State, as between signatories of the Convention of 1919 for the Regulation of Aerial Navigation see above, § 197*c* (*e*)

[2] See below, § 451*a*

are also considered to be State organs,[1] and are, consequently, in every point treated as though they were men-of-war

Proof of Character as Men-of-war

§ 448 The character of a man-of-war, or of any other vessel treated as a man-of-war, is, in the first instance, proved by its outward appearance, a vessel of this kind flies the war flag and the pennant of its State.[2] If, nevertheless, the character of the vessel seems doubtful, her commission, duly signed by the authorities of the State which she appears to represent, supplies a complete proof of her character as a man-of-war And it is by no means necessary to prove that the vessel is really the property of the State, the commission being sufficient evidence of her character.[3] Vessels chartered by a State for the transport of troops, or for the purpose of carrying its Head, are indeed not the property of such State, although they bear, by virtue of their commissions, the same character as men-of-war.[4]

Occasions for Men-of-war Abroad

§ 449 Whereas armed forces in time of peace have no occasion to be abroad except under some special conditions,[5] or in a case of necessity, men-of-war belonging to all maritime States possessing a navy are constantly crossing the high seas in all parts of the world, for all kinds of purposes, and occasions for men-of-war to sail through foreign territorial waters, and to enter foreign ports, necessarily arise No special convention between the flag-State and the littoral State is necessary to enable them to do this. All the territorial waters and ports of civilised States are, as a rule, open to men-of-war as well as to merchantmen of all nations, provided they are not excluded by special inter-

[1] It is questionable how far State ships other than men of war (see below, § 451*a*) should be regarded as State organs in the full sense, see Hatschek, pp 120, 121 And see Gidel, 1 pp 96-102, on the distinction between private and public ships

[2] Attention ought to be drawn here to Convention VII (concerning the conversion of merchant-ships into warships) of the Second Hague Peace Conference of 1907 Although this Convention concerns the time of war only, it is indirectly of importance for the time of peace For its stipulations see vol below, II § 84

[3] *The Schooner Exhange* v. *McFaddon* (1812) 7 Cranch 116, Scott, *Cases*, p 300, in which the judgment of Marshall C J may be regarded as the foundation of the English and American law on the position of State ships

[4] Privateers used to enjoy the same character and exemptions as men of war See also the *Zafiro* case cited above, § 163, p 328, n 1

[5] See above, § 444

national stipulations or special Municipal Laws of the littoral States On the other hand, it must be emphasised that, unless special international stipulations, or special treaties between the flag-State and the littoral State, provide to the contrary in regard to a particular port or to certain territorial waters, a State is, in strict law, always competent to exclude men-of-war from all or certain of its ports, and from those territorial waters which do not serve as highways for international traffic[1] And a State is, further, always competent to impose what conditions it thinks necessary upon men-of-war which it allows to enter its ports, provided these conditions do not deny to men-of-war their universally recognised privileges

Position of Men of-war in Foreign Waters

§ 450 The position of men-of-war[2] in foreign waters is characterised by the fact that they are called 'floating portions of the flag-State' For at the present time there is a customary rule of International Law, universally recognised, that the State owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-State Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters[3] No legal proceedings can be taken against her either for recovery of possession or for damages for collision, or for a salvage reward, or for any other cause.[4] No official of the littoral State is allowed to

[1] The matter is controversial See above, § 188, and Westlake, 1 p 196, in contradistinction to Hall, § 42

[2] As to merchantmen see above, § 189, and below, § 451*a*

[3] But see *Chung Chi Cheung* v *The King* [1939] A C 160, in which the Judicial Committee of the Privy Council rejected the fiction of 'exterritoriality' implied in the statement in the text above and expressed its preference for the statement in Brierly, *The Law of Nations* (1st ed, 1928), p 110

[4] This rule became universally recognised during the nineteenth century only Upon the former doctrines held in England and in the United States of America see Hall, § 54, and Lawrence, § 107 See *The Schooner Exchange* v *McFaddon*, *supra*, *The Constitution* (1879) 4 P D 39 Nor of course will a writ of *habeas corpus* issued by the local court run upon a foreign man-of war, or upon a prize lawfully brought into a neutral port *The Sitka* (1855), Scott, *Cases*, p 309, Opinion of Attorney General of United States of America Nor, in the English jurisdiction, would a maritime lien attach (for instance, for damage by collision or for a salvage reward) so as to be enforceable in the event of the vessel being transferred into private ownership *The Tervaete*, [1922] P 259 (a public collier) For an application by the Swedish Supreme

board the vessel without special permission of the commander Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities. Individuals who are subjects of the littoral State and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be punished there, if they commit a crime on board Even individuals who do not belong to the crew, and who, after having committed a crime on the territory of the littoral State, have taken refuge on board, cannot be forcibly taken off the vessel [1], if the commander refuses their surrender, it can be obtained only by diplomatic means from his home State [2]

On the other hand, men-of-war cannot do what they like in foreign waters They are expected to comply voluntarily with the laws of the littoral States with regard to order in the ports, the places for casting anchor, sanitation and quarantine, customs, and the like A man-of-war which

Court of the principle of immunity with regard to a Norwegian vessel requisitioned in 1940 by the Norwegian Government and handed over to the British Government for use for war purposes see *The Rigmor*, *Annual Digest*, 1941 1942, Case No 63

[1] See *Ex parte Sulman*, where the Supreme Court of South Africa declined to issue an order with regard to a Dutch subject placed on a Dutch vessel in South African national waters *Annual Digest*, 1941 1942, Case No 64 As in other cases of jurisdictional immunity, the privilege may be waived by the State in question English courts have, in general, shown reluctance to assume waiver of immunity See, *e g*, *Duff Development Co* v *Government of Kelantan* [1924] A C 797, *In re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch 139 On the other hand, in *Chung Chi Cheung* v *The King* [1939] A C 160, the Judicial Committee of the Privy Council held that English courts have jurisdiction in respect of a crime committed on board a Chinese customs cruiser on the ground, *inter alia*, that the competent Chinese authorities, subsequent to the failure of their original request for extradition, failed to take the proper steps for securing the surrender of the accused and also that they permitted members of the crew to give evidence before the British Court in aid of the prosecution

[2] On the question of asylum on foreign men of war generally see Moore, *Asylum in Legations and Consulates and Vessels* (1892), a reprint from the *Political Science Quarterly*, vol vii, Hyde, i § 254, Hackworth, ii § 194, Baldoni in *Hague Recueil*, vol 65 (1938) (iii), pp 285 292, and in *Archivio di diritto pubblico*, 3 (1938), pp 20 57, Keith's Wheaton, pp 247-251, Alcindor in *Répertoire*, ii pp 45-49 (and *ibid*, pp 49 53, on asylum on merchant-vessels) The Convention on Asylum adopted in February 1928 by the Sixth International Conference of American States recognises in principle the right of asylum on warships for political offenders, but not for persons accused or condemned for common crimes, or for deserters from the army or the navy *A J*, 22 (1928), Suppl, p 158

refuses to do so can be expelled, and, if on such or other occasions she commits acts of violence against the officials of the littoral State or against other vessels, steps may be taken against her to prevent further acts of violence But it must be emphasised that, even by committing acts of violence, a man-of-war does not fall under the jurisdiction of the littoral State Only such measures are allowed against her as are necessary to prevent her from further acts of violence [1]

Position of Crew when on Land Abroad

§ 451 Of some importance is the unsettled question respecting the position of the commander and the crew of a man-of-war in a foreign port when they are on land

The majority of writers distinguish between a stay on land in the service of the man-of-war and a stay for other purposes [2] The commander and members of the crew ashore in an official capacity in the service of their vessel, to buy provisions, or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even in respect of crimes committed ashore Although they may, if necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel On the other hand, if they are on land not on official business but for purposes of pleasure and recreation, they are under the territorial supremacy of the littoral State like any other foreigners, and they may be punished for crimes committed ashore

There are, however, a number of writers [3] who do not

[1] See the 'Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers,' adopted by the Institute of International Law, in 1898, of which Articles 8 24 deal with men of-war in foreign waters, *Annuaire*, 17 (1898), pp 275 280

[2] So also Moore, II § 256 And see *Triandafilou* v *Ministère Public*, decided in 1942 by the Court of Cassation of the Mixed Courts in Egypt, *A J*, 39 (1945), p 345

[3] See, for instance, Hall, § 55, Phillimore, I § 346, Testa, p 109 See also Article 18 of the 'Règlement' referred to above in § 450, n 1 Occasionally, as a matter of international courtesy, the authorities of the littoral State surrender to the foreign State a member of the crew who commits a crime while ashore, for an instance of an American seaman, a member of the crew of a destroyer, whom Great Britain, after a verdict against him, by a coroner's jury, of the 'wilful murder' of a fellow seaman, agreed as a matter of courtesy to leave to the United States naval authorities to deal with, see Home Office statement in London *Times* newspaper, September 4, 1926 it is not clear whether he was in the hands of the British police or not As to the surrender of deserters from foreign merchantmen and men-of-war see Gidel, II pp 369 384

make this distinction, and maintain that commanders, or members of the crew, whilst ashore, are in every case under the local jurisdiction.

State Ships other than Men of war

§ 451*a* The increasing practice of Governments of owning or controlling merchant-ships, either for purposes connected with public services such as the carriage of the mails or the management of railways, or frankly for the purpose of trade, has led to an ever-increasing extension of the immunities which, we have seen, are enjoyed by men-of-war [1] The practice of the courts of different States in this matter is far from being uniform, and we shall only refer to the British practice [2] As the result of a series of decisions, of which *The Parlement Belge* (a Belgian public mail-ship) [3] in 1880 may fairly be regarded as the starting-point, the movement in favour of immunity, greatly accelerated by the widespread practice of States during the First World War, has now reached this position (*a*) a British court of law will not exercise jurisdiction over a ship *which is the property of a foreign State*, whether she is actually engaged in the public service or is being used in the ordinary way of a shipowner's business, as, for instance, being let out under a charter-party, nor can any maritime lien attach, even in suspense, to such a ship so as to be enforceable against it if and when it is transferred into private ownership [4]

(*b*) Ships *which are not the property of a foreign State*, but are chartered or requisitioned by it or otherwise in its

[1] See Matsunami, *op cit*, Nielsen in *A J*, 13 (1919), pp 12 21, Walton in *J C L*, 3rd ser, 2 (1920), pp 252-258, Bisschop in *B Y*, 1922 1923, pp 159 166, Garner in *B Y*, 1925, pp 128 143, Gidel, ii pp 316 368 As to the Brussels Convention of 1926 see below, p 769, n 1

[2] See McNair in *B Y*, 1921 1922, pp 67 74, but the conclusions submitted on p 74 are modified by the text of this section

[3] (1880) 5 P D 197, see also *The Jassy* [1906] P 270, *The Esposende*, (1918) *Lloyd's List Newspaper Reports*, February 18 and 25, *The Porto Alexandre* [1920] P 30 (a Portuguese Government ship 'employed in ordinary trading voyages earning freight for the Government'), *Compania Mercantil Argentina* v *United States Shipping Board* (1924) 40 T L R 601, unless the foreign State voluntarily submits to the jurisdiction, as the United States of America frequently did Upon the conclusiveness of the statement of a foreign Government that the ship belongs to the State see *The Schooner Exchange* v *McFaddon*, *supra*, *The Porto Alexandre*, *supra*, and *The Jupiter* [1924] P 236

[4] *The Tervaete* [1922] P 259

possession and control, may not be arrested by process of the Admiralty Court while subject to such possession and control,[1] nor (it need hardly be stated) will any action lie against the foreign State, nor can any maritime lien attach, to the ship in respect of damage done by her or salvage services rendered to her while she was subject to such possession and control [2], but when the governmental possession and control cease to operate and she is re-delivered to her owner, an action *in personam* will lie against him in respect of salvage services rendered to her while in governmental possession and control, when he has derived a benefit from those services [3]

While Great Britain and the United States still adhere to the practice of not withholding jurisdictional immunities from State-owned ships engaged in commerce,[4] a number of States have now ratified the Brussels Convention of 1926

[1] *The Messicano* (1916) 32 T L R 519, *The Erissos* (1917) *Lloyd's List Newspaper Reports*, October 23, *The Koursk* (1918) *ibid*, June 19, *The Eolo* [1918] 2 *Irish Reports*, 78, *The Crimdon* (1918) 35 T L R 81 It is important to note the distinction made in most of these cases between a writ of summons instituting an action *in rem*, and a warrant of arrest the writ *in rem* is free from objection, it is the arrest that must be prevented by the Court When a ship chartered or requisitioned by a Government is merely being employed in ordinary trading voyages, it has been suggested (by Hill J, *obiter* in *The Annette* [1919] P, at p 111) that she enjoys no immunity

[2] *The Sylvan Arrow* [1923] P 220

[3] *The Meandros* [1925] P 61 Upon the domestic question of the remedies of a British subject against a ship requisitioned by the British Government see *The Broadmayne* [1916] P 64, and against a ship owned by a British Dominion, *The Scotia* [1903] A C 501 The attitude of American courts has not been uniform, but in 1926 the Supreme Court of the United States in *Berizzi Brothers Co* v *The Steamship Pesaro* (*A J*, 20 (1926), pp 811 815, *Annual Digest*, 1925 1926, Case No 135) extended the doctrine of *The Schooner Exchange* v *McFaddon*, *supra*, and held that 'a ship owned and possessed by a foreign Government and operated by it in the carriage of merchandise for hire is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court', see also Garner in *B Y*, 1925, pp 128 143, and in *A J*, 19 (1925), pp 745 748, *ibid*, 20 (1926), pp 759 767, and *ibid*, 21 (1927), pp 742-747, Dickinson, *ibid*, pp 108-111, and Hyde, 1 § 256 Much authoritative doubt was cast on this case by the Supreme Court in *The Baja California*, *A J*, 39 (1945), p 585 And see Sanborn, *ibid*, pp 794-796 and Kahn, *ibid*, pp 772 775

[4] In *The Cristina* [1938] A C 845, *Annual Digest*, 1938 1940, Case No 86, some members of the House of Lords expressed doubts whether this was in fact a principle accepted by English law and, assuming that it was, whether it was not superseded by the recent developments in State commerce See Lauterpacht in *L Q R*, 54 (1938), pp 339 344, Mann in *Modern Law Review*, 2 (1938-1939), pp 57 62, *Revue de droit maritime comparé*, 38 (1938), pp 156 175

which abolishes that privilege as between the contracting parties [1]

III

AGENTS WITHOUT DIPLOMATIC OR CONSULAR CHARACTER [2]

Hall, §§ 103, 104*—Moore, IV § 623—Hackworth, II § 175, IV §§ 374-376—Bluntschli, §§ 241 243—Ullmann, §§ 66, 67—Heffter, § 222—Rivier, I § 44—Calvo, III §§ 1337-1339—Fiore, II §§ 1188 1191—Martens, II § 5—Adler, *Die Spionage* (1906), pp 63 92—Routier, *L'espionnage et la trahison en temps de paix et en temps de guerre* (1915)—Heyking, *L'exterritorialité* (1926), pp 117-120—Kaufmann, *Die Immunität der Nicht Diplomaten* (1932)—Beauvais, *Attachés Militaires, Attachés Navals et Attachés de l'Air* (1937)—Eagleton in *A J*, 19 (1925), pp 293 314

Agents lacking Diplomatic or Consular Character

§ 452 Besides diplomatic envoys and consuls, States may, and do, send various kinds of agents abroad—namely, public political agents, secret political agents, commercial agents, spies, commissaries, and bearers of despatches The position of these agents varies according to the class to which they belong

Public Political Agents

§ 453 Public political agents are agents sent by one Power to another for political negotiations of different kinds They may be sent for an unlimited time, or for a limited time only As they are not invested with diplomatic character, they do not receive a letter of credence, but only a

[1] After long preparatory work by the International Maritime Committee (which is unofficial but representative of shipping and other interests), culminating in the Gothenburg Conference of 1923, and the Genoa Conference of 1925, a Convention was signed at Brussels on April 10, 1926, which embodies the general principle that ships (with their cargoes) operated or owned by Governments for commercial purposes shall in time of peace be subject to ordinary maritime law and shall not enjoy the immunities described above This Convention, which is printed in Hudson, *Legislation*, III p 1837, and *L N T S*, No 4062, has been ratified by a small number of States Great Britain signed, but has not ratified, the Convention See Franck in *L Q R*, 42 (1926), pp 308 312, Slooten in *R I*, 3rd ser, 7 (1926), pp 453 484, *Bulletin of the International Maritime Committee*, No 74 (1926), Report by de Magalhaes and Brierly for League Codification Committee in *A J*, 20 (1926), Special Suppl, pp 260-278, Gidel in *R I*, 3rd ser, 13 (1932), pp 34 70 See also, as to the Brussels Convention, *The Visurgis* and *The Siena* decided in 1938 by the German Supreme Court *Annual Digest*, 1938 1940, Case No 94

[2] The status of non diplomatic persons possessing diplomatic privileges has been discussed above, § 417*a* This section deals with agents, neither diplomatic nor consular, who do not possess diplomatic privileges

letter of recommendation or commission They may be sent not only by one full sovereign State to another, but also by and to insurgents recognised as a belligerent Power, and by and to States under suzerainty Political agents without diplomatic character afford, in fact, the only means for personal political negotiations with such insurgents and with States under suzerainty

As regards the position and privileges of public political agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys [1] But, on the other hand, they have a public character, being admitted as public political agents of a foreign State, and must, therefore, certainly be granted a special protection No distinct rules, however, concerning the special privileges to be granted to such agents seem to have grown up in practice Inviolability of their persons and official papers ought to be granted to them.[2]

Secret Political Agents.

§ 454 Secret political agents may be sent for the same purposes as public political agents But two kinds of secrecy must be distinguished An agent may be secretly sent to another Power with a letter of recommendation, and admitted by that Power Such an agent is secret in so far as third Powers do not know, or are not supposed to know, of his existence As he is admitted by the receiving State, although secretly, his position is essentially the same as that of a public political agent On the other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task Such an agent has no recognised position whatever according to International Law He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State He may be expelled at any moment if he

[1] Contrast, however, Heffter, § 222

[2] Ullmann, § 66, and Rivier, 1 § 44, maintain that they *must* be granted the privilege of inviolability to the same extent as diplomatic envoys As to the status of Mason and Slidell, the political agents of the American Confederate Government, see the *Trent* case below, vol II § 408 (n)

becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime [1]

Commercial Agents.

§ 454a. It sometimes happens, as in recent years, that one State sends to the territory of another agents to represent it in regard to some public service or business carried on by it—for instance, the management of a State railway or a State tobacco industry, or even a Trade Delegation for the purpose of general trading [2] Agents of this kind do not possess diplomatic character or immunities, and are fully subject to the jurisdiction of the State in whose territory they are They only differ from their fellow-nationals in the respect that, being governmental agents, both prudence and international courtesy demand that as far as possible special consideration should be shown by the local authorities to them and to premises occupied by them for official purposes No distinct rules have been developed with regard to their position, and occasionally the matter is dealt with by agreement between the two States [3]

[1] A United States Act of Congress of June 8, 1938 (*A J*, 32 (1938), Suppl, p 207), requires the registration of persons employed by foreign agencies, including foreign Governments, to disseminate propaganda in the United States and for other purposes

[2] Such a person must be distinguished from a commercial *attaché* on the staff of an embassy or legation for the purpose (*inter alia*) of reporting upon the commerce and industry of the receiving State In some cases higher customs officials of a foreign State have been recognised as commercial *attachés* to the diplomatic representative of that foreign State and accorded corresponding diplomatic status For the settlement in 1929 of a controversy which arose in this connection between the United States and France see Stowell in *A J*, 24 (1930), pp 110-118.

[3] For instance, Great Britain and the Union of Soviet Socialist Republics made an agreement on March 16, 1921 (Cmd 1207), regarding the position of official agents of either party in the territory of the other, this agreement conferred exemption from taxation and immunity from arrest and search, but it was held in *Fenton Textile Association* v *Krassin* (1922) 38 T L R 259, that it did not protect a Russian official agent from an action for the price of goods sold and delivered, and did not confer diplomatic privileges and immunities The British Government committed no violation of International Law when in May 1927 a search warrant was executed upon the premises of the Russian Trade Delegation (incidentally to the search of the premises of an English company known as 'Arcos Limited'), for the premises of the Trade Delegation had no diplomatic immunity, either under the agreement of March 16, 1921, or otherwise For a somewhat similar incident between Germany and Russia on May 3, 1924, see Toynbee, *Survey*, 1924, pp 215-217, and Strupp in *Strupp, Wört*, ii pp 560 563 As to the subsequent Anglo-Soviet Temporary Commercial Agreement, 1934 (Cmd 4513), in which the British Government under-

Spies

§ 455. Spies are secret agents of a State sent abroad[1] for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognised position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy

Commissaries.

§ 456 Commissaries and members of commissions are agents sent with a letter of recommendation or commission by one State to another for negotiations, not political, but of a technical or administrative character only, for instance, to make arrangements between the two States as regards railways, post, telegraphs, navigation, delineation of boundary lines, and so on[2] No distinct practice of guaranteeing certain privileges to commissaries has grown up, but inviolability of their persons and official papers ought to

took to ensure diplomatic privileges and immunities to some members of the Soviet Trade Delegation, see McNair in *B Y*, 15 (1934), p 144 On the status of Russian commercial representations abroad see Lieberich, *Die russische Handelsvertretung in Deutschland* (1928), Freund, *Das Aussenhandelsmonopol der Sovjetunion* (1928), and in 61 *Clunet* (1934), pp 5 21, Linker, *Der Umfang der Exterritorialität*, etc (1929), Metzler, *Die auswartige Gewalt der Sovjetunion* (1930), pp 67-74, Stauffenberg, *Die Rechtsstellung der russischen Handelsvertretungen* (1930), Hendler, *Die volkerrechtliche Stellung der Handelsvertretung der U S S R* (1931), Stoupnitzky, *Statut international de l'U.R S S. État Commerçant* (1936) (a comprehensive and valuable work)

[1] Concerning spies in time of war see below, vol II §§ 159 and 210, and Adler, *op cit*, pp 7-62

[2] As to their protection while in foreign countries see the literature arising out of the Corfu affair, cited below, vol II § 52*a* (n), and Eagleton in *A J*, 19 (1925), pp 293 314, and literature cited by him The Report of the Committee of Jurists appointed by the Council of the League after the Corfu affair states that 'the recognised 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' *B Y*, 1924, at p 181 As to the position of the representatives of the occupying Powers see above, § 417*a*

be granted to them, as they are officially sent and received for official purposes Thus Germany, in 1887, in the case of the French officer of police, Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes, and then arrested, recognised the rule that a safe-conduct is tacitly granted to foreign officials when they enter the territory of a State in an official capacity with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government

Bearers of Despatches

§ 457 Individuals commissioned to carry official despatches from a State to its Head or to diplomatic envoys abroad are agents of that State Despatch-bearers who belong to the retinue of diplomatic envoys as couriers must enjoy, as stated above (§ 405), exemption from civil and criminal jurisdiction, a special protection in the State to which the envoy is accredited, and a right of innocent passage through third States But bearers of official despatches who are not in the retinue of the diplomatic envoys employing them must nevertheless be granted inviolability for their persons and official papers, provided they possess special passports stating their official character as despatch-bearers The same applies to bearers of despatches between the Head of a State who is temporarily abroad and his Government at home

IV

INTERNATIONAL ADMINISTRATION, PERMANENT COMMISSIONS, UNIONS, AND OFFICES

Hall, § 104—Moore, iv § 623—Hyde, i § 34—Hershey, pp 92, 93, notes—Mérignhac, ii pp 694-732—Fauchille, §§ 914 928 (22)—Anzilotti, pp 179 182, and in *Rivista*, 8 (1914), pp 156 164—Rivier, i pp 564 566—Nys, ii pp 311 318—Schwarzenberger, pp 445 457—Gareis, §§ 51, 52—Hatschek, pp 264 269—Liszt, § 28—De Louter, i pp 537 576—Suarez, i §§ 215 221—Fenwick, pp 388-393, 302 404—Stowell, pp 698 728—Balladore Pallieri, pp 261 276—Anzilotti, pp 283 332—S Basdevant in *Répertoire*, x pp 704 717—Moynier, *Les bureaux internationaux des unions universelles* (1892)—Descamps, *Les offices internationaux et leur avenir* (1894)—Pounard, *Les unions et ententes internationales* (2nd ed , 1901)—Neumeyer, *Internationales Verwaltungerecht*, i (1910), ii (1922), iii (1927)—

Reinsch, *Public International Unions* (1911)—Sayre, *Experiments in International Administration* (1919)—Hold Ferneck, II pp 136-142—Kunz, *Die Staatenverbindungen* (1929), pp 373-401—Potter, *This World of Nations* (1929), pp 183 199, and in *J C L*, 3rd ser, 17 (1935), pp 260-264—Hill (N L), *International Administration* (1931)—Baldoni, *Le unioni internazionali di Stato* (1931), and in *Rivista*, 23 (1931), pp 352-385, 464 489—Eagleton, *International Government* (1932)—Ruth Masters, *Handbook of International Organisations in the Americas* (1945)—Ranshofen-Wertheimer, *The International Secretariat* (1945)—*Annuaire*, 30 (1923), pp 97-173, 348-381—Kaufmann in *Hague Recueil*, 1924 (II), pp 181-290—Rapisardi Mirabelli, *ibid*, 1925 (II), pp 345-390, and in *Z O*, 7 (1927), pp 11 21—Ruffini in *Hague Recueil*, 1926 (II), pp 471-499—Hudson, *Current International Co operation* (1927), pp 1-29—Butler and Maccoby, *The Development of International Law* (1928), ch XVI—Renault in *R G*, 3 (1896), pp 14-26—Kazansky in *R I*, 29 (1897), pp 238-247—Reinsch in *A J*, 1 (1907), pp 579-623, and *ibid*, 3 (1909), pp 1 45—Neumeyer in *R G*, 18 (1911), pp 492 499, and in *R I* (*Geneva*), 2 (1924), pp 16-40, 139 144, 343-362—Guillois in *R G*, 22 (1915), pp 5 127—Ottolenghi in *Rivista*, 17 (1925), pp 313 357, 461 499—Delisle Burns in *B Y*, 1926, pp 54-72—Gascon y Marin in *Hague Recueil*, vol 34 (1930) (IV), pp 5 72, and vol 41 (1932) (III), pp 725 795 (with special reference to the status of international officials)—Negulesco, *ibid*, vol 51 (1935) (I), pp 583-688—Phelan in *Problems of Peace* (10th ser, 1935), pp 126-138, and in *Foreign Affairs* (*U S A*), 11 (1933), pp 307 314—Ganeff in *Z I*, 52 (1937), pp 36 65—Dendias in *Hague Recueil*, vol 63 (1938) (I), pp 243-358—Friedmann in *Modern Law Review*, 6 (1943), pp 185-208—Schmitthoff in *Grotius Society*, 30 (1944), pp 165-183—Jenks in *B Y*, 22 (1945), pp 11 72—*Iowa Law Review*, 30 (1945), pp 4 *et seq* (A Symposium)—*Handbook of International Organisations* (published by the League of Nations) For literature relating to particular organisations see Appendix A of this volume

Permanent International Commissions, Unions, and Offices.

§§ 458-476, 581-596 [1] International commissions consist of persons delegated by two or more States to carry out functions of international importance A distinction must be made between temporary international commissions which dissolve as soon as their purpose is accomplished,[2] and which are very frequently established, and permanent international commissions Temporary international commissions may be set up for all manner of purposes—inquiry into disputes, delimitation of frontiers, arrangement of all kinds of administrative questions such as railways, telegraphs, navigation, and the like Among temporary

[1] As §§ 458 471*e* and 581-596 of the earlier editions consisted mainly of an enumeration of general conventions and of the permanent commissions, unions, and offices created by them, it is more convenient and more economical of space to enumerate them, together with short particulars and the relevant literature, in tabular form in Appendix A of this volume

[2] The position of their members has been discussed above, § 456.

commissions may be mentioned commissions of inquiry appointed in pursuance of the Hague Conventions of 1899 and 1907,[1] and the many temporary commissions established by the Peace treaties of 1919[2] and in connection with the settlement following upon the Second World War.[3] Permanent international commissions have been instituted by the action of a considerable body of States[4] for a variety of international purposes, economic or social and mainly

[1] See below, vol II § 5

[2] See *e g* the Agreement of June 26, 1945, establishing the Preparatory Commission of the United Nations (Misc No 11 (1945), Cmd 6669), the Declaration of June 5, 1945, on the Unconditional Surrender of Germany, including the Statement on the establishment of a Control Council for Germany with a Co-ordinating Committee composed of the representatives of the four Commanders in-Chief and a Control Staff (Germany No 1 (1945), Cmd 6648), the Interim Agreement of December 7, 1944, on International Civil Aviation establishing the Provisional International Civil Aviation Organisation (see above § 197*eb*)

[3] See, for example, the Treaty of Peace with Germany of 1919, Articles 203 (Inter-Allied Commissions of Control to supervise the Execution of the Military, Naval, and Air Clauses), 215 (Repatriation Commission), 233 (Reparation Commission) There are many others And see Pink, *The Conference of Ambassadors* (*Paris*, 1920-1923) (1942).

[4] There are, however, also many permanent commissions in existence which have been instituted by neighbouring States for local purposes, as for example (1) The American-Canadian International Fisheries Commission, instituted according to Article 1 of the Treaty of Washington of April 11, 1908 (see Treaty Series (1908), No 17), and the similar Commission as the result of the Convention for the Preservation of the Halibut Fishery of March 2, 1923 (2) The American Canadian International Joint Commission concerning boundary waters, instituted by Articles 7 12 of the Treaty of Washington of January 11, 1909, see Treaty Series (1910), No 23, Mackay in *A J*, 22 (1928), pp 292-318, and Chacko, *The International Joint Commission between the United States of America and the Dominion of Canada* (1932) (3) The Permanent Mixed Fisheries Commission between the United States, Canada, and Newfoundland, instituted in consequence of the award of the Hague Court of Arbitration in the *North Atlantic Fisheries* case, see Agreement of July 20, 1912, *Hertslet's Treaties*, 27, p 1095, Article 1 (4) (4) The International Boundary Commission between the United States and Mexico established by the Treaty of March 1, 1889 Its powers were enlarged by the Treaty of February 3, 1944, relating to the 'Utilization of Waters of Certain Rivers' See Timm, *The International Boundary Commission, United States and Mexico* (1941), and Ruth Masters, *Handbook of International Organizations in the Americas* (1945), pp 199-211 (5) Anglo-American Caribbean Commission set up on March 9, 1942, for the purpose of encouraging and strengthening social and economic co operation between the United States of America and its possessions and bases in the Caribbean and Great Britain and British colonies in the same area See *First Report* of the Commission (Washington, 1943), and Ruth Masters, *op cit*, pp 15 22 (6) The South Seas Regional Commission established in 1943 by an agreement between Australia and New Zealand Cmd 6513 (1943), *A J*, 38 (1944), Suppl, pp 193 200 As to the International Commission of the Lighthouse at Cape Spartel, established by the Convention of March 31, 1865, see Stuart in *A J*, 24 (1930), pp 770 776, Marchegiano, *ibid*, 25 (1931) pp 339 347

non-political As regards the privileges to be granted to the members of either temporary or permanent international commissions, as was stated above [1] no distinct practice has grown up If the Treaty by which a commission is constituted does not stipulate anything as regards such privileges, none need be granted, but the persons of the commissioners must be specially protected However that may be, there is no doubt that they cannot, unless this be specially stipulated, claim the privileges of diplomatic envoys [2]

Closely akin to these permanent commissions are the international unions which the growing interdependence of States has brought into existence for the international regulation of mainly non-political common interests As civilisation becomes more complex and communications improve, it is found that the sheer necessity of endeavouring to meet the needs of humanity and to maintain standards of life force international co-operation upon States, whether they like it or not In a great many cases the conventions which have been concluded for these purposes have brought into being international offices The members of the staff of these offices are often granted diplomatic privileges [3]

Appendix A, below,[4] contains an enumeration, with short particulars, of the more important of the general conventions which have been concluded for the mainly non-political international purposes referred to in this paragraph, whether or not those conventions have resulted in the establishment of a union or an office [5]

[1] § 456

[2] Thus, when in 1796 Gore and Pinkney, the American commissioners in London under Article 7 of the Jay Treaty, claimed these privileges, Great Britain refused to concede them See Moore, IV § 623, p 428 For the refusal of Turkey to grant diplomatic immunity to the members of the Straits Commission established under the Treaty of Lausanne of 1923 and the subsequent arrangements promised by Turkey, see *Off J*, 7 (1926), p 957

[3] See above, § 417*a*

[4] See pp 882 897

[5] The juristic character of international offices, such as the International Post Office and the International Telegraph Office, is hard to define Although they are under the jurisdiction of the States on whose territory they are constituted, they are not constituted by them, and their laws are only applicable to such offices in so far as the treaties which called them into existence are silent Since they are constituted by international treaties, Fusinato, *Avis sur les questions touchant la personalité juridique de l'Institut International d'Agriculture* (1914), fitly

characterises them as international juristic persons, although it has been maintained that they are not subjects of any international rights (see Ruffini, *op cit*, and Anzilotti in *Rivista*, 8 (1914), pp 156 164) And see the interesting decision of the Italian Court of Cassation of February 26, 1931, in which it was held that Italian courts had no jurisdiction in actions brought by the officials of the International Institute of Agriculture against the Institute *International Institute of Agriculture* v *Profili*, *Annual Digest*, 1929 1930, Case No 254 The Court distinguished between two kinds of international unions those which are subject to the jurisdiction of municipal courts and those, like the International Institute of Agriculture, which are not The Court held that the Institute was an international juristic person endowed with full autonomy to the exclusion of the substantive or adjective law of the country in which it is situated See *Rivista*, 23 (1931), pp 389 391, *Z o V*, 4 (1934), pp 165 167 (with a bibliography), Piccardi, *L'Istituto Internazionale di Agricoltura e la Giurisdizione dei Tribunali Italiani* (1933) (extract from *Rivista di Diritto Processuale Civile*), 11 (1933), ii p 1 In *Godman* v *Winterton and Others* the English Court of Appeal dismissed an action brought against the defendants as representing the Inter Governmental Committee established by the Conference at Evian in 1938 in connection with the problem of refugees from Germany The Court held that as the defendants were a committee of representatives of sovereign States, the action was one against sovereign States and could not, therefore, be entertained *The Times* newspaper, March 13, 1940 The Diplomatic Privileges (Extension) Act, 1944 (7 & 8 Geo 6, ch 44), Section 1 (2) (*a*), gave the Crown the power to provide that an international organisation shall have the legal capacities of a body corporate See above, § 417*a* (iii) For a suggestion that these provisions were merely declaratory see Jenks in *B Y*, 22 (1945), p 273 The Constitution of the Food and Agriculture Organisation of the United Nations provides that 'The Organisation shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution' (Article 15, Cmd 6590 (1945)) See also, to a like effect, Resolution No 32 of the First Session of the Council of the United Nations Relief and Rehabilitation Administration (1) (2), Cmd 6497 (1943)), Article 9 of the Agreement on the International Monetary Fund (see above, p 291) and Article 7 of the Agreement on the International Bank for Reconstruction and Development (see above, p 291) For other organisations see above, § 417*a* (p 737, n 1) On national subsidies to international organs see Myers in *A J*, 33 (1939), pp 318 331, on 'Some Legal Aspects of the Financing of International Institutions' see Jenks in *Grotius Society*, 28 (1941), pp 87-132 And see below, Appendix A, p 888, for further literature on the Institute The whole question of creating for international unions and other non profit-making international associations an international personality or status is at present receiving attention For the purpose of owning property and enforcing rights, and for general reasons, it is desirable that they should possess legal personality, yet if they are to be content with a legal personality conferred by the laws of any one State in which their office may happen to be located, there is a danger of political subordination to that State and of ceasing to be truly international see Report by Politis and discussion in *Annuaire*, 30 (1923), pp 97-173, 348 381 See also Friedmann in *Modern Law Review*, 6 (1943), pp 203 205 The subject was also on the agenda of the League Codification Committee for 1928 On the personnel of international administration see Basdevant (Suzanne), *Les fonctionnaires internationaux* (1931), Hill (N L) in *American Political Science Review*, 1929, pp 972 988 And see above, § 167*g*, as to the Secretariat of the League As to private organisations see Cromwell White, *The Structure of Private International Organisations* (1933), and Schrag, *Internationale Idealvereine* (1936)

The circumstance that the various

international organisations possess a legal personality of their own is shown in the fact that some of them have concluded agreements with the United Nations defining their mutual relationship in accordance with Article 57 of the Charter of the United Nations (see above, § 168*r*) See the Draft Agreements, approved in 1946 by the Economic and Social Council, with the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organisation, and the Food and Agriculture Organisation of the United Nations *Journal of the Economic and Social Council*, 1946, No 29, pp 486 510

PART IV

INTERNATIONAL TRANSACTIONS

CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I

NEGOTIATION

Heffter, §§ 234 239—Geffcken in *Holtzendorff*, iii pp 668 676—Ullmann, § 71—Fauchille, §§ 792 795 (1)—Pradier Foderé, iii §§ 1354-1362—Rivier, ii § 45—Calvo, iii §§ 1316 1320, 1670 1673—Cruchaga, §§ 519-522—Kaasik in *R I*, 3rd ser, 14 (1933), pp 62 95 And see literature cited below, vol ii § 4.

Conception of Negotiation.

§ 477 International negotiation is the term for such intercourse between two or more States as is initiated, and directed, for the purpose of effecting an understanding between them on matters of interest Since civilised States form a body knit together through their interests, such negotiation is, in some shape or other, constantly going on, and no State of any importance can abstain from it in practice [1]

Parties to Negotiation

§ 478 International negotiations can be conducted by all such States as have a standing within the Family of Nations Full sovereign States are, therefore, the regular subjects of international negotiation But it would be wrong to maintain that States which are not fully sovereign can never be parties to international negotiations For they can indeed conduct negotiations on those points concerning which they have a standing within the Family of Nations Thus, for instance, while Bulgaria was a half sovereign State, she was nevertheless able to negotiate on several matters with foreign States independently of Turkey [2]

[1] There are many other international transactions (see below, §§ 486-490), but negotiation is by far the most important of them And it must be emphasised that negotiation, as a means of amicably settling conflicts between two or more States, is only a particular kind of negotiation, although it will be specially discussed in another part of this work (see below, vol ii §§ 4-6)

[2] See above, § 91

It must be specially mentioned that negotiation between a State, on the one hand, and, on the other, a party which is not a State, is not *international* negotiation, although such party may reside abroad. Thus, too, negotiations between States and a body of foreign bankers and contractors concerning a loan, the building of a railway, the working of a mine, and the like, are not, as a rule,[1] international negotiations

Purpose of Negotiation

§ 479 Negotiations between States may have various purposes Their purpose may be only an exchange of views on some political question , or it may be an arrangement as to the line of action to be taken in future with regard to a certain point, or a settlement of differences,[2] or the creation of international institutions, such as the Universal Postal Union for example, and so on [3]

Negotiations, by whom conducted

§ 480 International negotiations are conducted by the agents which represent the negotiating States The Heads of these States may conduct the negotiations in person, either by letters or by a personal interview Serious negotiations have, in the past, been conducted by Heads of States, and, although this is comparatively seldom done now, there is no reason to believe that personal negotiations between Heads of States will not occur in future [4] As a rule, however, negotiation between States concerning more important matters is conducted by their Secretaries for Foreign Affairs, with the help either of their diplomatic envoys, or of agents without diplomatic character, or of so-called commissaries [5]

Form of Negotiation

§§ 481-482 The Law of Nations does not prescribe any particular form in which international negotiations must be conducted Such negotiations may, therefore, take place

[1] See *Mavrommatis Palestine Concessions (Jurisdiction)* case P C I J , Series A, No 2, pp 11-15

[2] See below, vol II §§ 4-6, and particularly § 4 (n 1) as to the emphatic recognition by the Permanent Court of negotiation as an international institution

[3] On the question of ' open diplomacy ' see above, § 167*n*

[4] See below, § 495 It should be noted that President Wilson, one of the four American signatories of the Treaty of Versailles, was stated in the preamble to be ' acting in his own name and by his own proper authority '

[5] Negotiations between armed forces of belligerents are regularly conducted by soldiers See below, vol II §§ 220 240

viva voce, or through the exchange of written representations and arguments, or both The more important negotiations are regularly conducted through the diplomatic exchange of written communications, as only in this way can misunderstandings be avoided, which easily arise during *viva voce* negotiations Of the greatest importance are the negotiations which take place through congresses and conferences [1]

II

CONGRESSES AND CONFERENCES

Phillimore, II §§ 39, 40—Twiss, II § 8—Taylor, §§ 34 36—Hershey, §§ 292-294—Bluntschli, § 12—Heffter, § 242—Geffcken in *Holtzendorff*, III pp 679 684—Ullmann, §§ 71, 72—Hatschek, pp 95, 96—Fauchille, §§ 796-814 (10)—Despagnet, §§ 478 482—Pradier-Fodéré, VI §§ 2593 2599—Rivier, II § 46—Nys, II pp 486 496—Calvo, III §§ 1674-1681—Cruchaga, §§ 523 539—Suarez, §§ 304 310—Bustamante, pp 539 549—Genet, III pp 3 265—Fiore, II §§ 1216 1224, and *Code*, §§ 1211-1250—Martens, I § 52—Charles de Martens, *Guide diplomatique* (1851), I § 58—Pradier Fodéré, *Cours de droit diplomatique* (1881), II pp 372-425—Zaleski, *Die volkerrechtliche Bedeutung der Congresse* (1874)—Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (1907), pp 480 526—Satow, §§ 529 557, and *International Congresses* (1920) (Foreign Office Peace Handbook)—Bittner, §§ 25 58—Frisch in *Strupp, Wort*, I pp 663-669—Gruber, *Internationale Staatenkongresse und Konferenzen* (1919)—Potter, *Introduction to the Study of International Organisation* (1920), pp 317 375—Dunn, *The Practice and Procedure of International Conferences* (1929)—Hill, *The Public International Conference* (1929)—Potter, *This World of Nations* (1929), pp 200-217—Moulton, *A Structural View of the Conference as an Organ of International Cooperation* (1930)—Riches, *Majority Rule in International Organisation* (1940), pp 31 138—Pastuhov, *A Guide to the Practice of International Conferences* (1945)—Report by Mastny and Rundstein on *Procedure of International Conferences* for League Codification Committee, in *A J*, 20 (1926), Special Suppl, and comment by Hudson in *A J*, 20 (1926), pp 747 750—Myers in *A J*, 8 (1914), pp 81 108—Wright, *ibid*, 20 (1926), pp 33 45—Sibert in *Hague Recueil*, vol 48 (1934) (II), pp 391 454

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[1] See below, § 483 During *viva voce* negotiations it happens sometimes that a diplomatic envoy negotiating with the Secretary for Foreign Affairs reads out a letter received from his home State In such case it is usual to leave a copy of the letter at the Foreign Office If a copy is refused, the Secretary for Foreign Affairs can, on his part, refuse to hear the letter read Thus in 1825 Canning refused to allow a Russian communication to be read to him by the Russian ambassador in London with regard to the independence of the former Spanish colonies in South America, because this ambassador was not authorised to leave a copy of the communication at the British Foreign Office As regards the language used during negotiation see above, § 359

Conception of Congresses and Conferences

§ 483 International congresses and conferences are formal meetings of the representatives of several States for the purpose of discussing matters of international interest, and coming to an agreement concerning these matters The term 'congress' as well as the term 'conference' may be used for the meetings of the representatives of only two States, but as a rule congresses or conferences denote such bodies only as are composed of the representatives of a greater number of States Several writers [1] allege that there are characteristic differences between a congress and a conference. But all such alleged differences vanish in face of the fact that the Powers, when summoning a meeting of representatives, use the terms 'congress' and 'conference' indiscriminately

Parties to Congresses and Conferences

§ 484 Congresses and conferences not being organised by customary or conventional International Law, no rules exist with regard to the parties to a congress or conference.[2] Everything depends upon the purpose for which a congress or a conference meets, and upon the Power which invites other Powers to the meeting If it is intended to settle certain differences, it is reasonable that all the States concerned should be represented, for a Power which is not represented is less likely to consent to the resolutions of the congress If the creation of new rules of International Law is intended, at least all full sovereign members of the Family of Nations ought to be represented To the First Peace Conference at The Hague, nevertheless, only the majority of States were invited to send representatives, the South American republics not being invited at all But to the Second Peace Conference of 1907, forty-seven States were invited, although only forty-four sent representatives

But no State can be a party which has not been invited,

[1] See, for instance, Martens, I § 52, Fiore, II §§ 1216-1224, and *Code*, § 1236 Canning recognised a distinction between the two terms in 1823, see Temperley, *The Foreign Policy of Canning, 1822-1827* (1925), p 116 Frisch, *op cit*, comments on the British dislike of the term 'congress'

[2] The League Codification Committee examined the questions of framing model rules upon a Report by Mastny (printed in *A J*, 20 (1926), Special Suppl, pp 205 213, and the Assembly in 1927 requested the Council to instruct the Secretariat to continue the investigation

or admitted at its own request If a Power thinks it fitting that a congress or conference should meet, it invites such other Powers as it pleases, though the invited Powers may accept upon condition that certain other Powers should, or should not, be invited or admitted Those Powers which have accepted the invitation become parties, if they send representatives [1] Each party may send several representatives, but they have only one vote, given by the senior representative for himself and his subordinates

Procedure at Congresses and Conferences

§ 485 After the place and time of meeting have been arranged—such place may be neutralised for the purpose of securing the independence of the deliberations and discussions—the representatives meet, and constitute themselves by exchanging their commissions and electing a president and other officers It is usual, but not obligatory,[2] for the Secretary for Foreign Affairs of the State within whose territory the congress meets to be elected president At the San Francisco Conference which in 1945 adopted the Charter of the United Nations the principal delegates of the four Sponsoring Powers—the United States, the Soviet Union, Great Britain and China—were elected Presidents of the Conference and presided in turn over the Plenary Session [3] If the difficulty of the questions on the programme

[1] Notice the recent practice, designed to facilitate presence at a conference in a non-committal manner, of appointing 'observers' (as the United States of America has frequently done in the case of conferences summoned by the League of Nations), or 'informateurs' (as was done by France in the case of the Three-Power Naval Disarmament Conference at Geneva in June July 1927) At the San Francisco Conference in 1945, in addition to the fifty States which attended the Conference, a number of established international organisations were invited to send representatives for the purpose of consultation These were the League of Nations, the International Labour Organisation, the Permanent Court of International Justice, the United Nations Relief and Rehabilitation Administration, and the Food and Agriculture Organisation Article 3 (5) of the Constitution of the Food and Agriculture Organisation of the United Nations provides that the Conference may invite any public international organisation which has responsibilities related to those of the Organisation to appoint a representative who, without having the right to vote, shall participate in its meetings on conditions prescribed by the Conference (Cmd 6590 (1945))

[2] Thus at both Hague Peace Conferences, which were convened at the instance of Russia, the first Russian delegate was elected President See Whitton in *A J*, 39 (1945), pp 535-537

[3] However, the principal delegate of the United States was throughout Chairman of the Steering Committee and of the Executive Committee

makes it advisable, special committees are appointed for the purpose of preparing the matter for discussion by the body of the congress [1] In such discussion all representatives can take part After the discussion follows the voting The motion must be carried unanimously to consummate the task of the congress, for the vote of the majority does not in any way bind the dissenting parties [2] But it is possible for the majority to consider the motion binding upon themselves If the discussions and voting lead to a final result upon which the parties agree, all the points agreed upon are generally drawn up in an Act, which is signed by the representatives and called the Final Act, or the General Act, of the congress or conference [3] A party can make a declaration or a reservation in signing the Act, for the purpose of excluding a certain interpretation of the Act in the future [4] And the Act may expressly stipulate freedom for States which were not parties to accede to it in future

III

TRANSACTIONS BESIDES NEGOTIATION AND TREATIES

Bluntschli, § 482—Hartmann, § 91—Gareis, § 77—Liszt, § 30, III (3)—Rousseau, pp 126-133—Bittner, §§ 97-104—Cavaglieri in *Lo stato di necessità nel diritto internazionale* (1917), pp 88 92, and in *Rivista*, 2nd ser , 7 (1918), pp 3 33, and *ibid* , 3rd ser , 5 (1926), pp 188 204—Balladore Pallieri, pp 73 80, 150-161—Anzilotti, pp 345 351—Pfluger, *Die einseitigen Rechtsgeschafte im Volkerrecht* (1936)—Sereni in *A J* , 34 (1940), pp 638 660

Different Kinds of Transactions

§ 486 International transaction is the term for every act on the part of a State in its intercourse with other States Besides negotiation, which has been discussed above in

[1] The practice of holding preparatory meetings of experts, legal and otherwise, is becoming increasingly common Upon the improvement in the efficiency of conferences resulting from the use of the League machinery, and particularly the advantage of a permanent secretarial organisation, see Buell, *International Relations* (1925), pp 644, 645, and Pastuhov, *Guide to International Conferences* (1945), pp 16 65

[2] See above, §§ 115 and 116*a* Unless, of course, the Conference is being held under a treaty by the terms of which the parties have bound themselves to accept a majority vote

[3] See Bittner, §§ 75, 76 By the consent of the minority, resolutions accepted by a majority only may be inserted in the Final Act, see Fauchille, § 807 (1)

[4] See below, §§ 517, 554 (11)

§§ 477-482, and treaties, which will be discussed in §§ 491-554 and 569-580, there are eleven other kinds of international transactions which are of legal importance—namely, declaration, notification, protest, renunciation, recognition, intervention, retorsion, reprisals, pacific blockade, war, and subjugation Recognition has already been discussed above in §§ 71-75*f*, intervention in §§ 134-138, and subjugation in §§ 236-241*a*. Retorsion, reprisals, pacific blockade, and war will be treated in the second volume of this work There are, therefore, only four kinds of transaction to be discussed here—namely, declaration, notification, protest, and renunciation

Declaration

§ 487 The term 'declaration' is used in three different meanings It is, in the first place, sometimes used as the title of a body of stipulations of a treaty, according to which the parties undertake to pursue in future a certain line of conduct The Declaration of Paris, 1856, and the Declaration of St Petersburg, 1868, are instances of this declarations of this kind differ in no respect from treaties Secondly, there are unilateral declarations which create rights and duties for other States, and it is this kind which is to be regarded as an international transaction within the meaning of this part of this chapter The different declarations belonging to this group are by no means of a uniform character, among them are declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral, and others Thirdly, when States communicate to other States, or *urbi et orbi*, an explanation and justification of a line of conduct pursued by them in the past, or an explanation of views and intentions concerning certain matters, this is called a declaration. Declarations of this kind may be very important, but they hardly comprise transactions out of which follow rights and duties of other States. This is, for instance, the position with regard to the so-called Atlantic Charter of August 14, 1941, in which the President of the United States and the Prime Minister of Great Britain 'deemed it right to make known certain common

principles in the national policies of their respective countries on which they base their hope for a future world'[1] But while it is clear that such declarations cannot, in law, be relied upon by States other than those which made them,[2] it is not certain to what extent they create rights and obligations as between the latter The answer depends to a large extent on the precision of the language used in the declaration A mere general statement of policy and principles cannot be regarded as intended to give rise to a contractual obligation in the strict sense of the word On the other hand, official statements in the form of Reports of Conferences signed by the Heads of States or Governments and embodying agreements reached therein may, in proportion as these agreements incorporate definite rules of conduct, be regarded as legally binding upon the States in question The Reports of the Conferences of the Heads of Governments of Great Britain, the United States and Russia at Crimea in February 1945[3] and at Potsdam in August of that year[4] may be mentioned as examples[5]

Notification

§ 488 Notification is the technical term for the communication to other States of certain facts and events of legal importance But a distinction must be drawn between obligatory and voluntary notification

Notification has been stipulated in several cases to be

[1] U S No 3 (1941), Cmd 6321, *A J*, 35 (1941), Suppl, p 191

[2] While a statement by the British Deputy Prime Minister lent itself to the interpretation that the Charter had the 'status of a treaty' (378 H C Deb, 5th ser, col 510), the Prime Minister described it on May 24, 1944, as 'a guiding signpost, expressing a vast body of opinion among all the Powers now fighting together' (House of Commons, vol 400, p 783) See on this subject Stone, *The Atlantic Charter* (1943), pp 144 148 In a Declaration of January 1, 1942, twenty five of the United Nations, including the Great Powers, formally 'subscribed to a common program of purposes and principles embodied in the Joint Declaration' of August 14, 1941 *A J*, 36 (1942), Suppl, p 191.

[3] Misc No 5 (1945), Cmd 6598

[4] *A J*, 39 (1945), Suppl, p 245

[5] Reference may also be made to the Declaration of June 5, 1945, by the British, American, Russian and French Governments, regarding the defeat of Germany and the assumption of supreme authority with respect to Germany (Cmd 6648) The Declaration was addressed primarily to the German people and German authorities in view of the fact that there was at that time no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers In a document (No 4)—which is in itself a Declaration—attached to the principal Declaration, the Four Powers announced their intention to consult other Powers in the exercise of the supreme authority assumed over Germany

obligatory [1] Thus, according to Article 2 of the Hague Convention concerning the Commencement of Hostilities, 1907, the outbreak of war must be notified to the neutral Powers, and the declaration of a blockade was also to be notified,[2] according to Article 11 of the unratified Declaration of London, 1909

Notification frequently takes place voluntarily, because States cannot be considered subject to certain duties without knowledge of the facts and events which give rise to them Thus it is usual to notify to other States changes in the headship and in the form of government of a State, the establishment of a Federal State, an annexation after conquest, the appointment of a new Secretary for Foreign Affairs, and the like In the same category there must be included an explicit reservation of rights such as the general warning issued in 1943 by some of the United Nations to the effect that they reserved their right to declare invalid transfers of property and interests situated in territories under enemy occupation [3]

Protest

§ 489 Protest is a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter A protest serves the purpose of preservation of rights,[4] or of making it known that the protesting State does not acquiesce in, and does not recog-

[1] Thus, according to Article 34 of the General Act of the Berlin Congo Conference of 1885, which has now been abrogated (that is, as between States which ratify or accede to the Convention of 1919, and except as regards the stipulations contained in Article 10 of the Convention of 1919, *L N T S*, 8, p 27) by a convention signed at St Germain on September 10, 1919, notification of new occupations and the like on the African coast was obligatory The obligation to notify is absent from the Convention of 1919 Thus, further, according to Article 84 of the Hague Convention for the peaceful settlement of international differences, in case a number of States are parties to a treaty, and two of them, who are at variance concerning its interpretation, agree to have the difference settled by arbitration, they have to notify this agreement to all the other parties

[2] See the unratified Declaration of London, 1909, Articles 11 (2), 16, 23, 25, and 26

[3] Misc No 1 (1943), Cmd 6418

[4] See Ralston, §§ 215, 222, 660, 696, and above, § 155c As to the protest of Abyssinia against a British Italian agreement see below, § 518*a* The effect of failing to protest against the assumption by States of jurisdiction in a certain kind of case was discussed by the Permanent Court in the *Lotus* case, Series A, No 10, pp 23, 29, 98 As to protests against violations of International Law not directly affecting the protesting State see Wright in *A J.*, 32 (1938), pp 526-535.

nise, certain acts.[1] A State can lodge a protest with another State against acts which have been notified to the protesting State, or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal, and against its rights, and nevertheless does not protest, this attitude implies a renunciation of such rights, provided that a protest would have been necessary to preserve a claim.[2] It may further happen that a State at first protests, but afterwards either expressly[3] or tacitly acquiesces in the act. And it must be emphasised that, under certain circumstances and conditions, a simple protest on the part of a State, without further action, is not in itself sufficient to preserve the rights in behalf of which the protest was made.[4]

Renunciation.

§ 490. Renunciation is the deliberate abandonment of rights.[5] It can be given *expressis verbis* or tacitly. If, for instance, a State by occupation takes possession of an island which has previously been occupied by another State,[6] the latter tacitly renounces its rights by not protesting as soon as it receives knowledge of the fact. Renunciation plays a prominent part in the amicable settlement of differences between States, either one or both parties frequently renouncing their claims for the purpose of coming to an agreement.[7] Mere silence on the part of a State does not imply renunciation, this occurs only when a State remains silent, although a protest is necessary to preserve a claim.

[1] See above, § 75*c*, on the principle and the policy of non recognition.

[2] See on this point Strupp, *Grundzüge*, p. 99; Cavaglieri in *Rivista*, 3rd ser., 5 (1926), p. 197; Kunz in *Strupp, Wort*, II pp. 329, 330; Bruel in *Nordisk T A*, 3 (1932), pp. 75-93; Pfluger, *op. cit.*, pp. 194-219.

[3] Thus by the Declaration concerning Siam, Madagascar, and the New Hebrides, which was embodied in the Anglo-French Agreement of April 8, 1904, Great Britain withdrew the protest which she had raised against the introduction of the customs tariff established at Madagascar after its annexation to France.

[4] See below, § 539, concerning the withdrawal of Russia from Article 59 of the Treaty of Berlin, 1878, stipulating the freedom of the port of Batoum.

[5] See Henningsen in *Strupp, Wort*, III pp. 163, 164; Pfluger, *op. cit.*, pp. 249-287; Cavaglieri in *Rivista*, 2nd ser., 7 (1918), pp. 3-33, and below, § 537.

[6] See above, § 247.

[7] See vol. II § 6. See also *ibid.*, p. 736, n. 4, for an example of renunciation of claims coupled with an explicit statement of adherence to the opposed legal views held by the contracting parties. For a suggestion that the conduct of the United States subsequently to its declaration of war on Germany in 1917 amounted to acquiescence in some practices of the Allied Powers and to an abandonment of claims arising therefrom see Anderson in *A J*, 23 (1929), p. 384.

CHAPTER II

TREATIES

I

CHARACTER AND FUNCTION OF TREATIES

Vattel, II §§ 152, 153, 157, 163—Hall, § 107—Phillimore, II § 44—Twiss, I, §§ 224 233—Taylor, §§ 341, 342—Hershey, §§ 295, 296—Hyde, II § 489—Fenwick, pp 326 330—Bluntschli, § 402—Heffter, § 81—Kohler, § 57—Despagnet, §§ 435, 436—Pradier Fodéré, II §§ 888 919—Fauchille, §§ 816, 817—Rousseau, pp 133 158—Rivier, II pp 33 40—Nys, II pp 497, 498, 522 530—Calvo, III §§ 1567-1584—Fiore, II §§ 976 982—Martens, I § 103—De Louter, I §§ 24, 28—Gemma, pp 207, 208, 212 214—Cruchaga, I §§ 557 559—Suarez, I §§ 78 81, 93—*Harvard Research* (1935, Part III), pp 686 705—Genet, III pp 349 538—Anzilotti, pp 352-356—McNair, Chapter 1—Scelle, II pp 329 344—Bergbohm, *Staatsvertrage und Gesetze als Quellen des Volkerrechts* (1877)—Jellinek, *Die rechtliche Natur der Staatenvertrage* (1880)—Laghi, *Teoria dei trattati internazionali* (1882)—Buonamici, *Dei trattati internazionali* (1888)—Nippold, *Der volkerrechtliche Vertrag* (1894)—Triepel, *Volkerrecht und Landesrecht* (1899), pp. 27 90—Grosch, *Der Zwang im Volkerrecht* (1912), pp 38 56, 138 143—Crandall, *Treaties their Making and Enforcement*, 2nd ed (1916)—Lammasch, *Das Volkerrecht nach dem Kriege* (1917), pp 92 129—Satow, §§ 560 585—Verdross in *Strupp, Wort*, II pp 655, 656—Dupuis in *Hague Recueil*, 1924 (I), pp 322 349—Butler and Maccoby, *The Development of International Law* (1928), ch XVII—Hoijer, *Les traités internationaux*, 2 vols (1928)—Chailley, *La nature juridique des traités internationaux* (1932), pp 3 72—Franguhs, *Théorie et pratique des traités internationaux* (1936)—Jessup, *A Modern Law of Nations* (1948), pp 123 156—Pillaut in 46 *Clunet* (1919), pp 593 602—Réglade in *Revue de droit public et de la science politique*, 41 (1924), pp 505 540—Crocker in *A J*, 18 (1924), pp 38 55—McNair in *B Y*, 11 (1930), pp 100 118—Whitton in *Hague Recueil*, vol 49 (1934) (III), pp 175 249—Kraus, *ibid*, vol 50 (1934) (IV), pp 317 396—Kelsen in *Théorie du droit*, 10 (1936), pp 253 292—Mann in *B Y*, 21 (1944), pp 11 33—Kunz in *A J*, 39 (1945), pp 180 197—Starke in *B Y*, 23 (1946), pp 341 346—Jessup in *A J*, 41 (1947), pp 378 405—Report by Mastny and Rundstein for League Codification Committee in *A J*, 20 (1926), Special Suppl, pp 204-221, and comment by Hudson in *A J*, 20 (1926), pp 747 750

Conception of Treaties

§ 491. International treaties are conventions, or contracts, between two or more States concerning various matters of

interest.[1] Even before a Law of Nations, in the modern sense of the term, was in existence, treaties used to be concluded between States And although in those times treaties were neither based on, nor were themselves a cause of, an International Law, they were nevertheless considered sacred, and binding, on account of religious and moral sentiment However, since the manifold intercourse of modern times did not then exist between the different States, treaties did not discharge such all-important functions in the life of humanity as they do now

A treaty, being a contract, must not be confused with various documents having relation to treaties but not in themselves treaties—namely, a *mémoire*, a *proposal*, a *note verbal*, a *procès-verbal*, or a *protocol*[2] A *mémoire* or *memorandum* is a diplomatic note containing a summary exposition of the principal facts of an affair A *proposal* is a document comprising an offer submitted by one State to another A *note verbal* is an unsigned document containing a summary of conversations or of events, and the like A *procès-verbal* is the official record or minutes of the daily proceedings of a conference and of the provisional conclusions arrived at, and is usually signed by representatives of the parties The term *protocol* is used to denote the same thing as a *procès-verbal* (which is undesirable), or, more correctly, an international agreement itself, though usually one of a supplementary nature or of a less formal and important character than a treaty[3]

Different Kinds of Treaties

§ 492 The important functions of treaties are manifest if attention is given to the varieties which exist

[1] The growing tendency to speak of treaties made between a large number of States as international legislation rather than contracts should be noted (see Bluntschli, § 110), but that is a metaphor See in particular the Draft Conventions of the International Labour Conference (above, § 340*f*)

[2] For the meaning of these and other terms connected with treaties see Vaughan Williams in *Hague Recueil*, 1923 (III), pp 255 258, Satow, §§ 559 583, *Harvard Research* (1935, Part III), pp 686-705, 710-722, and Bittner, pp 298 313

[3] By derivation *protocol* (from the Low Latin and late Greek) means the 'first glued' to a book, *i e* the flyleaf or register of the contents of a bundle of documents, and eventually the document itself On the present use of the term see Hyde, II § 514, Satow, §§ 651 671, Satow, *International Congresses* (1920), pp 18 19, Vaughan Williams, *supra*, p 256, Genet, III pp 530 534 And see *ibid*, pp 476 538, on the various forms of international agreements other than treaties and conventions.

nowadays, and are day by day concluded for innumerable purposes [1]

It is not intended to discuss the question of classification of the different kinds of treaties, for hitherto all attempts [2] at such classification have failed But there is one distinction to be made, which, though theoretically faulty, is of practical importance, and according to which the whole body of treaties is to be divided into two classes In one class are treaties concluded for the purpose of laying down general rules of conduct among a considerable number of States Treaties of this kind ought to be termed *law-making* treaties [3] Into the other class fall treaties concluded for any

[1] See also the Convention on Treaties adopted in February 1928 by the Sixth International American Conference and laying down some general principles applicable to treaties *A J*, Suppl, 22 (1928), pp 138 142

[2] Since the time of Grotius, the science of the Law of Nations has not ceased attempting a satisfactory classification of the different kinds of treaties See Heffter, §§ 89 91, Bluntschli, §§ 442 445, Martens, I § 113, Ullmann, § 82, Wheaton, § 268 (following Vattel, II § 169), Rivier, II pp 106 118, Westlake, I p 294, Hatschek, p 228, Rapisardi Mirabelli in *R I*, 3rd ser, 4 (1923), pp 653 667, Rousseau, pp 133 141, McNair in *B Y*, 11 (1930), pp 100 118, and many others

[3] See also above, § 18 Law making treaties have been concluded ever since International Law came into existence It was not until the nineteenth century, however, that there were law making treaties of world wide importance Although at the Congresses at Munster and Osnabruck all the European Powers then existing, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands and the practical sovereignty of the 332 States of the German Empire, was not of world-wide importance, in spite of the fact that it contained various law making stipulations And the same may be said with regard to all other treaties of peace between 1648 and 1815 The first law making treaty of world wide importance was the Final Act of the Vienna Congress, 1815 But it must be particularly noted that not all of these are *pure* law making treaties, since many contain other stipulations besides those which are law making

The Final Act of the Vienna Congress (Martens, *N R*, 2, p 379, see Angeberg, *Le Congrès de Vienne et les traités de 1815* (4 vols, 1863)), signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden Norway, comprised law making stipulations of world wide importance concerning four points—namely, the perpetual neutralisation of Switzerland (Article 118, No 11) (see above, § 98), free navigation on so called international rivers (Articles 108 117) (see above, § 178), the abolition of the negro slave trade (Article 118, No 15) (see above, § 340*h*), and the different classes of diplomatic envoys (Article 118, No 17) (see above, § 364) In addition to the foregoing and to the treaties enumerated in Appendix A of this volume, the following examples may be mentioned the Treaties of London of 1831 and 1839 providing for the neutralisation of Belgium (see above, § 99), the Declaration of Paris of 1856 (see below, vol II § 177), the Geneva Conventions of 1864, 1906, and 1929 for the amelioration of the

other purpose However, it must always be borne in mind that the distinction between law-making and other treaties is merely one of convenience In principle, all treaties are law-making inasmuch as they lay down rules of conduct which the parties are bound to observe as law [1]

Binding Force of Treaties

§ 493 The question why international treaties have binding force, always was,[2] and still is, very much disputed.[3] Many writers find the binding force of treaties in the Law of Nature, others in religious and moral principles, others [4] again in the self-restraint exercised by a State in becoming a party to a treaty Some writers [5] assert that it is the will of the contracting parties which gives binding force to their treaties, and others [6] teach that such binding force is to be found *im Rechtsbewusstsein der Menschheit*—that is, in the idea of right innate in man [7] The correct answer is probably that treaties are legally binding, because there exists a customary rule of International Law that treaties are binding The binding effect of that rule rests in the last

conditions of the wounded in armies in the field (see below, vol II §§ 118 124), the Final Act of the Hague Peace Conference of July 20, 1899 (see above, § 49), the Hague Conventions of 1907 (see above, § 50, and below, vol II §§ 19, 68), the Covenant of the League of Nations, the Protocol of Signature of the Statute of the Permanent Court of International Justice, December 16, 1920 (see below, vol II §§ 25*ab*-25*ag*), the General Treaty for the Renunciation of War (vol II § 52*i*), the Minorities treaties (see above, §§ 340*b* 340*e*), the Charter of the United Nations For a comprehensive list see Rühland, *System der volkerrechtlichen Kollektiv vertrage* (1929) And see in particular Hudson's *International Legislation* (1931-1936), of which five volumes have so far been published And see above, § 18

[1] In particular, in so far as the expression 'law making treaties' is used as synonymous with 'international legislation' it must be remembered that the latter is merely a metaphor There is as yet no international legislature proper in the international sphere except, perhaps, to the extent of some Members of the United Nations being bound to accept amendments of the Charter imposed by a qualified majority of the Members of the Organisation (see above, § 168*s*)

[2] For a historical account see Taube in *Hague Recueil*, vol 32 (1930) (2), pp 295 367, and Whitton, *ibid*, vol 49 (1934) (3), pp 151-174

[3] Hoijer, *Les traités internationaux*, I (1928) pp 185-245, Franguliis, *Théorie et pratique des traités internationaux* (1936), pp 89 107

[4] So Hall, § 107, Jellinek, *Staatenvertrage*, p 31, Nippold, § 11

[5] So Triepel, *Volkerrecht und Landesrecht* (1899), p 82, Blühdorn, *Einführung in das angewandte Volkerrecht* (1934), pp 52 84

[6] So Bluntschli, § 410

[7] Amongst other factors the theory of 'justifiable reliance' by one party upon the undertaking of the other party, which is believed by an increasing number of English and American lawyers to be the basis of the private law of contract, requires consideration here, see Williston, *Law of Contracts* (1921), § 20, and Pound, *Introduction to the Philosophy of Law* (1922), ch VI (the 'injurious reliance' theory)

resort on the fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of International Law [1]

II

PARTIES TO TREATIES

Vattel, II §§ 154 156, 206 212—Hall, § 108—Westlake, I p 290—Phillimore, II §§ 48, 49—Taylor, §§ 361-365—Hershey, § 297—Wheaton, §§ 265-267—Moore, V §§ 734-747—Hyde, II §§ 494 511—Bluntschli, §§ 403 409—Heffter, §§ 84, 85—Ullmann, § 75—Liszt, § 31 (II)—Fauchille, §§ 818, 818 (1), 820—Despagnet, § 446—Pradier Fodéré, II §§ 1058 1068—Rivier, II pp 45-48—Nys, II pp 499, 500—Calvo, III §§ 1616 1618—Cruchaga, I §§ 561-565—Gemma, pp 208-210—Fiore, II §§ 984 1000, and *Code*, §§ 748-754—Martens, I § 104—Anzilotti, pp 357 367—Rousseau, pp 323 333, 340-355—Baty, pp 408-423—McNair, Chapters 2, 3, 5, 6, 11, 12—Nippold, *op cit*, pp 104-111—Crandall, *op cit*, §§ 1 5—Bittner, §§ 5 21—Verdross, pp 47-53—Wohlmann, *Die Kompetenz zum Abschlusse von Staatsverträgen* (1931)—Chailley, *La nature juridique des traités internationaux* (1932) pp 167 236—Mirkine-Guetzévitch, *Droit constitutionnel international* (1933), pp 95-177, and in *Hague Recueil*, vol 38 (1931) (IV), pp 355 401—Vitta, *La validité des traités internationaux* (1940), pp 33 158—Paul de Visscher, *De la conclusion des traités internationaux* (1943)—Mervyn Jones, *Full Powers and Ratification* (1946)—Schoen in *Z V*, 5 (1911), pp 400 431—Weinschel in *Z V*, 15 (1930), pp 469 473—Nisot in 59 *Clunet* (1932), pp 872-876—Bleiber in *Z V*, 19 (1935), pp 385 402—*Harvard Research* (1935, Part III), pp 705-710, 1126 1134, 1144-1161—Kaira in *Nordisk T A*, 7 (1936), pp 39 67—Jessup in *A J*, 41 (1947), pp 380 385

The Treaty-making Power

§ 494 The so-called right of making treaties is not a right belonging to a State in the technical meaning of the term, but a mere competence attaching to sovereignty A State possesses, therefore, treaty-making power only so far as it is sovereign. Full sovereign States may become parties to treaties of all kinds, being regularly competent to make treaties on whatever matters they please. Not-

[1] That assumption is frequently expressed in the form of the principle *pacta sunt servanda*, but it is not certain that this is the best formulation see Anzilotti, pp 42 57, Verdross, pp 28 33, Kelsen, *Das Problem der Souveranität und die Theorie des Völkerrechts* (1920), and *Allgemeine Staatslehre* (1925), p 175 And see *Harvard Research* (1935, Part III), pp 977-992, Chailley, *op cit*, pp 73-130, Scelle, II p. 337, Rousseau, pp. 355-365, Strupp, *Éléments*, I p 8, Whitton in *R I (Paris)*, 18 (1936), pp 440-486, and in *International Conciliation* (Pamphlet No 313, October 1935), Kunz in *A J*, 39 (1945), pp 180 197 Cavaglieri in *Hague Recueil* (1929) (I), p 362, combines the two views While admitting the fundamental nature of the rule *pacta sunt servanda*, he points out that the binding force of that rule has also been accepted by international custom And see above, § 11 (n), on the 'initial hypothesis'

full sovereign States, however, can become parties only to such treaties as they are competent to conclude It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign States Everything depends upon the special case Thus, the constitutions of Federal States comprise provisions with regard to the competence, if any, of the member-States to conclude international treaties among themselves as well as with foreign States [1] Thus, again, it depends upon the special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States, ordinarily a vassal can conclude treaties concerning such matters as railways, extradition, commerce, and the like [2]

[1] According to Articles 7 and 9 of the Constitution of Switzerland the Swiss member States are competent to conclude non political treaties among themselves, and, further, such treaties with foreign States as concern matters of police, of local traffic, and of State economics As to Germany and Soviet Russia see above, § 89 According to Article 1, § 10, of the Constitution of the United States of America, the member States are not competent to conclude treaties either among themselves or with foreign States On the treaty making power of the United States see Crandall, *op cit*, §§ 1 67, Hyde, II §§ 495 509 (with bibliography in note to § 497), Tucker, *Limitations on the Treaty-making Power under the Constitution of the United States* (1915), Wright, *The Control of American Foreign Relations* (1922), Anderson in *A J*, I (1907), pp 636 670, and 14 (1920), pp 400 402, Tansill in *A J*, 18 (1924), pp 459 482, MacMaster in *J C L*, 3rd ser, 2 (1920), pp 189 195, Holt, *Treaties Defeated by the Senate* (1933), Dangerfield, *In Defense of the Senate A Study in Treaty Making* (1933), Butler in *A S Proceedings*, 1929, pp 176-183, McClendon in *American Historical Review*, 36 (1930-1931), pp 768 775, Burdick in *Foreign Affairs* (*U S A*), 10 (1932), pp 265 279, Scott in *A S Proceedings*, 1934, pp 2 34, Potter in *A J*, 28 (1934), pp 456 474 And see below, § 497, as to the Constitutional Restrictions See also Szászy in *Z o R*, 14 (1934), pp 459 486, Siotto Pintor in *R G*, 42 (1935), pp 521 540 As to France, Dehousse, *La ratification des traités* (1935), pp 124 151, Barthélemy et Duez, *Traité de droit constitutionnel* (1933) As to Belgium, Muûls in *R I*, 3rd ser, 15 (1934), pp 451 491 As to Japan, Colegrove in *A J*, 25 (1931), pp 270 297 As to Italy, Leibholz in *Z V*, 16 (1931 1932), pp 353 376 As to Sweden, Bloch in *Z o V*, 4 (1934), pp 25 52 And see Arnold, *Treaty making Procedure, a Comparative Study of the Methods obtaining in Different States* (1933)

[2] It seems probable that the League had the power of making treaties see Schucking und Wehberg, p 117, Verdross, p 51, and Fischer Williams in *International Law Association's Thirty fourth Report, 1926*, p 688 It has been suggested that mandates were in the nature of an agreement between the Council of the League and the mandatory The Charter of the United Nations provides for agreements between the Security Council and Members (or groups of Members) for making available to the former armed forces and other assistance for the purpose of maintaining international peace and security (Art 43) There is also a provision for agreements between the Economic and Social Council and the various specialised international organisations (Art 63).

Treaty-making Power exercised by Heads of States or their Governments

§ 495 The treaty-making power of States is, as a rule, exercised by their Heads, either personally or through representatives appointed by these Heads The Holy Alliance of Paris, 1815, was personally concluded by the Emperors of Austria and Russia and the King of Prussia And when, on June 24, 1859, the Austrian Army was defeated at Solferino, the Emperors of Austria and France met on July 11, 1859, at Villafranca, and agreed in person on preliminaries of peace Yet, as a rule, Heads of States do not act in person, but authorise representatives to act for them Such representatives receive a written commission, known as powers, or full powers, which authorise them to negotiate in the name of the respective heads of States They also receive oral or written, open or secret, instructions But, as a rule, they do not conclude a treaty finally, for all treaties concluded by such representatives are, in principle, not valid before ratification [1] If they conclude a treaty by exceeding their powers, or acting contrary to their instructions, the treaty is not a real treaty, and not binding upon the State they represent [2] While, as a rule, the treaty-making power of States is exercised by their Heads, the constitutional practice of some States assigns it, so far as many matters are concerned, to their Governments In such a case it is the Government, and not the Head of the State, which must ratify the treaty, in order to make it binding [3]

Minor Functionaries exercising Treaty-making Power

§ 496 For some non-political purposes of minor importance, certain minor functionaries are recognised as competent to exercise the treaty-making power of their

[1] See below, § 510

[2] A treaty of such a kind is called a *sponsio*, or *sponsiones* *Sponsiones* may become a real treaty, and binding upon the State, through the latter's approval Nowadays, however, the difference between real treaties and *sponsiones* is less important than in former times, when the custom in favour of the necessity of ratification for the validity of treaties was not yet general If nowadays representatives exceed their powers, their States can simply refuse ratification of the *sponsio*

[3] Assuming that the treaty requires ratification According to the British practice inter governmental agreements — *i e* treaties concluded between governments—do not require ratification unless they specifically provide for it (as they occasionally do see, *e g*, the Conventions of April 16, 1945, between Great Britain and the United States for the Avoidance of Double Taxation—Cmd 6624 and 6625) See McNair, p 86 And see below, § 509*a* on Inter-Governmental Agreements

States, which is, so to say, delegated to them. Such functionaries are *ipso facto*, by their offices and duties, competent to enter into certain agreements without the requirement of ratification [1] Thus, for instance, in time of war, military and naval officers in command [2] can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like But it must be emphasised that treaties of this kind are valid only when these functionaries have not exceeded their powers [3]

Self-Governing Dominions and Treaty-making Power

§ 496*a* The treaty-making power of the British Dominions must be regarded as inherent in them and directly exercised [4] In accordance with the Resolutions of the Imperial Conferences of 1923,[5] 1926,[6] and 1930,[7] the Government of any part of the British Empire, when contemplating the negotiation of a treaty, notifies the Government of any other part of the Empire likely to be affected thereby, and the latter Government should promptly define any interest it may have in the negotiations The treaty is made 'in the name of the King as the symbol of the special relationship between the different parts of the Empire' and states the parts of the Empire on behalf of which it is made and to which it therefore applies [8] The Resolutions of the Conferences of 1923,

[1] See Fauchille, § 824 (2) See, for example, the Convention of November 16, 1928, between the Norwegian and the South African Postal Administrations *L N T S*, 60, p 278 And see below, § 509*a*

[2] See below, vol II § 235, and Grotius, III c 22

[3] See also below, § 509*a*

[4] See Keith, *Responsible Government in the Dominions* (2nd ed, 1928), II pp 840-926, 1252, 1253 On the general position of the British Dominions in International Law see above, §§ 94*a*, 94*b* On their treaty-making powers see much of the literature cited above, §§ 94*a*, 94*b*, particularly Lewis in *B Y*, 1923-1924, pp 168, 169, *ibid*, 1925, pp 31-43, and see also Tupper in *J C L*, New Ser, vol 17 (1917), pp 5-18, MacKenzie in *B Y*, 1925, pp 191, 192, in *A J*, 19 (1925), pp 489 504 (Canada), in *Canadian Bar Review*, 15 (1937), pp 436 454, Allin in *Michigan Law Review*, 24 (1926), pp 249-276, Read in *Canadian Law Review*, 5 (1927), pp 229-238, 302-310, Hurst in *Great Britain and the Dominions* (University of Chicago Press (1927)), Klarner, *Die Stellung der Dominions beim Abschluss volkerrechtlicher Vertrage* (1931), pp 74-103, McNair, Chapter 6, Stewart in *A J*, 32 (1938), pp 467 487, and the same, *Treaty Relations of the British Commonwealth of Nations* (1939) And see above, § 94*b*

[5] Cmd 1987, pp 13 15

[6] Cmd 2768, pp 20 30

[7] Imperial Conference, 1930, *Summary of Proceedings*, Cmd 3717, p 28

[8] See Cmd 2768 for a specimen form, and see the British communication to the Council of the League in *Off J*, 1927, p 377, to the effect that the Governments of Great Britain and of the Dominions would

1926, and 1930 do not distinguish between political and non-political treaties In accordance with the Resolutions of 1926, 'full powers' to sign the treaty are issued on the advice of the Dominion Government concerned, not upon the advice of the Imperial Government in London [1] Thus the exercise of the treaty-making power of the Dominions cannot now be regarded as a delegation from any central Government, it is derived from their own status In the matter of inter-governmental agreements, which have become increasingly frequent in recent times,[2] Full Powers are issued by the appropriate Minister of the Dominion and the agreements are ratified by him Since 1932 the Irish Free State and the Union of South Africa have possessed their own Great Seals Canada passed in 1939 the Canadian Seals Act, which may enable the Governor-General to ratify treaties concluded in the traditional form as between Heads of States All these developments will assist in removing any formal restrictions and delays in the full exercise of the treaty-making power of the Dominions [3]

Constitutional Restrictions

§ 497 Although the Heads of States are regularly, according to the Law of Nations, the organs that exercise the treaty-making power of the States, constitutional restrictions imposed upon the Heads concerning the exercise of this power are nevertheless of importance for the Law of Nations Such treaties concluded by Heads of States, or representatives authorised by these Heads, as violate constitutional restrictions are not real treaties, and do not bind the State concerned, because the representatives have exceeded their powers in concluding the treaties [4] Such constitutional

find it easier to sign and ratify treaties negotiated under the auspices of the League if they were expressed to be made between the Heads of States than if they were expressed to be made between States themselves, and see Keith, *op cit*, pp 1252, 1253

[1] For a discussion of the function of the latter Government in the matter of 'full powers' and the ratification of a Dominion treaty on the basis of the 1923 Resolutions see Harrison Moore in *J C L*, 3rd ser, 8 (1926), at pp 22 25, and see Keith, *op cit*, at p 1252, and in *J C L*, 3rd ser, 10 (1928), pp 326, 327

[2] See § 509*a*

[3] See McNair, pp 80 82, as to the operation of international agreements to which more than two members of the British Commonwealth of Nations are parties

[4] See Nippold, *op cit*, pp 127-164, and Bittner, §§ 23 26, see also Schoen, *op cit*, and in *Strupp, Wort*, II pp 658 662, Guggenheim, pp 63 68, König, *Vollsbefragung und Registrierung beim Volker bund* (1927), pp 6-42, Chailley, *La nature juridique des traités inter*

restrictions, although they are not of great importance in Great Britain,[1] play a prominent part in the constitutions

nationaux (1932), pp 180 236, *Harvard Research* (1935, Part III), pp 992 1009, Verdross, *op cit*, pp 51 53, Paul de Visscher, *De la conclusion des traités internationaux* (1943), Mervyn Jones in *A J*, 35 (1941), pp 462 481 Normally the contracting parties do not pay much attention to the question whether each of them has complied with its constitutional requirements for the validity of the treaty and regard that as a domestic matter (see the Award in an arbitration between France and Switzerland of August 3, 1912, in *A J*, 6 (1912), p 1000), but cases have occurred in which a State has repudiated a treaty duly signed and ratified on the ground of non compliance with constitutional requirements see Verdross, pp 52, 53 See also the dispute between Iraq and Iran before the Council of the League in 1935 *Off J*, February 1935, pp 113, 190, and November 1935, p 1204, Hold Ferneck, II pp 157 160, according to whom treaties concluded in disregard of constitutional limitations may be annulled subject to the payment of compensation to the other party, McNair, pp 38 46, McNair's Introduction to Arnold, *Treaty Making Procedure* (1933), pp 1-16, Dehousse, *La ratification des Traités* (1935), according to whom compliance with the constitutional provisions as to the treaty making power is essential for the international validity of the treaty, but not necessarily compliance with other constitutional provisions, Fitzmaurice in *B Y*, 15 (1934), pp 113 137, Fairman in *A J*, 30 (1936), pp 439 462, and writers referred to above See also Jenks in *Canadian Bar Review*, 15 (1937), pp 464 477, and Stewart in *A J*, 32 (1938), pp 57 62, with regard to the validity of ratifications by Canada of certain International Labour Conventions following upon the judgment of the Judicial Committee of the Privy Council to the effect that Federal legislation passed to implement these Conventions was *ultra vires* (*Attorney-General for Canada* v *Attorney General for Ontario* [1937] A C 326)

It must now be regarded as established by the practice of the Permanent Court of International Justice that a party to proceedings before the Court may, in certain circumstances, validly undertake far-reaching obligations as the result of a declaration of its agent regardless of any constitutional restrictions Thus, in the course of the argument before the Court in the case concerning the Free Zones of Upper Savoy and the District of Gex, the Swiss Agent declared on behalf of Switzerland that should the Zones be maintained his country would agree that, in the absence of an agreement with France, the terms of the exchange of goods between the Zones and Switzerland should be settled by experts, that their decisions should be binding upon both States, and that no ratification on the part of Switzerland would be necessary The French Agent thereupon expressed doubts whether the Swiss declaration was binding in view of the requirements of Swiss constitutional law The Court held that, 'having regard to the circumstances in which the declaration was made,' it was binding on Switzerland Series A/B, No 46, p 170 (Judgment of June 7, 1932) In a number of cases the Court assumed jurisdiction by virtue of the argument or generally of the conduct of the representatives of the parties before the Court on questions not covered by a special or general agreement See Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp 56 58 And see Paul de Visscher, *op cit*, pp 174 200, for a survey of other cases decided by the Court and other international tribunals See also the *Lighthouses Case* between France and Greece as reported in *Annual Digest*, 1933 1934, Case No 36 (at pp 84, 85)

[1] See Anson, *The Law and Custom of the Constitution* (3rd ed), II (The Crown), Part II (1908), at pp 102-110, Atherley Jones in *Grotius Society*, 4 (1919), pp 95 109, Halsbury, *Laws of England*, VI § 679, McNair in *B Y*, 1928, pp 59 68, Holdsworth in *L Q R*, 58 (1942), pp 175-183

of most countries [1] Thus, according to Article 8 of the French Constitution, the President exercises the treaty-making power, but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament [2] Again, according to Article 2, § 2, of the Constitution of the United States, the President can only ratify treaties—as distinguished from so-called executive agreements [3]—with the consent of the Senate, given by two-thirds of the Senators present

Mutual Consent of the Contracting Parties

§ 498. A treaty being a contract, mutual consent of the parties is necessary Mere proposals made by one party, and not accepted by the other, are, therefore, not binding upon the proposer Without force are also pollicitations, which contain mere promises without acceptance by the party to whom they were made Not binding are, lastly, so-called *punctationes*, mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty [4] But such *punctationes*

[1] See Crandall, *op cit*, §§ 33 154, where the constitutional rules concerning the making of treaties which prevail in the United States, and in most other countries, are discussed And see Hyde, II §§ 495 509, Dickinson in *A J*, 20 (1926), pp 444 452, Hackworth, IV §§ 465 471, 514 517, *Reports from His Majesty's Representatives abroad on the Methods adopted in the Parliaments of Foreign Countries for dealing with International Questions*, Misc No 5 (1912), Cmd 6102, and Misc No 19 (1924), Cmd 2282

[2] As to the position of Germany prior to 1932 see Schmitz in *Z o V*, III (1932), pp 313 385 See also Meissner, *Vollmacht und Ratifikation bei volkerrechtlichen Vertragen nach Deutschem Recht* (1934), and Schiffer and Wilcox in *A J*, 30 (1936), pp 216 232

[3] These account for over one half of the international engagements entered into by the United States since 1789 There has been an increasing tendency to assert that the machinery of Article 2, § 2, of the Constitution was never intended to be exclusive, that executive agreements, made with the concurrence of both Houses of Congress, possess the same international and domestic authority as treaties ratified with the consent of two thirds of the Senate, and that there is no type of treaty which cannot be entered into by way of executive agreement See McClure, *International Executive Agreements* (1941), Hackworth, V pp 390 433, Levitan in *Illinois Law Review*, 35 (1940), p 369, Catudal in *George Washington Law Review*, 10 (1942), p 653, Quincy Wright in *A J*, 38 (1944), pp 341 355, and in *International Conciliation*, May 1945, Pamphlet No 411, Borchard in *A J*, 38 (1944), pp 637 643, Herbert Wright, *ibid*, pp 643 650, McDougal and Lans in *Yale Law Journal*, 54 (1945), pp 181 251 and 534 615, Borchard, *ibid*, pp 616 664 See also Dennison, *The Senate Foreign Relations Committee* (1942), Westphal, *The House Committee on Foreign Affairs* (1942), Colegrove, *The American Senate and World Peace* (1944)

[4] Hold Ferneck, II pp 152-155, denied the binding force of the Treaty of Versailles in so far as its provisions were contrary to the preliminary treaty of November 5, 1918, embodying the Wilsonian points

must not be confused either with a preliminary treaty, or with a so-called *pactum de contrahendo* A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later Such preliminary treaty is a real treaty, and therefore binding upon the parties A *pactum de contrahendo* requires likewise the mutual consent of the parties It is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties[1] The difference between *punctationes* and a *pactum de contrahendo* is that the latter imposes an obligation on the parties to elaborate in a treaty an agreement already reached on certain points, whereas in the case of the former no binding agreement has been concluded

Effect of Coercion of a State or its Representative

§ 499 Real consent on the part of the representatives of a State concluding a treaty is a condition of its validity A treaty concluded as the result of intimidation or coercion exercised personally against the representatives is invalid However, with regard to the freedom of action of the State as such, International Law as it existed prior to the Covenant of the League, the Charter of the United Nations, and the General Treaty for the Renunciation of War,[2] disregarded

[1] See *e g* Article 2, para 2, of the Treaty of March 2, 1936, between the United States and Panama providing that should the utilisation of lands and waters additional to those already employed prove necessary for the operation of the Canal, the parties shall agree upon the required measures *A J*, 34 (1940), Suppl, p 140 On the obligation to enter into negotiations as distinguished from the obligation to reach an agreement see the Advisory Opinion of the Permanent Court of October 1931 in the *Case concerning the Railway Traffic between Lithuania and Poland P C I J*, Series A/B, No 42, p 116 For an example of an undertaking to formulate a joint plan for an international conference to consider the negotiation of a multilateral agreement see Article 3 of the Anglo American Agreement on Petroleum of September 24, 1945 (Cmd 6683) For an example of a treaty laying down the principles upon which subsequent treaties to be negotiated shall be based see Article 8 of the Treaty of January 11, 1943, between Great Britain and China providing for the relinquishment of extraterritorial rights in China The Treaty provides that the parties shall enter into negotiations for the conclusion of a comprehensive modern treaty or treaties of friendship, commerce, navigation and consular rights and that 'the treaty or treaties to be thus negotiated will be based upon the principles of international law and practice as reflected in modern international procedure and in the modern treaties which each of the High Contracting Parties have respectively concluded with other Powers in recent years' (*Treaty Series*, No 2 (1943), Cmd 6456)

[2] See below, vol II § 52*g*

the effect of coercion in the conclusion of a treaty imposed by the victor upon the vanquished State This rule, although obnoxious to a general principle of law, and although challenged from time to time by writers and governments,[1] was a necessary corollary of the admissibility of war as an instrument for changing the existing law War was a legitimate means of compulsion, and consent given in pursuance thereof could not properly be regarded as tainted with invalidity The position has now probably changed in so far as war has been prohibited by the Charter of the United Nations and the General Treaty for the Renunciation of War The State which has resorted to war in violation of its obligations under these instruments cannot be held to apply force in a manner permitted by law Accordingly, duress in such cases must, it is submitted, be regarded as vitiating the treaty [2]

In so far as the victorious State was not bound by either of these instruments, or if resort to war on its part was not in violation of them, there is room for the continuance of the traditional rule disregarding the vitiating effect of physical coercion exercised against a State [3]

[1] See Lauterpacht, §§ 73, 74 On the effect of this rule upon the equality of States see McNair in *Michigan Law Review*, 26 (1927), pp 139 141, 149 151

[2] The resulting impossibility, on the part of the defeated State, validly to give its consent to the termination of the war by a treaty, can, it would appear, be remedied in such cases only by a quasi legislative act of third States expressly recognising the situation created by the treaty (see above, § 75i) This might best be done by the terms of the treaty being embodied in a general convention in the nature of an international settlement in which the concurrence of a considerable number of third States would to some extent offer the assurance that the terms of the treaty are not unreasonable or unjust And see above, § 241*a*, with regard to conquest The fact that coercion does not as a rule vitiate a treaty of peace does not mean that in other cases no notice is taken of the fact that a government acts under compulsion On April 9, 1941, the United States concluded an agreement with the Danish Minister in Washington relating to the defence of Greenland and subsequently ignored the declaration of the Government of Denmark, then under German occupation, that the agreement was void as concluded without its authorisation It is believed that the action of the United States, though novel, was not improper The Government of Denmark was not at that time a sufficiently free agent either to protect effectively the interests of Denmark abroad or to object to agreements made for that purpose on behalf of Denmark For a criticism of the agreement see Briggs in *A J*, 35 (1941), pp 506 513 For the text of the agreement see *ibid*, Suppl, p. 129

[3] For some recent discussion on the subject see Hold-Ferneck, II pp 149-152, Atassy, *Les vices de consentement dans les traités internationaux à l'exclusion des traités de*

Delusion and Error in Contracting Parties

§ 500 Although a treaty was concluded with the real consent of the parties, it is nevertheless not binding if the consent was given in error, or under a delusion produced by a fraud of the other contracting party If, for instance, a boundary treaty were based upon an incorrect map, or a map fraudulently altered by one of the parties, such treaty would by no means be binding [1] Although there is freedom of action in such cases, consent has been given in circumstances which prevent the treaty from being binding

III

OBJECTS OF TREATIES

Vattel, II §§ 160-162, 166—Hall, § 108—Phillimore, II § 51—Walker, § 30—Hyde, II §§ 490, 491, 493—Bluntschli, §§ 410 416—Heffter, § 83—Ullmann, § 79—Fauchille, § 819—Despagnet, § 445—Pradier Foderé, II §§ 1080 1083—Mérignhac, II p 640—Rousseau, pp 766 814—Rivier, II pp 57 63 Nys, II pp 503, 504—Fiore, II §§ 1001 1004, and *Code*, §§ 760 763—Martens, I § 110—De Louter, I pp 479 481—McNair, Chapter 10—Jellinek, *Die rechtliche Natur der Staatenvertrage* (1880), pp 59 60—Vitta, *La validité des traités internationaux* (1940), pp 159 215—Nippold, *op cit*, pp 181 190—Wright in *A J*, 11 (1917), pp 566 579—Rousseau in *R G*, 39 (1932), pp 133 192—Salvioli in *Hague Recueil*, vol 46 (1933) (IV), pp 26 30—Pasching in *Z o R*, 14 (1934), pp 54 61

Objects in general of Treaties

§ 501 The object of treaties is always one or more obligations, whether affecting all the parties, or unilateral on the part of one only Speaking generally, the object of treaties can be an obligation concerning any matter of interest for States Since there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty However, the Law of Nations

paix (1929), Tomšič, *La reconstruction du droit international en matière des traités* (1931), Vitta, *La validité des traités internationaux* (1940), pp 102 140, Weinschel in *Z V*, 15 (1930), pp 469 473, F de Visscher in *R I*, 3rd ser, 12 (1931), pp 513-537, Butler in *A S Proceedings*, 1932, pp 45 48, Turlington, *ibid*, pp 49 53, Bleiber in *Z V*, 19 (1935), pp 385 402, Cavaglieri in *Rivista*, 27 (1935), pp 4 23, Verzijl in *R I* (*Paris*), 15 (1935), pp 324-330, *Harvard Research* (1935, Part III) pp 1148 1161, Schoen in *Z V*, 21 (1937), pp 277 296, McNair, Chapter 11 (2), Brierly in *Hague Recueil*, vol 58 (1936) (IV), pp 203 210

[1] See Weinschel in *Z V*, 15 (1930), pp 449 469, Pasching in *Z o R*, 14 (1934), pp 33-47, *Harvard Research* (1935, Part III), pp 1126 1134, 1144-1148, Verzijl in *R I* (*Paris*), 15 (1935), pp 284 339, McNair, Chapter 11 (3)

prohibits some obligations from becoming objects of treaties, so that such treaties as consist of obligations of this kind are, from the very beginning, null and void.[1]

Obligations of Contracting Parties only can be Object

§ 502 A treaty, other than a general and almost universal treaty of a law-making character enacted for the general good of the international community,[2] which purported to impose an obligation upon a third party would to that extent be null and void, for the general principle prevails that *pacta tertiis nec nocent nec prosunt*[3] But this must not be confused with an obligation undertaken by one of the contracting States to use its influence to induce another State to perform certain acts. The object of a treaty containing such a stipulation is an obligation of one of the contracting States, and the treaty is therefore valid and binding

Treaties Inconsistent with Former Treaty Obligations

§ 503 Treaties, whether general or particular, lay down rules of conduct binding upon States As such they form part of International Law They are, in the first instance, binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations This implies the duty not to conclude treaties inconsistent with the obligations of former treaties The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker[4] It is incompatible with the unity of the law to recognise and enforce mutually exclusive rules of conduct laid down in a contract in cases in which such inconsistency is known to both parties In view of the relatively small number and publicity of treaties, this rule applies with special force in the international spheres The practice of States offers several examples of protest[5]

[1] The voidance *ab origine* of these treaties must not be confused with voidance of such treaties as are valid in their inception, but become afterwards void on some ground or other, see below, §§ 541 544

[2] See below, § 522*a*

[3] See Roxburgh, *International Conventions and Third States* (1917), and particularly ch. VII for the exceptions to the general principle

[4] See above, § 241*a*, with regard to Conquest, § 499 (Effect of Coercion), and § 167*oo* (Article 20 of the Covenant)

[5] See on this subject De Louter, I p 480, *Harvard Research Treaties* (1935), pp 1016 1129, Wright in *A J*, 11 (1917), pp 576 579, Salvioli in *Rivista*, 12 (1918), pp 229-241, Rousseau in *R G*, 39 (1932), pp 140-162, Verzijl in *R I* (*Paris*), 15 (1935), pp 284 339 (in connection with the general question of validity of international juridical acts), Lauterpacht in *B Y*, 17 (1936), pp 54-65, Sorensen in *Nordisk T A*, 9 (1938), pp 150-173

against treaties conflicting with pre-existing treaty obligations Thus when in 1878 Russia and Turkey concluded the preliminary Treaty of Peace of San Stefano, which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, Great Britain protested [1]

The so-called doctrine of non-recognition of treaties and situations inconsistent with previous treaties [2] must be regarded as based on the principle as stated above The rigid application of that principle may lead to difficulties in cases in which the modification of a general convention by a new treaty is obstructed by a small number of the signatories of the former treaty However, as every legal principle must be applied reasonably, it is submitted that the second treaty, although inconsistent with the first, would not be held by an international court to be invalid if it could be shown that the interests of the complaining State are not affected at all or that the degree to which they are affected is slight when related to the general advantage accruing from the new treaty [3]

Treaties Inconsistent with the Charter of the United Nations

§ 503a Article 103 of the Charter of the United Nations lays down that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail This Article is both more precise and more far-reaching than the corresponding provisions of the Covenant of the League of Nations [4] It establishes an absolute supremacy of the

[1] See Martens, *N R G*, 2nd ser, 3, p 257, and above, § 132 (2) As to the British protest, in 1846, against the Treaty providing for the annexation of Cracow, see *British and Foreign State Papers*, 35, p 1085, and, generally, *ibid*, pp 1042-1107 For a survey of some cases see Tobin, *The Termination of Multipartite Treaties* (1933), pp 206 249 For decisions of the Central American Court of Justice concerning the Bryan - Chamorra Treaty between the United States and Nicaragua see *A J*, 11 (1917), pp 228 and 729, and above, p 274, n 1 See also P C I J, Series A/B, No 41 (*Austro German Customs Union Case*)

[2] See above, § 75i

[3] See *B Y*, 16 (1935), pp 162 166, with regard to the Dissenting Opinions of Judges Van Eysinga and Schucking in the *Oscar Chinn* case between Belgium and Great Britain P C I J, Series A/B, No 63 See also Hudson in *A J*, 24 (1930), p 461 (with regard to treaties codifying International Law), Moscato in *Rivista*, 23 (1931), pp 54 66, 199 215 (with regard to the abrogation of the neutralisation of Belgium), Fitzmaurice in *B Y*, 18 (1937), pp 189 191 (concerning the Montreux Straits Convention of 1936) See also Rousseau, pp 781-814

[4] See above, § 167oo

obligations of the Charter—and these are manifold in scope and going beyond the duties of observance and of common enforcement of the obligations of pacific settlement—over any other contractual agreement of the members whether past or future, and whether between members *inter se* or with States which are not members of the United Nations It may be said that, to the extent of their inconsistency with the Charter, all these agreements are, for all practical purposes, void and unenforceable [1] The Charter thus establishes a significant hierarchy in the system of conventional rules of International Law It constitutes what may be called a 'higher law' with a resulting limitation of the contractual capacity of the members of the United Nations

Object must be physically possible

§ 504 An obligation to perform a physical impossibility [2] cannot be the object of a treaty If perchance a State entered into a convention stipulating an obligation of that kind, no right to claim damages for non-fulfilment of the obligation would arise for the other party, such treaty being legally null and void

Immoral Obligations

§ 505 It is a customarily recognised rule of the Law of Nations that immoral obligations cannot be the object of an international treaty [3] Thus, an alliance for the purpose of attacking a third State without provocation is, from the beginning, not binding It cannot be denied that in the past many treaties stipulating immoral obligations have been concluded and executed, but this does not alter the fact that such treaties were legally not binding upon the contracting

[1] The main difficulty raised by this provision of the Charter arises in connection with treaties concluded with non-member States prior to the acceptance of the Charter For it is not easy to see how the Charter, unless it is assumed to possess a legislative character binding directly States which have not subscribed to it (see below, § 522*a*), can derogate from their rights acquired by treaties concluded prior to its entry into force In practice the difficulty will tend to disappear in proportion as the United Nations approach universality With regard to treaties concluded with non-member States after the Charter has entered into force, the legitimate rights of non member States are not affected in view of their knowledge of the fact that the contractual capacity of the Members of the United Nations has been limited by Article 103 of its Charter Such treaties also fall under the operation of the general rule of International Law relating to treaties inconsistent with the former obligations of the contracting parties See above, § 503

[2] See below, § 542

[3] See McNair in *Michigan Law Review*, 26 (1927), pp 140 142, Verdross in *A J*, 31 (1937), pp 571 577

parties It must, however, be taken into consideration that the question as to what is immoral is often controversial An obligation which is considered immoral by other States may not necessarily appear immoral to the contracting parties

Illegal Obligations.

§ 506 It is a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty If, for instance, a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the open sea, or should command its vessels to commit piratical acts on the open sea, such treaty would be null and void, because it is a principle of International Law that no part of the open sea can be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the high seas [1]

IV

FORM AND PARTS OF TREATIES

Grotius, II c 15, § 5—Vattel, II § 153—Hall, § 109—Westlake, I pp 290, 291—Wheaton, § 253—Moore, V § 740—Hershey, § 298—Hyde, II §§ 512 515—Bluntschli, §§ 417 497—Hartmann, §§ 46, 47—Heffter, §§ 87 91—Ullmann, § 80—Fauchille, §§ 821 823 (2)—Pradier Fodéré, II §§ 1084 1099—Mérignhac, II p 645—Rivier, II pp 64 68—Nys, II pp 504 507—Fiore, II §§ 1004 1006, and *Code*, §§ 764 768—Martens, I § 112—Jellinek, *Die rechtliche Natur der Staatenvertrage* (1880), p 56—Nippold, *op cit*, pp 178 181—Crandall, *op cit*, § 6—McNair, Chapters 1, 4—Satow, pp 318 402, and *International Congresses* (Foreign Office Peace Handbook) (1920), pp 20 32—Bittner, §§ 59 76—Report of Mastny and Rundstein for the League Codification Committee in *A J*, 20 (1926), Special Suppl, pp 205 218—*Harvard Research* (1935, Part III), pp 722 739—Anzilotti, pp 367 374—Devaux in *R I F*, I (1936), pp 299 309—Mervyn Jones in *B Y*, 21 (1944), pp 111-122

No Necessary Form of Treaties

§ 507 The Law of Nations includes no rule which prescribes a necessary form of treaties A treaty is, therefore, concluded as soon as the mutual consent of the parties becomes clearly apparent [2] Such consent must always be

[1] As to the effect of inconsistency with the terms of the Covenant under Article 20 see above, § 167*oo*

[2] As to the effect of non compliance by members of the League with the obligation to register treaties with the Secretariat under Article 18 of the Covenant see below, § 518*a*

given expressly, or by unmistakable conduct, for a treaty cannot be concluded by mere tacit acquiescence [1] or mere passivity But it matters not whether an agreement is made orally, or in writing, or by such conduct as implies mutual consent, as, for instance, when an agreement is made by symbols Thus, in time of war, the exhibition of a white flag symbolises the proposal of an agreement as to a brief truce, for the purpose of certain negotiations, and the acceptance of the proposal on the part of the other side by the exhibition of a similar symbol establishes a convention as binding as any written treaty Thus, too, history tells of an oral treaty of alliance, secured by an oath, concluded in 1697 at Pillau between Peter the Great of Russia and Frederick III , Elector of Brandenburg [2] In the case between Norway and Denmark concerning the status of Eastern Greenland, the Permanent Court of International Justice held in 1933 that an oral declaration given by the Minister of Foreign Affairs on behalf of his Government in answer to a request by the representative of a foreign State is binding upon the State to which the Minister belongs, provided that the subject-matter of the declaration falls within his province [3] However, in practice, treaties take the form of a written [4] document, signed by duly authorised representatives of the contracting parties [5]

Acts, Conventions, Declarations, etc

§ 508 International compacts which take the form of written contracts are sometimes termed not only *agreements* or *treaties*, but *acts*, *conventions*, *declarations*, *protocols*, and the like But there is no essential difference between them, and their binding force upon the contracting parties is the same, whatever be their name The Geneva Convention,

[1] Tacit acquiescence must not be confused with what in English law is sometimes called 'tacit consent,' *i e* a contract which is not made in writing or orally, but is inferred from conduct

[2] See Martens, 1 § 112

[3] Series A/B, No 53, p 71 And see for comment thereon, Garner in *A J*, 27 (1933), pp 493 497, who cites some precedents The Pan-American Convention on Treaties (see above, p 62, n) lays down that the written form is an essential condition of treaties (Article 2) Some States, like Mexico and Turkey, became bound by the wide obligations of the Covenant simply by accepting the invitation to join the League without any formal document of adhesion having been executed

[4] Which includes printing

[5] As to choice of language see above, § 359, and Fauchille, §§ 815-815 (6), 822 (2)

the Declaration of Paris, and the Final Act of the Vienna Congress are as binding as any agreement which goes under the name of 'treaty' or 'convention'[1] The term 'declaration'[2] often denotes a law-making treaty according to which the parties engage themselves to pursue in future a certain line of conduct[3] But such law-making treaties are quite as frequently styled 'conventions' as 'declarations' The best example is the Hague 'Convention' concerning the laws and usages of war, which is based upon the unratified 'declaration' concerning the laws and customs of war produced by the Brussels Conference of 1874[4]

Parts of Treaties

§ 509 Since International Law lays down no rules concerning the form of treaties, there exist no rules concerning the arrangement of the parts of written treaties But the following order is usually observed A first part, the so-called *preamble*,[5] comprises the names of the Heads of the contracting States,[6] of their duly authorised representatives,

[1] On the part of the British Foreign Office see *Parl Papers*, Misc No 5 (1909), Cmd 4555, Proceedings of the International Naval Conference held in London, 1908 1909, p 57 The attempt to distinguish between a 'declaration' and a 'convention' by maintaining that, whereas a 'convention' creates rules of particular International Law between the contracting States only, a 'declaration' contains the recognition, on the part of the best qualified and most interested Powers, of rules of universal International Law, does not stand the test of criticism Thus the Declaration of Paris of 1856 had not been agreed to by the United States of America, or by many other States, at the time of its promulgation

[2] Bittner, § 97, considers the real difference between 'declarations' and other treaties to lie in the fact that as a general rule the former are more concise and omit many of the purely formal clauses as to full powers, ratifications, etc, usually found in other treaties

[3] See above, § 487

[4] As to the distinction made in the United States between *treaties*, which can only be ratified by the President with the consent of the Senate, and *agreements*, which do not require such consent, see above, § 497 (See also Moore, v § 752, and, in particular, Crandall, *op cit*, §§ 56 61, as regards the assertion that only such compacts require ratification as bear the title *treaties* or *conventions* see below, § 512)

[5] Paul You, *Le Préambule des Traités Internationaux* (1941), and in *R I (Geneva)*, 20 (1942), pp. 25-45, Rousseau, pp 172 188

[6] In treaties made by Great Britain it has been customary to name 'His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India' as one of the High Contracting Parties, but as the result of a Proclamation of May 13, 1927, issued under the Royal and Parliamentary Titles Act, 1927, His present Majesty's title is 'George VI by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India,' the change being due to the creation of the Irish Free State in 1922 Then follows an enumeration of the different units of the British Empire in respect of which the Treaty is made, separate plenipotentiaries signing for each unit and those for the home

and the motives for the conclusion of the treaty [1] A second part consists of the primary stipulations in numbered articles A third part consists of miscellaneous stipulations concerning the duration of the treaty, its ratification, the accession of third Powers, and the like The last part comprises the signatures of the representatives But this order is by no means necessary Sometimes, for instance, the treaty itself does not contain the very stipulations upon which the contracting parties have agreed, such stipulations being placed in an annex to the treaty It may also happen that a treaty contains secret stipulations in an additional part, which are not made public with the bulk of the stipulations [2]

Inter Governmental and Inter Departmental Agreements

§ 509a Recent international practice has adopted, in addition to the traditional form of treaties—*i e* treaties negotiated and signed expressly on behalf of the Head of the State by virtue of Full Powers received from him—so-called inter-governmental and inter-departmental agreements [3] The former, concluded between the Governments of the Contracting Parties, are, in their legal effect, in the same category as ordinary treaties concluded on behalf of the State They are not limited to matters of minor or transient importance.[4] The main reason for adopting this

Government signing 'for Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League' (see Imperial Conference, 1926, *Summary of Proceedings*, Cmd 2768, pp 22, 23, and 29-31)

The correct practice is, it is believed, to name the Head of the State as a party to a treaty, but this practice has not always been followed, for instance, in the Anglo-French Treaty of September 18, 1897, regarding Tunis, 'the United Kingdom of Great Britain and Ireland' is stated to be a party, though the Treaty appears to bind the whole Empire (Treaty Series, No 11 (1897), and two unratified treaties with Russia of 1924 (Russia Nos 1 and 2, 1924, Cmd 2215 and 2216) were stated to be between 'Great Britain and Northern Ireland on the one hand and the Union of Soviet Socialist Republics on the other hand' (see Keith in *J C L*, 3rd ser, 7 (1925), pp 106, 107 and pp 200, 201, Mackenzie in *A J*, 19 (1925), p 502, and Hudson, *ibid*, 22 (1928), pp 146-150) For the British Foreign Secretary's intimation to the Council of the League as to the future practice which it was desired to adopt see above, § 496a (p 798, n 4)

[1] As to the authority of the preamble to the Charter of the United Nations see above, § 168a

[2] The matter is treated with all details by Pradier Fodéré, II §§ 1086 1099 See also below, § 518a, 'Registration and Publication of Treaties'

[3] For a detailed discussion of the subject see M Jones in *B Y*, 21 (1944), pp 111 122

[4] See the Agreement of August 25, 1939, between the Government of the United Kingdom and the Polish

form of treaty is that it is attended by a smaller degree of formality and that, occasionally, it obviates certain inconveniences connected with the municipal law of the country concerned Thus some of the British Dominions have attached importance to being able to conclude treaties without resorting to the somewhat cumbrous procedure of receiving authority for the issue of Full Powers under the Great Seal [1] In the United States that form of treaty does occasionally offer the advantage of a more speedy procedure than that permitted by an ordinary treaty requiring for its ratification the advice and consent of two-thirds of the Senate [2] However that may be, the international validity of such agreements is the same as that of ordinary treaties The same applies to agreements made, with the authority of the Governments concerned, between government departments such as the Central Post Offices or various ministries [3] Often treaties provide expressly for inter-departmental arrangements of this nature [4]

V

RATIFICATION OF TREATIES

Grotius, II c 11, § 12—Pufendorf, III c 9, § 2—Vattel, II § 156—Hall, § 110—Westlake, I pp 290 292—Lawrence, § 132—Phillimore, II § 52—Twiss, I § 214—Halleck, I pp 296, 297—Taylor, §§ 364 367—Moore, V §§ 743

Government regarding Mutual Assistance Cmd 6616 (1945), or the Four Powers Agreement of August 8, 1945, for the Prosecution and Punishment of Major War Criminals, Cmd 6668 (1945) However, important treaties, multilateral and bilateral, are still, as a rule, concluded as between Heads of States It will be noted that the opening passage of the Preamble to the Charter of the United Nations is 'We, the peoples of the United Nations ' The Preamble to the Constitution of the Food and Agriculture Organisation of the United Nations (see above, p 291) begins 'The Nations accepting this Constitution '

[1] A consideration which will tend to disappear with the full acquisition of liberty of action by the Dominions also in this respect See above, § 496

[2] See above, § 498

[3] See *e g* the Agreement concerning Telecommunications concluded on December 15, 1936, between the Telegraph Administrations of Denmark, Finland, Iceland, Norway, and Sweden Hudson, *Legislation*, VII p 492, or the Agreement between the Post Office Authorities of those countries of December 31, 1934, concerning postal exchanges *ibid*, VI p 965

[4] See *e g* an Agreement cited by M Jones, *op cit*, p 119, n 4, between the British Air Ministry and the Austrian Federal Ministry of Commerce, based upon Article 1, para 2, of the Air Navigation Convention concluded between the two countries in 1933

756—Walker, § 30—Wharton, II §§ 131, 131*a*—Hershey, § 298—Wheaton, §§ 256-263—Hyde, §§ 516-520—Bluntschli, §§ 420, 421—Heffter, § 87—Gessner in *Holtzendorff*, III pp 15-18—Ullmann, § 78—Liszt, § 31 (IV V)—Hatschek, pp 230 234—Fauchille, §§ 824-824 (7)—Rousseau, pp 188 247—Pradier-Fodéré, II §§ 1100 1119—Mérignhac, II pp 652 666—Nys, II pp 507 515—Rivier, II § 50—Calvo, III §§ 1627-1636—Fiore, II § 994, and *Code*, § 755—Martens, I §§ 105-108—Scelle, II pp 467-479—Wicquefort, *L'ambassadeur et ses fonctions* (1680), II § XV—Jellinek, *Die rechtliche Natur der Staatenvertrage* (1880), pp 53-56—Nippold, *op cit*, pp 123-125—Wegmann, *Die Ratifikation von Staatsvertragen* (1892)—Crandall, *op cit*, § 3—McNair, Chapters 7, 9, 13—Satow, §§ 711-730—Bittner, §§ 77-93—Vexler, *De l'obligation de ratifier les traités régulièrement conclus* (1923)—Meissner, *Vollmacht und Ratifikation* (1934)—Dehousse, *La ratification des traités* (1935)—Wilcox, *Ratification of International Conventions* (1935)—Fragulis, *Théorie et pratique des traités internationaux* (1936), pp 39 82—Mervyn Jones, *Full Powers and Ratification* (1946)—Genet in *R G*, 38 (1931), pp 749-769—McNair in *Hague Recueil*, vol 43 (1933) (I), pp 297 302—Fitzmaurice in *B Y*, 15 (1934), pp 113-137—*Harvard Research* (Part III, 1935), pp. 739 812

Concep tion and Function of Ratifi- cation

§ 510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives, and is commonly used to include the exchange of the documents embodying that confirmation [1] Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is, as a rule, suspended till ratification is given [2] The function of ratification is, therefore, to make the treaty binding, and, if it is refused, the treaty falls to the ground in consequence As long as ratification is not given, the treaty is, although concluded and not devoid altogether of certain effects,[3] not perfect.

[1] See below, § 517*b* For forms of ratification, British and other, see Satow, §§ 727-730, and *International Congresses* (Foreign Office Peace Handbook) (1920), pp 131 134 For the meaning of 'ratification,' when applied to the Draft Conventions of the International Labour Organisation see above, § 340*f*, p 660, n 3

[2] See Jones in *A J*, 29 (1935), pp 51 65, who maintains that, with the exception of the United States, the practice of States and judicial decisions support the view expressed in the text But see *ibid*, p 51, n 1, for a long list of writers, including Westlake, Hall, and Hyde, in whose view the Treaty is binding from the date of its signature, the exchange of ratifications having a retroactive effect The Pan-American Convention on Treaties of February 1928 (see above, p 62, n) provides that treaties shall become effective from the date of ratification (Article 8) See also *Harvard Research* (1935, Part III), pp 719 812

[3] See Nisot in 57 *Clunet* (1930), pp 878 883, and *Harvard Research* (1935, Part III), pp 778-787 In *Philippson and Others* v *Imperial Airways Limited*, [1939] A C 332, the majority of the House of Lords held that the term 'high contracting party' used in a contract of carriage and referring to the Warsaw Conven

Many writers[1] maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent, and really concludes the treaty Before ratification, they maintain, no treaty has been concluded, but a mere mutual proposal to conclude a treaty has been agreed to But this opinion does not accord with the real facts[2] For the representatives are authorised, and intend, to conclude a treaty by their signatures Governments have always acted on the view that a treaty is concluded as soon as their mutual consent is clearly apparent They have always made a distinction between their consent, given by representatives, and their ratification to be given subsequently, they have never confused the two by considering their ratification to be their consent It is for that reason that a treaty cannot be ratified in part,[3] that no alterations of the treaty are possible through the act of ratification,[4] that a treaty may be tacitly ratified by its execution, that it is always dated from the day when it was duly signed by the representatives, and not from the day of its ratification, and that there is no essential difference between such treaties as need, and such as do not need, ratification

Rationale for the Institution of Ratification

§ 511 The *rationale* for the institution of ratification is partly that States require an opportunity of re-examining not the single stipulations, but the whole effect of the treaty upon their interests These interests may be of various kinds. They may undergo a change immediately after the

tion of 1929 on Air Transport included Belgium, who had signed but not ratified the Convention It is probable that the decision was influenced by consideration of the special circumstances of a commercial contract It appears that the British Government, in a communication addressed to the United States, dissociated itself from the ruling of the House of Lords It said 'His Majesty's Government are of the opinion that the ordinary meaning of High Contracting Party in a convention is to designate a party who is bound by the provisions of a convention and therefore does not cover a signatory who does not ratify it' The United States Department of State expressed its agreement with this view Hackworth, IV § 367 (p 373) See also M Jones in *L Q R*, 56 (1940), pp 399 404

[1] See, for instance, Ullmann, § 78, Jellinek, *op cit*, p 55, Nippold, *op cit*, p 123, Wegmann, *op cit*, p 11

[2] The matter is very ably discussed by Rivier, II pp 74-76

[3] When in 1934 Ecuador, who was a signatory of the Treaty of Versailles but had not ratified the Treaty, decided to become a member of the League as an original member (see *Off J*, 1934, p 1468) she ratified the Covenant without ratifying the Treaty of Versailles But this must be regarded as exceptional

[4] See below, § 517*a*

signing of the treaty by the representatives They may appear to public opinion in a different light from that in which they appear to the Governments, so that the latter want to reconsider the matter Another reason for ratification is that treaties on many important matters are, according to the constitutional law of most States, not valid without some kind of consent on the part of parliaments Governments must, therefore, have an opportunity of withdrawing from a treaty, in case parliaments refuse their approval [1]

Ratification regularly, but not absolutely, necessary

§ 512 But ratification, although necessary in principle, is not always essential Although it is now a universally recognised customary rule of International Law that treaties regularly require ratification, even if this is not expressly stipulated, there are exceptions to the rule [2] For treaties concluded by such State functionaries [3] as have, *ipso facto* by their office, the power to exercise within certain narrow limits the treaty-making competence of their State, do not require ratification, but are binding at once when they are concluded, provided that the respective functionaries have not exceeded their powers Further, treaties concluded by Heads of States in person do not require ratification, provided that they do not concern matters in regard to which constitutional restrictions [4] are imposed upon Heads of States Again, it may happen that the contracting parties stipulate expressly, for the sake of a speedy execution of a treaty,

[1] For the temporary British practice in 1924 of laying treaties, after signature and before ratification, on the table in both Houses of Parliament see Hansard, Commons, 1924, vol 171, p 2007, *B Y*, 1924, pp 190-191 The practice was temporarily abandoned in December 1924 upon a change of Government (see Hansard, Commons, 1924 1925, vol 179, col 565, *B Y*, 1925, p 188, and Scott in *A J*, 18 (1924), pp 296-298). It was restored in 1929, but it is a practice which admits of exceptions whenever circumstances so require The expression that 'Parliament has ratified' a certain treaty, though occasionally met with, is objectionable when used of a British treaty Parliament, if invited by the Government to do so, may authorise the Government to ratify a treaty, but it is the King, upon the advice of his Ministers responsible for the parts of the Empire concerned, who ratifies a treaty Legislation may be necessary to give effect to the treaty, but that is not ratification Thus the title of the Treaty of Peace (Turkey) Act, 1924, is 'an Act to carry into effect a Treaty of Peace,' etc See McNair in *B Y*, 1928, pp 59-68

[2] Fauchille, § 824 (2), gives a number of illustrations of the exceptions which follow and of certain others See also Dehousse, *op cit*, pp 82 117

[3] See above, § 496

[4] See above, § 497

that it shall be binding at once without ratifications being necessary [1] But it must be emphasised that renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation If the representatives have not received a special authorisation to dispense with ratification, their renunciation is not binding upon the States which they represent

It is asserted that 'apart from those compacts which bear the title *treaty* or *convention*, ratification is only required where it is provided for' [2], but this assertion is too sweeping Since *all* international compacts are contracts, and therefore treaties in the wider sense of the term, the title which a particular compact bears cannot decide the question whether it does, or does not, require ratification The answer to the question depends upon the contents of the compact Thus a protocol, or an exchange of notes, which merely add some minor point, or record agreement on the interpretation of a clause in a treaty, do not require ratification, unless this is

[1] Thus, Article 6 of the Alliance between Great Britain and Japan of 1902, Article 8 of the Alliance of 1905, and Article 6 of the Alliance of 1911, stipulated that the agreement 'shall come into effect immediately after the date of signature' Again, the Treaty of London of July 15, 1840, between Great Britain, Austria, Russia, Prussia, and Turkey, concerning the pacification of the Turco Egyptian conflict, was accompanied by a secret protocol (see Martens, *N R G*, 1 p 163), signed by the representatives of the parties, according to which the Treaty was to be executed at once, without being ratified For the Powers were, on account of the victories of Mehemet Ali, very anxious to setttle the conflict as quickly as possible The Anglo Polish Treaty of Alliance of August 25, 1939, the Anglo Ethiopian Agreement of December 19, 1944, the Four Powers Agreement of August 9, 1945, concerning the prosecution and punishment of the major war criminals, and many other treaties concluded during or in connection with the Second World War, were declared to enter into force on the day of signature Occasionally — as in the Soviet Czecho Slovak Treaty of friendship, mutual assistance and post war collaboration concluded on December 12, 1943—the treaty is declared to enter into force immediately after its signature while being nevertheless subject to ratification (usually 'at the earliest possible date') For a useful enumeration of cases in which, according to the British practice, ratification is unnecessary see McNair, pp 86, 87 See also De Felice, *Gouvernements nationaux et accords internationaux* (1942), on international agreements brought into force without ratification

[2] See Satow (2nd ed), II § 606, p 312 And see Fitzmaurice in *B Y*, 15 (1934), pp 113 129, who gives reasons for the view that, in the absence of an express or implied provision to the contrary, a treaty does not, in the international sphere, require ratification

The Pan American Convention on Treaties of February 1928 (see above, p 62, n) provides that treaties are obligatory only after ratification even if the full powers or the treaty itself do not contain this condition (Article 5)

specially stipulated [1] The same applies with regard to agreements providing for a *modus vivendi* and the like, whatever title they may bear Further, there is no doubt that matters of minor importance are frequently agreed upon by an exchange of notes, or in so-called protocols, arrangements, declarations, and the like, which are not considered to be subject to ratification, because the agreements therein contained are at once carried out But apart from these obvious exceptions, all compacts require ratification unless they contain a stipulation to the contrary,[2] whatever title the document comprising them may bear [3]

Length of Time for Ratification

§ 513 No rule of International Law prescribes the length of time within which ratification must be given, or refused If this is not specially stipulated by the contracting parties in the treaty itself, a reasonable length of time must be presumed to be mutually granted Without doubt, a refusal to ratify must be presumed from the lapse of an unreasonable time without ratification having been made [4] In most cases, however, treaties which are in need of ratification now contain a clause stipulating that they are subject to ratification, and, occasionally, also prescribing the time within which ratification should take place It is often provided that ratification shall take place as soon as possible [5]

[1] Accessions and adhesions to treaties by third States (see below, §§ 532, 533) normally do not require ratification, but they are sometimes expressly made subject to ratification, see below, p 839, n 4

[2] Which stipulation must be presumed if the Treaty provides that it shall enter into force immediately See *e g* the Anglo Ethiopian Agreement of December 19, 1944 Cmd 6584 (1945)

[3] In the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder* the Permanent Court of International Justice held in September 1929 that the expression 'drawn up' used in Article 338 of the Treaty of Versailles meant, with reference to a treaty, a convention duly signed and ratified The Court pointed out that, unless there was in the treaty an express provision to the contrary, the contracting parties must have intended to abide by 'the ordinary rules of international law, amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of ratification' Series A, No 23, pp 17 21

[4] Whereupon presumably the treaty becomes stale and incapable of ratification

[5] See *e g* the Anglo-Russian Treaty of Alliance of May 26, 1942 (Cmd 6368) or the Anglo Chinese Treaty of January 11, 1943, for the relinquishment of extraterritorial rights in China (Cmd 6456) The Agreement on Petroleum between the United States and Great Britain of September 24, 1945, lays down, without providing for ratification, that it shall enter into force upon a date to be agreed upon after each Government shall have notified the other of its readiness to bring the Agreement into force (Cmd 6683)

Refusal of Ratification

§ 514 Formerly[1] it was maintained that ratification could not be refused unless the representatives had exceeded their powers, or violated their secret instructions. But nowadays there is probably no writer who maintains that a State is in *any* case *legally*[2] bound to accord ratification Some insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification It is difficult, however, to see the value of such a moral, in contradistinction to a legal, duty International Law does in no case impose a legal duty of ratification A State refusing ratification will always have reasons for doing so which appear just to itself, although they may be insufficient in the eyes of others In practice, ratification is given or withheld at discretion[3] It is clear that a State which has created for itself a reputation for arbitrarily refusing or delaying ratification may, in practice, find its contractual capacity somewhat impaired

Form of Ratification

§ 515 No rule of International Law exists which prescribes a necessary form of ratification Ratification can, therefore, be given tacitly as well as expressly Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it It is usual for ratification to take the form of a document duly signed by the Heads of the States concerned, and their Secretaries for Foreign Affairs It is usual to draft as many documents as

[1] See Grotius, II c 11, § 12, Bynkershoek, *Quaestiones juris publici*, II 7, Wicquefort, *L'Ambassadeur*, II 15, Vattel, II § 156, G F von Martens, § 48

[2] See Hyde, II § 516, *Harvard Research* (1935, Part III), pp 769 778

[3] Bittner, p 261, n 1047, gives many instances As to the duty to submit treaties for ratification before legislative authorities see Nisot in 58 *Clunet* (1931), pp 349-351, and above, § 340*f* See also Article 4 of the Constitution of the Food and Agriculture Organisation of the United States In 1930 the Council of the League appointed a Committee to inquire into the causes of the delay in the ratification of conventions concluded under its auspices In its report (Doc No A 10 1930 V), which was approved by the Assembly in the same year, the Committee recommended that the Secretary-General should request a State which had signed a convention but not ratified it within one year to declare its intention in the matter, that a similar inquiry should be addressed after five years to members of the League who had neither signed nor ratified the Convention, and that in the event of an insufficient number of ratifications, the Council should consider the advisability of calling a new conference with a view to modifying the Convention, if necessary See Wilcox, *The Ratification of International Conventions* (1935), pp 145-158, and the same in *Geneva Special Studies*, VI No 2 (1935)

there are parties to the Convention, and to exchange these documents between the parties [1] Occasionally the whole of the treaty is recited *verbatim* in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory representatives are cited As ratification is only the confirmation of an already existing treaty, the essential requirement in a ratifying document is merely that it should refer clearly and unmistakably to the treaty to be ratified The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement

By whom Ratification is effected

§ 516 Ratification is effected by those organs which exercise the treaty-making power of the States These organs are regularly the Heads of the States or their Governments,[2] but they can, according to the Municipal Law of some States, delegate the power of ratification for some parts of their territory to other representatives Thus, the Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India [3]

In case the Head of a State ratifies a treaty, although the necessary constitutional requirements have not been previously fulfilled (as, for instance, where a treaty has not received the necessary approval from the Parliament of the said State), the question arises whether such ratification is valid, or null and void Many writers [4] maintain that it is nevertheless valid But this opinion is not correct seeing that, in such a case, the Head of the State has exceeded his powers, and that, therefore, the State concerned cannot be held to be bound by the treaty [5]

[1] See below, § 517*b*

[2] See above, § 495

[3] As the result of the Resolutions of the Imperial Conference of 1923 (Cmd 1897), reaffirmed by the Imperial Conference of 1926 (Cmd 2768), the ratification of treaties imposing obligations on one self-governing part of the British Empire is effected by the King at the instance of the Government of that part To this extent the final paragraph of the note by MacKenzie in *B Y*, 1925, pp 191 192, is no longer accurate

[4] See, for instance, Martens, I § 107, and Rivier, II p 85

[5] See above, § 497, and Nippold, *op cit*, p 147 The conflict between the United States and France in 1831, frequently quoted in support of the opinion that such ratification is valid, is not in point It is true that the United States insisted on payment of the indemnity stipulated for by a treaty which had been ratified by

Ratification cannot be Partial and Conditional.

§ 517. It follows from the nature of ratification, as a necessary confirmation of a treaty already concluded, that ratification must be either given or refused, no conditional or partial ratification being possible That occasionally a State tries to modify a treaty in ratifying cannot be denied, but *conditional ratification* is no ratification at all, but equivalent to refusal of ratification coupled with a fresh offer which may or may not be accepted[1] Nothing, of course, prevents the other contracting party from entering into fresh negotiations in regard to such modifications, but it must be emphasised that such negotiations are negotiations for a new treaty,[2] the old treaty having become null and void through its conditional ratification On the other hand, no obligation exists for such party to enter into fresh negotiations, it being a fact that conditional ratification is identical with refusal of ratification, whereby the treaty falls to the ground Thus, for instance, when the Senate of the United States on December 20, 1900, in consenting[3] to the ratification of the Hay-Pauncefote Treaty, added amendments which modified it, Great Britain did not accept the amendments, and considered the Treaty to have fallen to the ground

Quite particular is the case of a treaty to which a con-

the King of France without having received the necessary approval of the French Parliament But the United States did not maintain that the ratification was valid, she insisted upon payment, because the French Government had admitted that such indemnity was due to her See Wharton, II § 131*a*, p 20 For a comparative survey of the practice of various States see Rousseau, pp 202-234

[1] See below, § 517*a*, Hyde, II § 519, and Fauchille, § 824 (6) In particular see Bittner, § 85, who criticises the statement in the text

[2] This is the correct explanation of the practice on the part of States, which sometimes prevails, of acquiescing, after some hesitation, in alterations proposed by a party to a treaty in ratifying it; see examples in Pradier Foderé, II § 1104, and Calvo, III § 1630

[3] It is of importance to emphasise that the Senate of the United States, in proposing an amendment to a treaty before its ratification, does not, strictly speaking, ratify such treaty conditionally, since it is the President, and not the Senate, who possesses the power of granting or refusing ratification, see Willoughby, *The Constitutional Law of the United States* (1910), I p 462, n 14 The President, however, according to Article 2 of the Constitution, can not grant ratification without the consent of the State, and so the proposal of an amendment to a treaty on the part of the Senate amounts to a proposal of a new treaty, but see Moore, V § 748, p 201 As to the dispute between Persia and Iraq before the Council of the League in 1935 see *Off J*, 1935, p 217

siderable number of States are parties, and which one of the contracting parties ratifies only in part Thus France, in ratifying the General Act of the Brussels Anti-Slavery Conference of July 2, 1890, excepted from ratification Articles 21 to 23 and 42 to 61, and the Powers acquiesced in this partial ratification, so that France was not bound by these twenty-three articles [1] Such so-called partial ratification takes place only if one or more stipulations of the treaty which have been signed without reservation are exempted from ratification, or if an amending clause is added to the treaty during the process of ratification It is therefore quite legitimate for a party who, in signing a treaty, made reservations against certain articles,[2] to except those articles from ratification, and it would be incorrect to speak in this case of partial ratification

Again, it is quite legitimate—and one ought not in this case to speak of conditional ratification—for a contracting party who wants to secure a certain interpretation for certain terms and clauses of a treaty, to grant ratification upon the understanding only that they should bear a particular interpretation [3] In such cases ratification does not introduce an amendment or an alteration, but only fixes the meaning of otherwise doubtful terms and clauses of a treaty

Reservations

§ 517a A State in signifying its consent to a treaty may wish not to be bound by a particular provision contained in it [4] This effect may be achieved in at least four ways

[1] See Martens, *N R G*, 2nd ser, 22, p 260

[2] See below, § 517a

[3] Thus when, in 1911, opposition arose in Great Britain to the ratification of the Declaration of London on account of the fact that the meaning of certain terms was ambiguous, and that the wording of certain clauses did not agree with the interpretation given to them by the Report of the Drafting Committee, the British Government declared that they would only ratify upon the understanding that the interpretation contained in the Report should be considered as binding, and that the ambiguous terms concerned should bear that interpretation In fact, the Declaration has not been ratified at all

[4] Hyde, II § 519, Fauchille, §§ 823 (1), 824 (6), Miller, *Reservations to Treaties* (1919), Kellogg in *A J*, 13 (1919), pp 767-773, Malkin in *B Y*, 1926, pp 141-162, Rapisardi-Mirabelli, *I limiti d'obbligatorietà delle norme giuridiche internazionali* (1922), pp 135 141, Wright, *Conduct of Foreign Policy in the United States of America* (1922), pp 45-53, 252-254, Huber, *Gemeinschaft und Sonderrecht unter den Staaten* in *Festschrift für Otto Gierke* (1911), pp 817-850, Scheidtmann, *Der Vorbehalt beim Abschluss volkerrechtlicher Verträge* (1934), Von Crayen, *Die Vorbehalte im Volkerrecht* (1938), Moore, v § 748, p 201, Rousseau, pp 290 300, McNair, Chapter 9, Wehberg in *Strupp, Wort*, pp 672, 673, and in

(i) by the insertion in the treaty itself of a stipulation that the particular provision shall not apply to the State making the reservation (for instance, Article 287 of the Treaty of Peace with Germany), this is not truly a reservation at all but a substantive provision of the treaty, (ii) by a reservation attached to the signature of the treaty by its representatives, and duly recorded in a *procès-verbal* or protocol of signatures, (iii) by a reservation attached to ratification and duly recorded, (iv) in the case of a treaty which is signed by some States and left open for accession by others, by a reservation attached to the accession and duly recorded

Reservations raise an important question of principle because they modify the terms of the offer which a State in signing or ratifying or acceding to a treaty purports to accept A reservation is upon analysis the refusal of an offer and the making of a fresh offer Therefore in principle it seems necessary that the other party should assent to the reservation either expressly or by implication arising from acquiescence, and practice accords with this view [1] It not infrequently happens that this assent is given in advance in the course of the sessions of a conference preceding a treaty, it being tacitly agreed that a State which declares a reservation at that time shall be allowed to renew its declaration on signing the treaty

Exchange and Deposit of Ratifications

§ 517*b* The mere signing or sealing of an instrument of ratification by the parties to a treaty is not enough to

R I, 3rd ser, 4 (1923), pp 187-194, Schucking und Wehberg, pp 175, 176, Baldoni in *Théorie du droit*, 4 (1929 1930), pp 178 192, Genet in *R I (Geneva)*, 10 (1932), pp 95 114, 232 240, 308 319, Shatzky in *R I*, 3rd ser, 14 (1933), pp 216 234, *Harvard Research* (1935, Part III), pp 843 912, Podesta Costa in *R I (Paris)*, 21 (1938), pp 1 52, Sanders in *A J*, 33 (1939), pp 488 499

[1] Malkin, *op cit*, has analysed a number of instances of reservations and shows that those who are concerned with the machinery of treaty-making by their practice bear witness, perhaps unconsciously, to what must be the right principle, namely, that 'every reservation must be the subject of definite acceptance by the other signatories' His article deals with multilateral treaties, but the same principle seems to apply to bilateral treaties, it is the mechanical difficulty which is greater in the case of the former See in particular a Report by the League Codification Committee on the 'Admissibility of Reservations to General Conventions' submitted to the Council in June 1927 League Doc C 357 M 130 1927 V 16 See also Hudson in *A J*, 32 (1938), pp 330 335

make it binding upon them.[1] It is necessary that the instruments of ratification should be exchanged between them or deposited in some agreed place, and they do not take effect until they have been exchanged or deposited, unless the treaty stipulates that it shall come into operation upon the notification by a party that it has ratified it, whereupon the actual exchange or deposit will follow later. The exchange or deposit is usually recorded in a *procès-verbal*, and it is not uncommon for the treaty to stipulate the date of the *procès-verbal*, or of the first of the series of *procès-verbals*, as the date of the coming into force of the treaty for the States in respect of which the exchange or deposit of ratifications is thereby recorded While some treaties require ratification by all the contracting parties before entering into force, others stipulate that a limited number of ratifications will be sufficient for the purpose Thus the various instruments adopted at the Hague Codification Conference in 1930 provided for entry into force after the deposit of ten ratifications[2] The Charter of the United Nations lays down, in Article 110, that it shall come into force upon the deposit of ratifications by China, France, Russia, Great Britain, and the United States, as well as by a majority of the other signatory States[3]

Effect of Ratification

§ 518 The effect of the exchange or deposit of ratifications by the parties is to make a treaty binding If one party executes an instrument of ratification, and the other does not, the treaty falls to the ground But the question arises

[1] Hall, § 110, Hyde, II § 520, Fauchille, § 824 (3), Bittner, §§ 87-93 Exchange or deposit of ratification is not unlike the 'delivery' which is necessary to give effect to an English deed after signing and sealing, see Blackstone, *Commentaries*, II 306

[2] See above, § 310*a*

[3] The same Article lays down that the ratifications shall be deposited with the Government of the United States, which shall notify all the signatory States of each deposit, and that after the requisite number of ratifications has been received that Government shall draw up a protocol of the deposit of ratifications and communicate copies thereof to all the signatory States The Treaty of Peace with Germany of 1919 was stipulated to come into force on the date of a *procès verbal* recording the deposit of ratifications by Germany and any three of the Principal Allied and Associated Powers, the Treaty of Lausanne of 1923 is similar, the Washington Treaties of 1922 as to the Limitation of Naval Armaments, the Rules of Maritime Warfare, and the Use of Noxious Gases, are stipulated to come into force upon the deposit of *all* the ratifications at Washington

whether the effect of ratification is retroactive, so as to make a treaty binding from the date when it was duly signed by the representatives No unanimity exists among writers as regards this question [1] As in all important cases treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect Different, however, is of course the case in which the contrary is expressly stipulated in the treaty itself, and, again, the case where a treaty contains stipulations to be executed at once, without waiting for the necessary ratification Be this as it may, ratification makes a treaty binding only if the original consent was not given in error, or under a delusion [2] If, however, the ratifying State, having discovered such error or delusion, ratifies the treaty nevertheless, such ratification makes the treaty binding The same applies with regard to a ratification given to a treaty although the ratifying State knows that its representatives have exceeded their powers by concluding the treaty

VI

REGISTRATION AND PUBLICATION OF TREATIES

Fauchille, §§ 825-831 (2)—Hyde, II §§ 491, 521—Hudson in *A J*, 19 (1925), pp 273 292, *ibid*, 28 (1934), pp 546 552, and in *Harvard Law Review*, 38 (1925), pp 936 938—Schucking und Wehberg, pp 644 660—Hatschek, pp 232 234—Anzilotti, pp 374 392—Scelle, II pp 484 492—McNair, Chapter 14—*Harvard Research* (1935, Part III), pp 912 918—Rousseau, pp 302 322—Konig, *Volksbefragung und Registrierung beim Volkerbund* (1927), pp 42 69—Dehousse, *L'enregistrement des traités* (1929), and the same, *La ratification des traités* (1935), pp 186 197—Schwab, *Die Registrierung der internationalen Vertrage beim Volkerbund* (1929)—Frangulis, *Théorie et pratique des traités internationaux* (1936), pp 82 88—Rolin in *R I*, 3rd ser, 3 (1922), pp 352 360—Report of Adatci and Charles de

[1] See above, § 510 Ratification was held to have a retroactive effect in the Arbitration between Chile and Peru in 1875 regarding a treaty of alliance of 1865 Moore, *International Arbitrations*, II p 2091, but see the Award in the *Iloilo* case before the British American Claims Arbitration Tribunal in *A J*, 20 (1926), pp 382-384 See also the first *Mavrommatis* Judgment of the Permanent Court, Series A, No 2, at pp 34, 35, and Ralston, § 6

[2] See above, § 500

Visscher in *Annuaire*, 30 (1923), pp 47-63—Lambris in *R I*, 3rd ser, 7 (1926), pp 697 709—Memorandum approved by the Council of the League of Nations printed in *L N T S*, 1 (1920), pp 8-13—Stieger in *Z o R*, 8 (1928), pp 121-133—Keydel in *R I (Geneva)*, 9 (1931), pp 141-160—Shatzky in *R I (Paris)*, 11 (1933), pp 559-577—Reitzer in *R G*, 44 (1937), pp 67 89

Registration of Treaties under the Covenant

§ 518*a* The widespread dissatisfaction provoked during the First World War by the publication of a number of secret treaties found expression in Article 18 of the Covenant of the League of Nations, which provided that

> Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it No such treaty or international engagement shall be binding until so registered

The fact that up to July 1944 a total of 4822 ' treaties or international engagements ' were registered under this article and that 204 volumes containing treaties and agreements thus registered were published indicates the scope and importance of its provisions Its language was extensive It included treaties and international engagements made by a member of the League whether with another member or with a non-member, and whatever particular form or label may have been given to them, ' convention,' ' declaration,' ' exchange of letters,' and so forth [1], in fact,

[1] See Hudson, *A J*, 19 (1925), p 277 In fact, however, certain international agreements were not registered for instance, a military understanding of September 7, 1920, between the chiefs of staff of the French and Belgian armies, and certain financial arrangements entered into ' with a view to completing and liquidating the abnormal transactions rendered inevitable by the war ' (see Hudson, *loc cit*, pp 280 282) See also Schücking und Wehberg, p 655

Great Britain protested by a letter to the Secretary General of the League upon learning of the registration by the Irish Free State of the ' Articles of Agreement ' signed on December 6, 1921, between the British Government and a delegation of Irish leaders which led to the creation of the Irish Free State *L N T S*, 26, p 9, and 27, pp 449 450 See Baker, *op cit*, pp 319 324 The British Commonwealth Merchant Shipping Agreement of December 10, 1931, which is the first formal agreement of all the members of the Commonwealth *inter se*, was registered with the Secretariat of the League on May 10, 1932, at the instance of South Africa See *L N T S*, 129, p 179, (1932) Cmd 3994, Hudson, *Legislation*, v p 1153 Each Dominion has the right to register a treaty with a foreign State which affects that Dominion, certainly when it is the only part of the Empire affected (see the registration by Canada of the Halibut Fisheries Treaty with the United States in *L N T S*, 32, p 94), and probably in the case of any treaty signed and ratified by its Government There

to quote the memorandum [1] of the Secretariat approved by the Council of the League, the Article covered 'not only every formal Treaty of whatsoever character and every International Convention, but also any other International Engagement or Act by which nations or their Governments intend to establish legal obligations between themselves and another State, Nation, or Government'

The following further points deserve mention

(*a*) The functions of the Secretariat were conceived of as being purely ministerial, and registration did not confer any approval upon the contents of the treaty [2]

(*b*) A number of treaties were registered by non-members of the League (for instance, Germany,[3] before she became a member [4]) In 1934 the United States agreed in the future to furnish the Secretary-General, for the purpose of registration and publication, with a certified copy of each international agreement to which they shall become a party [5]

(*c*) It was not clear whether failure to register a treaty or other international engagement made it entirely void, or voidable at the instance of a party to it, or merely incapable of being cited and relied upon before the Assembly or

are instances of the registration of a treaty between a Mandatory and its Mandated Area (*L N T S*, 47 (1926), p 419, Great Britain and Iraq see above, § 94*d* (n 2)), and of a treaty between two Mandated Areas (*L N T S* (1926), 49, p 9, Iraq and Syria and Lebanon) As a matter of convenience denunciations of treaties were included

[1] *L N T S*, 1 (1920), pp 8 13

[2] In 1930 Peru proposed that Article 18 be amplified so as to make impossible the registration of treaties imposed by force as a result of a war undertaken in violation of the Pact of Paris *Off J*, 1930, p 78 The proposal was considered by the Committee for the Amendment of the Covenant so as to bring it into harmony with the Pact of Paris, but was rejected by the Committee *Minutes of the Committee*, L Doc C 160 M 69 1930 V, p 81 Before the Committee Lord Cecil stated that Article 18 'was inserted in order to secure publicity for international engagements, and was never intended to be used to censor, modify, or supervise them' *ibid*, p 84 The publication in the Treaty Series of the League of the notes exchanged between the British and Italian Governments regarding their respective spheres of influence in Abyssinia was accompanied by a reference to the correspondence between Abyssinia and the League and Great Britain and Italy arising from the exchange of those notes see *L N T S*, 50, p 281, and *Off J*, 1926, p 1526 Cmd 2792 See also McNair in *Michigan Law Review* (1927), pp 131-152

[3] But entirely as a matter of courtesy and on the understanding that the system of registration did not apply to her

[4] See *L N T S*, II p 60 (n)

[5] See Hudson in *A J*, 28 (1934), pp 342-345 And see the same, *ibid*, 22 (1928), pp 852 856, and 24 (1930), pp 752 757

Council of the League or the Permanent Court, or unenforceable pending registration [1]

Publication took the form of inclusion in the *League of Nations Treaty Series*, which began in September 1920 and contained the text of the treaties in the original languages together with French and English translations when the original languages did not include French and English

Registration of Treaties under the Charter

§ 518*b* Article 102 of the Charter of the United Nations has adopted, with some changes, the provisions of the Covenant of the League of Nations on the subject It lays down that every treaty and every international agreement [2] entered into by any member of the United Nations after the Charter comes into force shall as soon as possible be registered with the Secretariat and published by it The

[1] Hyde, II § 491, suggests that in default of registration a treaty which ought to be registered is like a contract valid but unenforceable by action owing to non-compliance with a Statute of Frauds, such as is known to English or American law If that is so, registration would cure the defect and make the treaty enforceable The views of Adatci and Charles de Visscher, *Annuaire*, 30 (1923), p 63, and Schucking und Wehberg, p 657, do not in effect differ much from Hyde's So far as concerned a treaty between two members of the League, the effect of non-registration was probably, in the first instance, unenforceability and not voidness, if registration did not occur within a reasonable time, the treaty probably became void So far as concerned a treaty between a member and a non member, it might seem that non-registration did not deprive the treaty of binding force, because the Covenant was *res inter alios acta* However, there is room for the view that a treaty made with the deliberate intention to ignore the duty of registration fell within the category of treaties void because of their inconsistency with former treaty obligations (see above, § 503) Third States were not bound by Article 18, but they were bound by general rules of International Law in the matter of treaties.

See the *Pablo Nájera* case, *Annual Digest*, 1927-1928, Case No 271, between France and Mexico, where it was held that a State which is not a member of the League is not entitled to invoke the absence of registration as a reason for avoiding its international obligations In 1933 the National Assembly of Salvador denounced the Treaty concluded in 1923 with the other four Central American Republics (see above, p 128, n 3) on the ground that it had not been registered See Hudson, *A J*, 28 (1934), p 551 In 1938 the Eighth International Conference of American States adopted a plan for the registration of treaties by the Pan American Union For details see Hudson in *A J*, 38 (1944), p 98

[2] In 1946 the First General Assembly laid down detailed rules concerning the registration and publication of treaties They provide, among others, that registration shall not take place until the treaty or international agreement has come into force between two or more of the parties, that registration relieves all other parties of the obligation to register, that the United Nations shall register *ex officio* every treaty or agreement to which it is a party, that a specialised agency may effect registration in some cases *Journal* No 75, January 15, 1947, p 946 The term 'agreement' must be understood to include every contractual undertaking or arrangement

same Article provides that no party to any such treaty or international agreement which has not been registered may invoke that treaty or agreement before any organ of the United Nations The sanction, thus expressed, of non-registration within a reasonable time [1] is certainly of a drastic nature although the implied distinction between the organs of the United Nations and other bodies is open to criticism,[2] and although it is not clear whether a treaty which has not been registered may be relied upon, *proprio motu*, by an organ of the United Nations without having been invoked by the parties to it [3] However, for most practical purposes complete unenforceability is the sanction of non-registration Effect is thus given to the conviction that secret treaties [4] imposing upon peoples commitments of which they have no knowledge are contrary alike to the principles of democracy and to the requirements of international peace.

VII

EFFECT OF TREATIES

Hall, § 114—Lawrence, § 134—Halleck, I pp 299 302—Taylor, §§ 370 373—Wharton, II § 137—Wheaton, § 266—Hyde, II §§ 522 529—Bluntschli, §§ 415, 416—Hartmann, § 49—Heffter, § 94—Guggenheim, pp 88 93—Fauchille, §§ 832 832 (7)—Despagnet, §§ 447, 448—Pradier Fodéré, II §§ 1151-1155—Mérignhac, II pp 667 672—Rivier, II pp 119 122—Calvo, III §§ 1643-1648—McNair, Chapters 28, 29—Rousseau, pp 379 439, 452-484—Fiore, II §§ 1008, 1009, and *Code*, §§ 773 783—Martens, I §§ 65, 114

[1] This follows from the expression 'as soon as possible' Clearly a party to a secret treaty which has not been registered for a number of years would not be allowed to make the treaty enforceable by registering it at a moment when it suits it to do so

[2] It is, for instance, difficult to see why the same treaty should be deemed to have a legal existence when invoked before a tribunal of the Permanent Court of Arbitration and be legally non existent in a dispute before the International Court of Justice

[3] When, for instance, the International Court of Justice is concerned with the interpretation of a disputed provision of a registered treaty, can it take notice, on its own initiative, of another, hitherto unregistered, treaty between the parties the contents of which have been published in the meantime by one of the parties or some other body or person ?

[4] As distinguished from negotiations not attended by full publicity It is clear that purely military agreements and arrangements, concluded within the orbit of the general obligations of the Charter, may not be suitable for registration However, these are not primarily intended as legal obligations the enforceability of which may be called into question as the result of non-registration

—Scelle, II pp 366 377—Keith's Wheaton, pp 519-522—Anzilotti, pp 402 413—*Harvard Research* (1935, Part III), pp 918-937—Nippold, *op cit*, pp 151 160—Crandall, *op cit*, §§ 155 159—Roxburgh, *International Conventions and Third States* (1917)—Winkler, *Vertrage zu Gunsten und zu Lasten Dritter im Volkerrecht* (1932)—Chailley, *La nature juridique des traités internationaux* (1932), pp 240 328—Nauroıs, *Les traités inter nationaux devant les juridictions nationales* (1934)—Wright in *A J*, 10 (1916), pp 706 736, and 11 (1917), pp 566-577—McNair in *B Y*, 9 (1928), pp 59 68—Mestre in *Hague Recueil*, vol 38 (1931) (IV), pp 264-302—Enriques in *Rivista*, 25 (1933), pp 24 37—Kelsen in *R G*, 43 (1936), pp 5 49—Kaira in *Acta Scandinavica*, 7 (1936), pp 39 67—Scrimah in *Z o R*, 21 (1941), pp 190 216—Kunz in *A J*, 41 (1947), pp 119 126. And see literature cited at head of § 20 above, and as to the treaty-making power, in §§ 494, 496*a*, and 497

Effect of Treaties upon Contracting Parties

§ 519 A treaty concerns in the first place the contracting parties The effect of the treaty upon them is that they are bound by its stipulations, and that they must execute it in all its parts No distinction should be made between more and less important parts of a treaty as regards its execution Whatever may be the importance or the insignificance of a part of a treaty, it must be executed in good faith, for the binding force of a treaty covers all its parts and stipulations equally If, however, a party to a treaty concluded between more than two parties signs it with a reservation as regards certain articles, such party is not bound by these articles, although it ratifies [1] the treaty.

Effect of Treaties upon the Subjects of the Parties

§ 520 The binding force of a treaty concerns in principle the contracting States only, and not their subjects [2] As International Law is primarily a law between States only and exclusively, treaties can as a rule have effect upon States only [3] This rule can, as has been pointed out by the Permanent Court of International Justice,[4] be altered by

[1] See above, §§ 517, 517*a*, and Bittner, §§ 65 67

[2] On the question whether the failure of subjects to invoke a treaty can bring about its desuetude see Ralston, § 12, citing the Award in the *Yuille, Shortridge and Co* Arbitration between Great Britain and Portugal in 1861, and Lapradelle-Politis, II p 115

[3] While that is true as a general principle, it has been held by the Permanent Court that the intention of the contracting parties may show that the treaty is self executing and itself confers rights upon the subjects of one State against the other State, enforceable in the former State's national courts see Advisory Opinion as to Polish Railway Service Officials of March 3, 1928, Series B, No 15 See also *McCandless* v *United States, ex rel Paul Diabo* in March 1928 before U S Circuit Court of Appeals for the Third Circuit *Annual Digest*, 1927-1928, Case No 363

[4] Series B, No 15. See above, § 13*a*

the express or implied terms of the treaty, in which case its provisions become self-executory Otherwise, if treaties contain stipulations with regard to rights and duties of the subjects of the contracting States,[1] their courts, officials, and the like, these States must take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like.[2] It may be that, according to the Municipal Laws of some countries, the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments [3]

Effect of Changes in Government upon Treaties

§ 521 As treaties are binding upon the contracting *States*, changes in the Government, or even in the form of government, of one of the parties can, as a rule, have no influence whatever upon the binding force of treaties [4] Thus, for instance, a treaty of alliance concluded by a State with a

[1] See above, § 289

[2] As regards Great Britain and the United States of America see above, § 497 See also *The Civilian War Rights Association* v *The King* (referred to above, p 581) and *Administrator of German Property* v *Knoop* [1933] Ch 439 As to France see Revel, *La publication des lois* (1933), and Basdevant in *Bulletin de la Société d'Études législatives*, 1933, pp 127 *et seq*

[3] See McNair in *B Y*, 1928, pp 59-68 The distinction between International and Municipal Law as discussed above, §§ 20 25, is the basis from which the question must be decided whether international treaties have a direct effect upon the officials and subjects of the contracting parties The matter is treated in detail by Wright in *A J*, 10 (1916), pp 706-736, and by Noel, *De l'autorité des traités comparée à celle des lois* (1921) As to the enforcement of multipartite administrative treaties in the United States see Reiff in *A J*, 34 (1940), pp 661-679 See also Dehousse, *La ratification des traités* (1935), pp 198-203 See also *Re Arrow River and Tributaries Slide and Boom Co Ltd* (1931), 1 D L R 260, (1931), 2 D L R 216, and comment thereon in *B Y*, 13 (1932), pp 122 124 On the question as to how far a British court may refer to the terms of a treaty in interpreting a municipal enactment passed in order to give effect to it see below, § 553 (n) On the question as to how far a treaty concluded by the United States and containing provisions the execution of which would violate the provisions of the Constitution relating to due process of law or just compensation is enforceable by courts see Cowles, *Treaties and Constitutional Law Property Interference and Due Process of Law* (1941)

[4] Nevertheless, the recognition of a new Government, particularly when it is a revolutionary Government (see above, § 75*b*), may necessitate an overhauling and confirmation (see below, § 551) of existing treaty relationships see, for instance, the unratified Draft of Proposed General Treaty between Great Britain and the Russian Federal Soviet Socialist Republics in 1924, Cmd 2215 See also the French decision cited below, § 546 (n) And see McNair, Chapter 34

constitutional government remains valid, although the ministry may change And no Head of a State can shirk the obligations of a treaty concluded by his State under the Government of his predecessor Even when a monarchy turns into a republic, or *vice versa*, treaty obligations regularly remain the same For all such changes and alterations, important as they may be, do not alter the person of the State which concluded the treaty If, however, a treaty stipulation essentially presupposes a certain form of government, then a change from such form makes such stipulation void, because its execution has become impossible [1]

Effect of Treaties upon Third States

§ 522 According to the principle *pacta tertiis nec nocent nec prosunt*, a treaty concerns the contracting States only, neither rights [2] nor duties,[3] as a rule,[4] arise under a treaty

[1] See below, § 542 Not to be confused with the effect of changes in government is the effect of a change in international status upon treaties, as, for instance, if a hitherto full sovereign State becomes half or part sovereign, or *vice versa*, or if a State merges entirely into another, and the like This is a case of succession of States which has been discussed above, §§ 82 84, see also below, § 548

[2] In the case concerning *Certain German Interests in Polish Upper Silesia* the Permanent Court of International Justice held in 1926 that as Poland was not a party to the Armistice Agreement she was not entitled to avail herself of that instrument Series A, No 7, pp 27 29 See also the Judgment of September 13, 1928, in the case of the *Factory at Chorzów* Series A, No 17, pp 43 46 And see *Steiner and Gross v Polish State*, decided on March 30, 1928 by the Upper Silesian Arbitral Tribunal, in which it was held that a Czecho Slovak subject, *i e* a national of a State not party to the Convention establishing the Tribunal, could bring an action against Poland, one of the two parties to the Convention *Annual Digest*, 1927-1928, Case No 287

[3] But see below, § 522*a*

[4] In the case of the *Free Zones of Upper Savoy and the District of Gex*, which was before the Permanent Court of International Justice from 1929 to 1932, the question arose whether Switzerland acquired rights under certain instruments and declarations made during the Congress of Vienna in 1815 The Court found that there was, with regard to the Gex zone, an actual agreement between Switzerland and the various Powers, including France Accordingly, the Court did not find it necessary to consider whether the Gex zone was a stipulation in favour of a third party But the Court added that although it could not be lightly presumed that stipulations in favour of a third State have been adopted in order to create a legal right in its favour, there was nothing to prevent contracting parties from effectively creating rights in favour of third parties The Court pointed out that the question of the existence of a right acquired under a treaty between other States must be decided in each particular case Series A/B, No 46, p 147 See also Order of August 19, 1929 Series A, No 22, p 20 For instances of provisions in treaties in favour of third States see Articles 109 (Denmark), 116 (Russia), and 358 (Switzerland) of the Treaty of Peace with Germany of 1919

for third States which are not parties to the treaty But sometimes treaties have indeed an effect upon third States [1] Such an effect is always produced when a treaty touches previous treaty rights of third States Thus, for instance, a commercial treaty conceding more favourable conditions than hitherto have been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-favoured-nation clause* [2] with one of the contracting parties [3]

The question arises whether in exceptional cases third States can acquire rights (and become subject to the duties connected therewith) by giving their express or implied consent to the stipulations of such treaties as were specially concluded for the purpose of creating such rights, not only for the contracting parties, but also for third States Thus, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901, and the Hay-Varilla Treaty between the United States and Panama of 1903, stipulate that the Panama Canal shall be open to vessels of commerce and of war of all nations, although Great Britain, the United States, and Panama only are parties [4] Thus, further, Article 5 of the Boundary Treaty of Buenos Ayres of September 15, 1881, stipulates that the Straits of Magellan shall be open to vessels of all nations, although Argentina and Chile only are parties The question must be answered in the negative Nothing prevents the contracting parties from altering such a treaty without the consent of third States, provided the latter have not in the meantime customarily acquired such

[1] The matter is exhaustively discussed by Roxburgh, *International Conventions and Third States* (1917), Winkler, *Verträge zu Gunsten Dritter* (1932), McNair in *Hague Recueil*, vol 43 (1933) (I), pp 209 296, Brierly, *ibid*, vol 58 (1936) (IV), pp 221-229, Rousseau, pp 452 484, and see Salvioli in *Rivista*, 12 (1918), pp 228 241, Scrimali in *Z o R*, 21 (1941), pp 190 216, and Anzilotti, pp 413 428

[2] See below, § 580, but note the American interpretation of this clause

[3] On the question of the effect of some treaties on nationals of States which are not parties to these treaties see Capitant, *Les traités de droit privé dans leur application aux nationaux des tiers états* (1928) See also the case of *Steiner and Gross* v *Polish State*, decided in March 1928 by the Upper Silesian Arbitral Tribunal, *Annual Digest*, 1927-1928, Case No 287, and above, p 831, n 2

[4] See above, § 184

rights through the unanimous implied consent of all concerned.[1]

It has been asserted[2] that if a treaty stipulates for a right for third States, and they make use of such a right, they thereby acquire a legal right for themselves, so that the treaty could not be abrogated without their consent It is argued that, having accepted a right which was offered to them, they cannot be deprived of it against their will There is no doubt that this line of argument would be correct, if the contracting parties really intended to offer such a right to third States But it may well be doubted whether such is always their intention. If the contracting parties had intended to do so, they probably would have embodied a stipulation in the treaty, according to which the third parties concerned could *accede* to it[3]

[1] The case of treaties intended to make an 'international settlement' (see Roxburgh, *op cit*, pp 51-60) would seem to be a case of unanimous implied consent With regard to the Convention of 1856 between Great Britain, France, and Russia whereby Russia undertook not to fortify the Aaland Islands (which was mentioned in the third edition as an instance of the point under discussion), it should be noted that the Committee of Jurists appointed by the Council of the League took the view (*Off J*, Special Suppl, No 3, pp 17 19) that this convention, embodying 'a settlement regulating European interests constituted a special international status for the Aaland Islands,' and that 'until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them' They were replaced by a convention of October 20, 1921, between ten States, not including Russia, see above, § 205, and below, vol II § 72 (8), and *Strupp, Wort*, I p 22, for bibliography of Swedish, Finnish, and general literature upon the Aaland Islands question It is particularly in connection with those treaty restrictions upon the use of State territory, which many writers (including the author, see above, §§ 203 208) call 'servitudes,' that parties other than the parties to the original treaty are likely to acquire an interest in their preservation see McNair in *B Y*, 1925, pp 111 127

[2] Diena in *Z I*, 25 (1915), pp 14 22

[3] A treaty between two States can never invalidate a stipulation in a treaty between one of the contracting parties and a third State, unless the latter expressly consents If, for instance, two States have entered into an alliance, and one of them afterwards concludes a treaty with a third State, according to which all conflicts without exception shall be settled by arbitration, the previous treaty of alliance remains valid, even in the case of war breaking out between the third State and the other party to the alliance See below, § 573 Therefore, when in 1911 Great Britain contemplated entering into a treaty of general arbitration with the United States of America, according to which all differences should be decided by arbitration, she notified Japan of her intention, on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance Article 4 of which stipulates that the alliance shall never concern a war with a third Power with whom one of the allies may have concluded a treaty of general arbitration

Indirect Imposition of Obligations upon Non-Parties.

§ 522a. The rule that treaties cannot validly impose obligations upon States which are not parties to them follows clearly from the sovereignty of States and from the resulting principle that International Law does not as yet recognise anything in the nature of a legislative process by which rules of law are imposed upon a dissenting minority of States However, in proportion as international society is transformed into an integrated community, a departure from the accepted principle becomes unavoidable, in particular in the sphere of preservation of international peace and security The Covenant of the League of Nations, without expressly imposing obligations upon non-members, in fact asserted the right of the League to compel them to assume some of the obligations of the Covenant with regard to the settlement of their disputes with members of the League [1] It also asserted the right of active intervention of the League in disputes between non-member States [2] Article 2 of the Charter of the United Nations lays down that the Organisation shall ensure that States which are not members of the United Nations act in accordance with the principles of the Organisation in so far as may be necessary for the maintenance of international peace and security This is a mandatory provision which, upon analysis, constitutes a claim to regulate conduct of non-members to the extent required for the fulfilment of the object of that Article It cannot be admitted that the International Court of Justice or any other organ of the United Nations established under the Charter would be at liberty to hold that action taken in pursuance of Article 2 is contrary to International Law Both the Covenant of the League of Nations and the Charter of the United Nations must therefore be regarded as having set a limit, determined by the general interest of the international community, to the rule that a treaty cannot impose obligations upon States which are not parties to it [3]

[1] Article 17 See vol II § 25*g*

[2] *Ibid*

[3] See Kunz in *A J*, 41 (1947), pp 119 126, Jessup, *ibid*, pp 386 391 The obligation, it will be noted, is not a direct one However, inasmuch as a legal rule is conceived as a precept of conduct enforced by external sanction, the difference is one of form rather than of substance Article 14 of the Opium Convention of 1931 (see below, Appendix A, p. 891) in fact, although not in law, imposes obligations upon States which are not parties to the Convention inasmuch as the parties are under

VIII

MEANS OF SECURING PERFORMANCE OF TREATIES

Vattel, II §§ 235-261—Hall, § 115—Lawrence, § 134—Phillimore, II §§ 54 63*a*—Bluntschli, §§ 425 441—Heffter, §§ 96, 97—Geffcken in *Holtzendorff*, III pp 85 90—Ullmann, § 83—Liszt, § 33 (I II)—Fauchille, §§ 835-835 (7)—Despagnet, §§ 451, 452—Pradier-Fodére, II §§ 1156 1169—Rivier, II pp 94 97—Nys, II pp 516 520—De Louter, I pp 501-506—Rousseau, pp 439 450—Calvo, III §§ 1638 1642—Fiore, II §§ 1018, 1019, and *Code*, §§ 789-796—Martens, I § 115—Hold Ferneck, vol II pp 178-181—Nippold, *op cit*, pp 212 227—Crandall, *op cit*, § 7—Idman, *Le traité de garantie* (1913), pp 10 40—Heyland, *Die Rechtsstellung der besetzten Rheinlande* in Stier Somlo's *Handbuch des Volkerrechts* (1923), pp 37-74—Satow in *Cambridge Historical Journal*, I (1925), pp 295 318—Wild, *Sanctions and Treaty Enforcement* (1934)—Frangulis, *Théorie et pratique des traités internationaux* (1936), pp 189 206—Wright in *A S Proceedings* 1932, pp 101 119

What Means have been in Use

§ 523 Among the means to secure the performance of treaties are oaths, hostages, pledges, occupation of territory, guarantee, and, above all, the various means of enforcement in use by international action

Oaths

§ 524 Oaths are a very old means of securing the performance of treaties, which was constantly made use of not only in antiquity and the Middle Ages, but also in modern times For in the sixteenth and seventeenth centuries, all important treaties were still secured by oaths During the eighteenth century, however, the custom gradually died out, the last example being the treaty of alliance between France and Switzerland in 1777, which was solemnly confirmed by the oaths of both parties in the cathedral at Solothurn.

an obligation to stop imports of certain drugs to non parties who have exceeded the estimates of the maximum quantity of drugs allotted to them See Starcoff in *J C L*, 3rd ser, 18 (1936), p 90 See also Kelsen in *Prager Juristische Zeitschrift*, 1934, pp 420 432, who points to cases such as that of Danzig in which the contracting parties imposed duties upon a future State created by treaty See also the Resolution on German Assets in Neutral Countries included in the Final Act of the Paris Conference of October 21, 1945, on Reparations (Cmd 6721, p 13) 'The Conference unanimously resolves that the countries which remained neutral in the war against Germany should be prevailed upon by all suitable means to recognise the reasons of justice and of international security policy which motivate' the various Powers 'in their efforts to extirpate the German holdings in neutral countries'

Hostages

§ 525 Hostages are as old a means of securing treaties as oaths, but they have likewise, for ordinary purposes [1] at least, become obsolete, because they have practically no value at all The last case of a treaty secured by hostages was the Peace of Aix-la-Chapelle in 1748, in which hostages were stipulated to be sent by England to France for the purpose of securing the restitution of Cape Breton Island to the latter The hostages sent were Lord Sussex and Lord Cathcart, who remained in France till July 1749 [2]

Pledge

§ 526 The pledging of movable property [3] by one of the contracting parties to the other for the purpose of securing the performance of a treaty is possible, but has not frequently occurred Thus, Poland is said to have pledged her crown jewels once to Prussia [4] The pledging of movables is nowadays quite obsolete, although it might on occasion be revived

Charges

§ 526*a* On the other hand, the practice of creating a charge upon some or all of the assets of a contracting State, and particularly upon its revenues, to secure payments due under a treaty is increasing [5], for instance, Article 248 of the Treaty of Peace with Germany of 1919 and the 'Dawes Agreement' of August 1924,[6] between the Reparation Commission and the German Government, relating to security for the payment by Germany of reparations

Occupation of Territory

§ 527 Occupation of territory, such as a fort or even a whole province, as a means of securing the performance of a treaty, has frequently been made use of with regard to the payment of large sums of money due to a State under a treaty [7] Nowadays such occupation is only resorted to in connection with treaties of peace stipulating the payment

[1] Concerning hostages nowadays taken in time of war see below, vol II §§ 258, 259

[2] For an interesting account of how the taking of hostages frequently developed, through the so called *custodes treugarum*, into treaties of guarantee, see Lutteroth, *Der Geisel im Rechtsleben* (1922), pp 207-210 And see Wild, *op cit*, pp 95 101

[3] For a pledge of immovable property see the case of Wismar, above, § 171 (3)

[4] See Vattel, II § 241, and Phillimore, II § 55

[5] See literature cited above, §§ 137 155*a*

[6] *Parl Papers*, Misc No 17 (1924), Cmd 2270, *A J*, 19 (1925), Suppl, pp 23-52

[7] See Robin, *Des occupations militaires en dehors des occupations de guerre* (1913), particularly pp 471 482, 696 706, and other literature cited above, § 443

of a war indemnity. Thus, the preliminary peace treaty of Versailles in 1871 stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliards of francs

Again, the Treaty of Peace with Germany in 1919 provided that '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' [1]

Guarantee

§ 528 A frequent means of securing treaties is the guarantee of other States not directly affected by them Such a guarantee is a kind of accession [2] to the treaty guaranteed, and is a treaty in itself—namely, the promise of the guarantor, should occasion arise, to do what is in his power to compel the contracting party or parties to execute the treaty In this category there must be included the various Minority Treaties concluded in and after 1919 and placed 'under the guarantee of the League of Nations' [3] The guarantee of a treaty is only one species of guarantee in general, which will be discussed below, §§ 574-576a

Enforcement by International Action

§ 528a Reference should also be made (1) to the economic and other sanctions contained in Article 16 of the Covenant of the League [4] and the various comprehensive measures of enforcement which form the subject-matter of Chapter VII

[1] Article 428 See below, vol II § 277 (n) For the Agreement on the Evacuation of the Rhineland of April 30, 1929, see Treaty Series, No 16 (1931), Cmd 3796

[2] See below, § 532

[3] See above, § 340d

[4] See below, vol II § 52e Following upon the unilateral repudiation by Germany of the disarmament clauses of the Treaty of Versailles and the condemnation of her action by the Council of the League (see below, p 853) the latter appointed a Committee entrusted, *inter alia*, with the task of defining the economic and financial measures to be applied against States, whether members of the League or not, endangering peace by the unilateral repudiation of their international obligations *L N Monthly Summary*, April 1935, 15, p 84 For the answer of the Committee to the effect that the Council may, in appropriate cases, recommend economic and financial measures see *ibid*, p 146 From sanction for the breach of a treaty there must be distinguished termination of advantages accruing under the Treaty or the nullity of acts constituting a violation of the Treaty The Preamble of the General Treaty for the Renunciation of War (which lays down that a State which breaks the Treaty shall be deprived of its benefits) is an example of the former (see vol II p 52 (n))

of the Charter of the United Nations [1], (ii) to the 'measures of an economic character' which members of the International Labour Organisation are authorised to take against a member which makes default in its obligations under Labour Conventions binding upon it [2], (iii) to the embargo upon imports in relation to a country which has exceeded the estimate of dangerous drugs to be exported to it in accordance with the provisions of Article 14 of the Convention of 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs [3]

IX

PARTICIPATION OF THIRD STATES IN TREATIES

Hall, § 114—Wheaton, § 288—Hartmann, § 51—Heffter, § 88—Ullmann, § 81—Fauchille, §§ 823 (3), 833, 834—Despagnet, § 448—Pradier-Fodéré, II §§ 1127-1150—Rivier, II pp 89 93—Rousseau, pp 274 285—Calvo, III §§ 1621 1626—Fiore, II §§ 1025 1031—Martens, I § 111—Scelle, II pp 379-383—Anzilotti, pp 428 432—McNair, Chapter 8—*Harvard Research* (1935, Part III), pp 812 843—Zannini, *L'adesione ai trattati internazional* (1946)—Kelsen in *Revue de droit*, 10 (1936), pp 286 289

Interest and Participation to be distinguished

§ 529 Ordinarily a treaty creates rights and duties between the contracting parties exclusively, according to the principle *pacta tertiis nec nocent nec prosunt*, which has already been discussed [4] Nevertheless, third States may be interested in such treaties, for the common interests of the members of the Family of Nations are so interlaced that few treaties between single members can be concluded in which third States have not some kind of interest But such an interest, all-important as it may be, must not be confused with participation of third States in treaties Such participation can occur in five different forms—namely, good offices, mediation, intervention, accession and adhesion

Good Offices and Mediation.

§ 530 A treaty may be concluded with the help of the good offices, or through the mediation, of a third State, whether these offices be asked for by the contracting parties, or be exercised spontaneously by a third State Such third

[1] See Articles 39-50
[2] See above, § 340g
[3] See below, Appendix A, p 891.
[4] See above, § 522

State, however, does not necessarily, either through good offices or through mediation, become a real party to the treaty, although this might be the case [1]

Intervention.

§ 531 A third State may participate in a treaty in such a way that it interposes dictatorially between two States negotiating a treaty, and requests them to drop, or to insert, certain stipulations Such intervention does not necessarily make the interfering State a real party to the treaty. Instances of threatened intervention of such a kind are the protest of Great Britain against the preliminary peace treaty concluded in 1878 at San Stefano [2] between Russia and Turkey, and that of Russia, Germany, and France in 1895 against the peace treaty of Shimonoseki [3] between Japan and China

Accession.

§ 532 Of accession [4] there are two kinds Accession means, in the first place, the formal entrance of a third State into an existing treaty, so that it becomes a party to the treaty, with all rights and duties arising therefrom Such accession can take place only with the consent of the original contracting parties, it always constitutes a treaty in itself Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain State And the so-called law-making treaties, as the Declaration of Paris or the Geneva Convention for example, regularly stipulate that all such States as have not been originally contracting parties, shall have an opportunity of acceding

But there is, secondly, another kind of accession For a State may become a party to a treaty between other States for the purpose of guaranteeing its due performance [5] This kind of accession makes the acceding State also a

[1] The difference between good offices and mediation is discussed below, vol II § 9

[2] See above, § 135 (2)

[3] See *R G*, II (1895) pp 457 463 Details concerning intervention have been given above, §§ 134 138, see also below, vol II § 50 Note also intervention which takes the form of a dictatorial insistence by State A, acquiesced in by State B by treaty, that certain treaties between States B and C shall be abrogated by State B, see Article 292 of the Treaty of Peace with Germany in 1919

[4] Accessions and adhesions normally do not require ratification, but they are sometimes expressly made subject to ratification see above, § 512, and Report made to the Council of the League and circulated to the Assembly in September 1927 (*Assembly Documents*, A 12 1927 V)

[5] See above, § 528

party to the treaty, but the rights and duties of the acceding State are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty

Adhesion. § 533 Adhesion is defined as such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations, or with regard only to certain principles laid down in the treaty Whereas through accession a third State becomes a party to the whole treaty, with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to. But it must be specially observed that the distinction between accession and adhesion is one made in theory, to which practice frequently does not correspond [1]

X

EXPIRATION AND DISSOLUTION OF TREATIES

Vattel, II §§ 198 205—Hall, § 116—Westlake, I pp 295 297—Lawrence, § 134—Halleck, I pp 314 316—Taylor, §§ 394 399—Wharton, II § 137*a* —Wheaton, § 275—Moore, V §§ 770 778—Hyde, II §§ 538 551—Fenwick, pp 350 359—Bluntschli, §§ 450 461—Heffter, § 99—Ullmann, § 85—Liszt, § 32 (III)—Fauchille, §§ 845 860—Despagnet, §§ 453 455—Pradier-Fodéré, II §§ 1200 1218—Mérignhac, II p 788—Rivier, II § 55—Nys, II pp 531 535—Calvo, III §§ 1662 1668—Cruchaga, I §§ 576, 577—Cavaglieri, pp 341-348—Fiore, II §§ 1047 1052—Guggenheim, pp 104 122—Nippold, *op cit*, pp 235 248—Hold Ferneck, II pp 181 192—Anzilotti, pp 439 466 —McNair, Chapters, 31-36, 39 43—Rousseau, pp 487 630—Lauterpacht, *The Function of Law*, pp 270 285—Scelle, II pp 396 437—*Harvard Research* (1935, Part III), pp 1077 1126, 1161 1173—Hoijer, *Les traités internationaux* (1928), II 430 454—Schmidt, *Ueber die volkerrechtliche Clausula 'rebus sic stantibus,'* etc (1907)—Kaufmann, *Das Wesen des Volkerrechts und die Clausula 'rebus sic stantibus'* (1911)—Bonucci in *Z V*, 4 (1910), pp 449 471—Crandall, *op cit*, §§ 178 186—Lammasch, *Das Volkerrecht nach dem Kriege* (1917), pp 130 171—Lauterpacht, §§ 75-77 —Lord Phillimore, *Three Centuries of Treaties of Peace* (1917), pp 132 140

[1] Although the French text uses the term 'adhesion,' the official English version speaks of 'accession' On the question whether there is a substantial difference between the two terms see Satow, § 737, *International Congresses* (Foreign Office Peace Handbook) (1920), p 24, Fauchille, § 833 (2), and the Report of the League Committee on the 'Admissibility of Reservations to General Conventions' submitted to the Council in June 1927 (League Doc C 211 1927 V).

—Rapisardi-Mirabelli, *I limiti d'obbligatorietà delle norme giuridiche internazionali* (1922), pp 115 133—Bertram, *Die Aufhebung der volkerrechtlichen Vertrage* (1915)—Goellner, *La revision des traités sous le régime de la Société des Nations* (1925)—Tobin, *The Termination of Multipartite Treaties* (1933)—Hill, *The Doctrine 'rebus sic stantibus' in International Law* (1934)—Cereti, *La Revisione dei trattati* (1934)—Frangulis, *Théorie et pratique des traités internationaux* (1936), pp 120 188—Taylor in *Proceedings of American Society of International Law*, 1913, pp 223 231—Brierly in *Grotius Society*, 11 (1926), pp 11 20—Woolsey in *A J*, 20 (1926), pp 346 353—Garner, *ibid*, 21 (1927), pp 509 516—Fischer Williams, *ibid*, 22 (1928), pp 89 104—McNair in *Hague Recueil*, vol 22 (1928) (2), pp 465-535, and *ibid*, vol 43 (1933) (1), pp 280 289—Scelle, *ibid*, vol 46 (1933) (4), pp 469 482—Ray, *ibid*, 48 (1934) (II), pp 635 709—Bonoly, *ibid*, vol 58 (1936) (IV), pp 212 221—Genet in *R G*, 37 (1930), pp 287 311—Garner in *Iowa Law Review*, 19 (1933 1934), 312 329—Fairman in *A J*, 29 (1935), pp 219 236—Whitton in *R I (Paris)*, 18 (1936), pp 440 486—Engels in *R I*, 3rd ser, vol 20 (1939), pp 529 558, 708 747—Jessup in *A J*, 41 (1947), pp 394 401 And see the extensive literature cited above, § 167*o* (n), in connection with Article 19 of the Covenant

Expiration and Dissolution in contradistinction to Fulfilment

§ 534 The binding force of treaties may terminate in four different ways—because a treaty may expire, or be dissolved, or become void, or be cancelled [1] The grounds of expiration of treaties are, first, expiration of the time for which a treaty was concluded, and, secondly, occurrence of a resolutive condition Of grounds of dissolution of treaties there are three—namely, mutual consent, withdrawal by notice, and vital change of circumstances In contradistinction to expiration, dissolution, voidance, and cancellation, performance of treaties does not terminate their binding force A treaty whose obligation has been performed is as valid as before, although it is then of historical interest only [2]

Expiration through Expiration of Time

§ 535 All such treaties as are concluded for a certain period of time only, expire with the expiration of such time, unless they are renewed, or prolonged for another period Such time-expiring treaties are frequently con-

[1] The distinction made in the text between fulfilment, expiration, dissolution, voidance, and cancellation of treaties is, it appears, nowhere sharply drawn, although it would seem to be of considerable importance Voidance and cancellation will be discussed below, §§ 540 544 and 545 549

[2] In so far as it creates or transfers rights *in rem* (what Westlake called a *dispositive* treaty, *e g* a treaty of cession), it sets up a permanent state of affairs, in so far as it merely creates rights *in personam*, they are satisfied when due performance is given, in neither case (it is submitted) is it necessary to say that the validity of the treaty continues

cluded, and no notice is necessary for their expiration, except when specially stipulated

A treaty, however, may be concluded for a certain period of time only, but with an additional stipulation that the treaty shall, after the lapse of such period, be valid for another period, unless one of the contracting parties gives notice in due time [1]

Expiration through Resolutive Condition

§ 536 Different from time-expiring treaties are such as are concluded under a resolutive condition, which means under the condition that they shall at once expire with the occurrence of certain circumstances As soon as these circumstances arise, the treaties expire

Mutual Consent

§ 537 A treaty, although concluded for ever, or for a period of time which has not yet expired, may nevertheless always be dissolved by mutual consent of the contracting parties Such mutual consent can be evidenced in three different ways

First, the parties can expressly and purposely declare that a treaty shall be dissolved, this is rescission Or, secondly, they can conclude a new treaty concerning the same objects as those of a former treaty, without any reference to the latter, although the two treaties are inconsistent with each other This is substitution, and in such a case it is obvious that the treaty previously concluded was dissolved by tacit mutual consent Or, thirdly if the treaty is one that imposes obligations upon one of the contracting parties only, the other party can renounce its rights [2] Dissolution by renunciation is a case of dissolution by mutual consent, since acceptance of the renunciation is necessary

Withdrawal by Notice

§ 538 Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal, after

[1] *E g* the Washington Treaty of 1922 for the Limitation of Naval Armament For instances of withdrawal by notice see the British Denunciation of the Sixth Hague Convention (see below, vol II § 102*a*, p 276), and withdrawals from the League under Article 1 of the Covenant (see above, § 167*b*) And see Rapisardi Mirabelli, *op cit*, pp 61-84

[2] See above, § 490 On the question of the legality of a renunciation of rights by one party to a multilateral convention when that renunciation operates to the detriment of another party see Fauchille, § 850 (1)

notice by one of the parties Many treaties [1] stipulate expressly for the possibility of such withdrawal, and as a rule contain details in regard to form, and period, in which notice is to be given for the purpose of withdrawal But there are other treaties which, although they do not expressly stipulate for the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties To that class belong all such treaties as are either not expressly concluded for ever, or are apparently not intended to set up an everlasting condition of things Thus, for instance, a commercial treaty, or a treaty of alliance not concluded for a fixed period only, can always be dissolved after notice, although such notice be not expressly stipulated for Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are as a rule not terminable by notice, although they can be dissolved by mutual consent of the contracting parties All treaties of peace, and all boundary treaties, belong to this class History records many cases in which treaties of peace have not established an everlasting condition of things, since one, or both, of the contracting States took up arms again, as soon as they recovered from the exhausting effect of the previous war But this does not prove either that such treaties can lawfully be dissolved through giving notice, or that, at any rate as far as International Law is concerned, they are not intended to create an everlasting condition of things

Vital Change of Circumstances [2]

§ 539 Although, as just stated, treaties concluded for a certain period of time, and such treaties as are expressly or impliedly made for the purpose of setting up an everlasting condition of things, cannot, in principle, be dissolved by withdrawal of one of the parties, there is an exception to this rule For it is an almost universally recognised fact that vital changes of circumstances may be of such a kind as to justify a party in demanding to be released from the

[1] See § 535

[2] As to extinctive prescription, which is a different matter, see above, § 155c

obligations of an unnotifiable treaty [1] The vast majority of writers, as well as the Governments of civilised States, defend the principle [2] *conventio omnis intelligitur rebus sic stantibus*, and they agree,[3] therefore, that all treaties are concluded under the tacit condition *rebus sic stantibus* That this condition involves a large amount of danger cannot be denied, for it can be, and indeed frequently has been, abused for the purpose of hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness But all this cannot alter the fact that this exceptional condition is as necessary for International Law and international intercourse as the very rule *pacta sunt servanda* The consent of a State to a treaty presupposes a conviction that it is not fraught with danger

[1] Such a demand can, of course, only be made with regard to executory treaties Executed treaties are beyond the reach of such a demand Sometimes express provision is made in a treaty for the event of a material change of circumstances, *e g* in Article 21 of the Treaty of Washington of February 6, 1922, for the Limitation of Naval Armament Miso No 1 (1922), Cmd 1627, and see above, p 842, n 1 Note the point made by Fischer Williams, *op cit*, namely, that the true operation of a vital change of circumstances (when it does operate) is to produce, not an option to one party to withdraw from the treaty, but its automatic expiration See also Genet in *R G*, 37 (1930), pp 287 311

[2] The principle dates back to the *glossatores*, and has found entrance into the doctrine of International Law by way of the doctrine of Municipal Law See Pfaff, *Die Clausel 'rebus sic stantibus' in der Doctrin und der osterreichischen Gesetzgebung* (1898), Bindewald, *Rechtsgeschichtliche Darstellung der Clausel 'rebus sic stantibus' und ihre Stellung im Bürgerlichen Gesetzbuch* (1901) For an early formulation of the principle, in the sphere of International Law, by Spinoza, see Lauterpacht in *B Y*, 1927, at pp 94 107, and see an early invocation of it by Queen Elizabeth against the Netherlands, in Zouche, *Jus et Judicium Feciale*, II § 4, cited by Brierly, *op cit*, at p 13, and Lauterpacht, p 171 (n)

[3] See Bonucci in *Z V*, 4 (1910), pp 449 471 Many writers agree to it with great reluctance only, and in a very limited sense, as, for instance, Grotius, II c 16, § 25, No 2, and § 27, Vattel, II § 296, Kluber, § 165 Some few writers, however, disagree altogether, as, for instance, Bynkershoek, *Quaest Jur public*, II c 10, and Wildman *Institutes of International Law*, I (1849) p 175 Schmidt, *op cit*, pp 26 92, would seem to reject the *clausula* altogether, yet — see pp 93 151 — can nevertheless not help recognising it in the end, although not as a rule of law but as a morally justifiable rule of policy See also Strupp, *Grundzüge*, p 104, who maintains that the alleged instances of the application of the *clausula* are either cases of necessity (*Notstand*) or manifest breaches of law A good survey of the practice of the States in the matter during the nineteenth century is given by Kaufmann, *op cit*, pp 12 37 See also Foster, *The Practice of Diplomacy* (1906), pp 299 305 Lammasch in *Das Volkerrecht nach dem Kriege* (1917) maintains that the *clausula* is not, and has never been, a recognised rule of customary International Law, but he attempts to prove on pp 159 171 that treaties of alliance and guarantee are not binding, or, at any rate, are concluded according to the principle *rebus sic stantibus* (p 170)

to its existence and vital development [1] For this reason every treaty implies a condition that, if by an unforeseen change of circumstances an obligation stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand [2] to be released from the obligation concerned

The great danger of the clause [3] *rebus sic stantibus* is to be found in the elastic meaning of the term 'vital change of circumstances,' since, in the absence of submission to an international court, a State will in each particular case judge for itself whether or not there is a vital change of circumstances justifying its demand to be released from a treaty obligation The doctrine *rebus sic stantibus* conceived as a legal doctrine embodies the same principle which the law of various countries has admitted as a ground for dissolution or discharge or unenforceability of contract owing to a vital change of circumstances But the operation of that principle is necessarily limited for the simple reason that it is the function of the law to enforce contracts or treaties even if they become burdensome for the party bound by them This explains why in almost all cases in which the doctrine *rebus sic stantibus* has been invoked before an international tribunal, the latter, while not rejecting it in principle, has refused to admit that it could be applied to the case before it Thus in the *Case of the Free Zones of Upper Savoy and the District of Gex*, decided by the Permanent Court of International Justice on June 7, 1932, France maintained that with regard to the latter the change of circumstances had been so great as to justify the Court in holding that the provisions in question had lapsed The Court found that the changes relied upon by France had no reference to 'the whole body of circumstances—circumstances essentially governed by the geographical configuration of the Canton of Geneva and of the sur-

[1] For a criticism see Brierly, *op cit*, at p 14

[2] See, however, Fischer Williams, *op cit*, referred to above, p 841

[3] The use of the term clause, *clausula*, *clausel*, to denote a doctrine or principle is unfortunate, as it suggests the presence in treaties of such a clause, whereas the controversy is upon the question as to the legal position when there is no such clause Such a clause was frequent in treaties of the seventeenth and eighteenth centuries.

rounding region—which the High Contracting Parties had in mind at the time that the free zones were created,' and that accordingly they could not be taken into consideration [1]

[1] Series A/B, No 46, p 158 The *rebus sic stantibus* doctrine appears so far to have received very little consideration from international and other tribunals, the following references may be given to cases where the doctrine or something like it has come under discussion (i) Decision of the Supreme Court of Switzerland upon a treaty in a dispute between the Cantons of Lucerne and Argau in 1882, *Entscheidungen des Schweitzer Bundesgerichts*, VIII (1882) p 57 (cited by Kaufmann, *op cit*, p 38), (ii) *Hooper* v *United States* (1887), United States Court of Claims, 22 Ct Cl 408, Scott, *Cases*, p 470, (iii) Award of the Hague Court of Arbitration in the *Interest on Indemnities* case between Russia and Turkey (Wilson, *Hague Arbitration Cases* (1915), pp 313 315), the doctrine was not pleaded in this case, but an exception was pleaded based on *force majeure*, (iv) Advisory Opinion of the Permanent Court on the *French Nationality Decrees in Tunis and Morocco*, Series B, No 4, p 29, (v) Decision of the German Staatsgerichtshof of June 26, 1925, in a dispute between Prussia and Bremen, where the *clausula* was held to be applicable to treaties but was not applied in that particular case *Bulletin de l'Institut Intermédiare International*, 14 (1926), p 289, *Juristische Wochenschrift*, vol 54, p 2478, *Annual Digest*, 1925 1926, (vi) *MM Rothschild et Sons* v *Gouvernement égyptien* in *Gazette des Tribunaux Mixtes d'Egypte*, August 1925, 52 *Clunet* (1925), pp 1090 1105, and 53 *Clunet* (1926), pp 754 766, *Journal des Tribunaux Mixtes*, No 486 of May 1, 1926, (vii) In *Canton of Thurgau* v *Canton of St Gallen*, the Swiss Federal Court refused, in February 1928, to apply the doctrine on the ground that the servient Canton failed to invoke it at an earlier stage and also because of the trifling character of the changed circumstances *Annual Digest*, 1927-1928, Case No 289, (viii) Judgments of the Permanent Court of International Justice of July 12, 1929, in the cases of Serbian and Brazilian loans in France As under (iii) above, the doctrine was not pleaded *eo nomine*, but the exception of *force majeure* was invoked Series A, Nos, 20 21, pp 39 and 120, *Barcs Pakrac Railway Co* v *Yugoslavia*, where arbitrators appointed under a Resolution of the Council of the League held, on October 5, 1934, that Yugoslavia was entitled to invoke changed conditions with regard to the interpretation of a concessionary contract *Annual Digest*, 1933 1934, Case No 190 See also Lauterpacht, §§ 75-77, for discussion of instances of the invocation of the doctrine

At the Conference which preceded the signing of the Treaty of Lausanne of 1923 Turkey based her claim for the abolition of the system of capitulations in part on the *rebus sic stantibus* principle, which was also being pleaded on behalf of China for a similar purpose see Woolsey in *A J*, 20 (1926), pp 346 353 Other instances of the recognition by a treaty of a change of circumstances will be found in Article 31 of the Treaty of Peace of 1919 with Germany as to the abrogation of the neutralisation of Belgium (see above, § 99) and Article 435 of the same treaty (to which Switzerland is not a party) regarding the status of the neutralised zone of Savoy and the free zones of Upper Savoy and the Gex district, as to which see Waldkirch, *Artikel 435 des Versailles Vertrages in seiner rechtlichen Bedeutung* (1924), pp 25 30, and above, § 207 For the Turkish Note of April 10, 1936, setting forth, without expressly invoking the clausula *rebus sic stantibus*, the reasons necessitating the revision of Article 18 of the Straits Convention, see *Off J*, 1936, p 504 In December 1932 the French Chamber of Deputies invoked the principle *rebus sic stantibus* 'as recognised in public international law, treaties and conventions' in connection with the question of inter allied debts *Débats Parlementaires*, Chamber, p 3585, *Z o V*, 4 (1934), p 145

Be that as it may, it is generally agreed that the clause *rebus sic stantibus* may only be resorted to in very exceptional circumstances, and that certainly not every change of circumstances justifies a State in making use of it All agree that, although treaty obligations may, through a change of circumstances, become disagreeable, burdensome, and onerous, they must nevertheless be discharged All agree, further, that a change of government, and even a change in the form of a State, such as the turning of a monarchy into a republic and *vice versa*, does not alone, and in itself, justify a State in resorting to the clause [1] On the other hand, all agree in regard to many cases in which it could justly be made use of Thus, for example, if a State enters into a treaty of alliance for a certain period of time, and if, before the expiration of the alliance, a change of circumstances occurs, so that now the alliance endangers the very existence of one of the contracting parties, all will agree that the clause *rebus sic stantibus* would justify that party in demanding to be released from the treaty of alliance

Since the beginning of the nineteenth century only very few cases of the application of the clause have occurred And there is no doubt that during the last century a conviction became more and more prevalent that the clause *rebus sic stantibus* ought not to give a State the right, immediately upon the happening of a vital change of circumstances, to declare itself free from the obligations of a treaty, but should only entitle it to claim to be released from them by the other party or parties to the treaty Accordingly, when a State is of the opinion that the obligations of a treaty have, through a vital change of circumstances, become unbearable, it should first approach the other party or parties, and request them to abrogate the treaty [2] If such abrogation be refused, a conflict arises

[1] The Pan American Convention on Treaties of February 1928 (see above, p 62, n) provides that if the organisation of a State changes so as to render impossible the execution of treaties because of division of territory or other like reasons, treaties shall be adapted to the new conditions (Article 11)

[2] See Lord Phillimore, *Three Centuries of Treaties of Peace* (1917), pp 134 139, for a more detailed discussion of the same argument As to various instances of revision

between the treaty obligations and the right to be released from them, which, if the other party refuses to abide by a decision of an international court that could give judgment in the matter, cannot be settled juridically It is only then that a State may be justified in declaring that it can no longer consider itself bound by these obligations The refusal to submit the issue for judicial determination is in itself *prima facie* evidence either that the doctrine *rebus sic stantibus* has been invoked as a cloak for an intended breach of the law or that the State benefiting from the treaty is determined to take advantage of a treaty which has lost its legal reason of existence

The conviction that a State has no right to liberate itself

of treaties by agreement in the nineteenth century see Elbe in *Z o V*, 5 (1935), pp 269-292, and Crutwell, *A History of Peaceful Change in the Modern World* (1937) See also Tobin in *A J*, 18 (1934), pp 487-505 In the Treaty of December 20, 1928, between Great Britain and China, the parties abrogated all provisions of the existing treaties limiting the right of China to settle her national customs tariff and agreed that henceforth the principle of complete national tariff autonomy shall apply Treaty Series, No 10 (1929), Cmd 3319 See also the Treaty between Great Britain and China of January 11, 1943, for the relinquishment of extraterritorial rights in China (Treaty Series No 2 (1943) Cmd 6456)

A number of commercial treaties refer expressly to a change in circumstances as a reason for terminating the Treaty Thus Article 32 (3) of the Treaty of Commerce of May 1, 1934 (*Reichsgesetzblatt*, Part II of May 19, 1934), between Germany and Yugoslavia provides that should the economic situation on which both parties relied in concluding the Treaty undergo a fundamental change to the prejudice of one party, then the State in question may give three months' notice to terminate the Treaty instead of two years' notice See also Article 5 (2) of the Agreement regarding the Exchange of Goods between Germany and the Netherlands Indies of June 6, 1934 (*L N T S*, No 4034) Article 19 of the Economic Agreement between Poland and Germany of November 4, 1935 (*Reichsgesetzblatt*, Part II of November 16, 1935), goes so far as to provide for the right of denunciation, following upon abortive negotiations, in cases in which the expectations of either party, which underlay the conclusion of the Treaty, should remain unfulfilled or in which the economic measures taken by one party have a prejudicial effect upon the other The most favoured nation Treaty between the United States and France of May 6, 1936 (*Journal Officiel de la République française*, May 13, 1936), provides in Article 12 (4 and 5) for the right of denunciation in case the application of the provisions of the Treaty shall become dangerous to the vital interests of one of the contracting parties So also in the Treaty with Holland of December 20, 1935 (*Handelsberichten* of January 16, 1936, No 3, Annex) For a survey of revision clauses in treaties since the First World War see Wilson in *American Political Science Review*, 28 (1934), p 901, and Engel, *Les clauses de revision dans les traités internationaux multilateraux* (1937) For a survey of the revision clauses in some of the recent international organisations see Jenks in *B Y*, 22 (1945), pp 65-68

from the obligations of a treaty,[1] without having first asked the other party or parties for its release from them, became apparent when, in 1870, during the Franco-Prussian War, Russia declared her withdrawal from the stipulations of the Treaty of Paris of 1856, which concerned the neutralisation of the Black Sea, and imposed a restriction upon her in regard to men-of-war in that sea Great Britain protested, and a conference was held in London in 1871 Although by a Treaty signed on March 13, 1871, this conference, consisting of the signatory Powers of the Treaty of Paris—namely, Austria, Great Britain, France, Germany, Italy, Russia, and Turkey—complied with the wishes of Russia and abolished the neutralisation of the Black Sea, it had adopted in a protocol [2] of January 17, 1871, the following declaration 'C'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment [3] des parties contractantes, au moyen d'une entente amicale' When on March 10, 1935, and March 7, 1936, Germany unilaterally repudiated, respectively, her obligations under Part V (disarmament clauses) and Article 43 (demilitarisation of the Rhineland) of the Treaty of Versailles (see below, § 547, n 4) the Council of the League, in condemning Germany's action, reiterated that declaration [4]

In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from Article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum [5] The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of

[1] A rule which is stressed in the Preambles of the Covenant ('scrupulous respect for all treaty obligations') and of the Charter of the United Nations (establishment of conditions 'under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained')

[2] See Martens, *N R G*, 18, p 278

[3] Whatever be the merits of this declaration, it certainly goes too far in declaring that a State can only free itself from the obligations of a treaty by agreement with the other party, for—see below, § 547—a State may cancel a treaty if the other party to it violates it

[4] *Off J*, 1935, p 551, *Documents*, 1935, p 98, Treaty Series, Germany, No 2 (1936), Cmd 5134

[5] See Martens, *N R G*, 2nd ser, 14, p 170, and Rolin Jaequemyns in *R I*, 19 (1887), pp 37 49

Great Britain, who protested Again, in October 1908, Austria-Hungary, in defiance of Article 25 of the Treaty of Berlin, 1878, proclaimed her sovereignty over Bosnia and Herzegovina, which hitherto had been under her occupation and administration, and simultaneously Bulgaria, in defiance of Article 1 of the same Treaty, declared herself independent [1] Thus the standard value of the declaration of the Conference of London of 1871 had become doubtful again, until in the Permanent Court of International Justice an independent international court was created with jurisdiction, if given to it by the parties, to set aside a treaty obligation which has become oppressive as the result of a juridically relevant change of circumstances It has already been mentioned [2] that the Covenant of the League attempted to deal with the problem, and reasons have been given [3] for regarding the means adopted as unsatisfactory [4]

XI

VOIDANCE OF TREATIES

See the literature quoted at the commencement of § 534

Grounds of Voidance.

§ 540 A treaty, although it has neither expired, nor been dissolved, may nevertheless lose its binding force by be coming void [5] And such voidance may have different grounds—namely, extinction of one of the two contracting

[1] See above, § 50, Martens, *N R G*, 3rd ser, 2, pp 656, 666, and Blociszewski in *R G*, 17 (1910), pp 417 449

[2] See above, § 167*o*

[3] See above, §§ 167*o*, 167*s* (4)

[4] For a number of other instances of the invocation of the *rebus sic stantibus* condition see Fauchille, § 853 (4) 853 (11) Brierly, *op cit*, suggests that, if a juridical basis is to be found for the *rebus sic stantibus* doctrine, it is worth while giving careful consideration to the English common law doctrine of frustration of the objects of a compact, upon which see MacKinnon, *The Effect of War on Contract* (1917), and McNair in *L Q R*, 35 (1919), pp 84 100, reprinted in *Some Legal Effects of War* (1920), pp 78 98, and Fischer Williams, *op cit* For a consideration of the doctrine *rebus sic stantibus* as a general principle of law see Lauterpacht, *The Function of Law*, pp 270 285

[5] But such voidance must not be confused with the voidness of a treaty from its very beginning, see above, § 501 Sometimes treaty obligations are conditional upon the happening or non happening of a certain event, for instance, Article 2 of the Rapallo Agreement between Germany and Russia of April 16, 1922 *L N T S*, vol 16, p 248

parties, impossibility of execution, realisation of the purpose of the treaty otherwise than by fulfilment, and, lastly, extinction of such object as was concerned in the treaty

Extinction of One of the Two Contracting Parties

§ 541 All treaties concluded between two States become void through the extinction of one of the contracting parties,[1] provided that they do not devolve upon the State which succeeds to the extinct State That some treaties devolve upon the successor has been shown above (§ 82), but many treaties do not On this ground all political treaties, such as treaties of alliance, guarantee, neutrality, and the like, become void

Impossibility of Execution

§ 542 All treaties the execution of which becomes impossible subsequently to their conclusion are thereby rendered void[2] A frequently quoted example is that of three States concluding a treaty of alliance, and subsequent war breaking out between two of them In such a case, it is impossible for the third party to execute the treaty, and it becomes void[3] It must, however, be added that the impossibility of execution may be temporary only, and that then the treaty is not void, but merely suspended

Realisation of Purpose of Treaty other than by Fulfilment

§ 543 All treaties the purpose of which is realised otherwise than by fulfilment become void For example, a treaty concluded by two States for the purpose of inducing a third State to undertake a certain obligation becomes void, if the third State voluntarily undertakes the obligation before the two contracting States have had an opportunity of approaching it with regard to the matter

Extinction of such Object as was concerned in a Treaty

§ 544 All treaties the obligations of which concern a certain object become void through the extinction of such object Treaties, for example, concluded in regard to a certain island become void when such island disappears through the operation of nature, so do treaties concerning a third State when such State merges in another

[1] See *Harvard Research* (1935, Part III), pp 1165-1168, and Hyde in *A J*, 26 (1932), pp 133 ff

[2] It is submitted that to differentiate this ground of voidance from the mere invocation of the *rebus sic stantibus* principle the cause must amount almost to physical impossibility

[3] See also above, § 521, and Hyde, u § 542

XII

CANCELLATION OF TREATIES

See the literature quoted at the commencement of § 534

Grounds of Cancellation

§ 545 A treaty, although it has neither expired, nor been dissolved, nor become void, may nevertheless lose its binding force by cancellation The causes of cancellation are four—namely, inconsistency with International Law created subsequently to the conclusion of the treaty, violation by one of the contracting parties, subsequent change of status of one of them, and war

Inconsistency with subsequent International Law

§ 546 Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through a progressive development of International Law they become inconsistent with the latter [1] A valuable example is the abolition of privateering by the Declaration of Paris of 1856, in consequence of which any previous treaties based on privateering as a recognised institution of International Law were *ipso facto* cancelled, provided that all the parties to such treaties were signatory Powers of the Declaration of Paris [2] Certainly subsequent Municipal Law can have no derogating influence upon existing treaties [3] On occasions, indeed, subsequent Municipal Law does create for a State a conflict between its treaty obligations and such law In such a case this State must endeavour to obtain a release by the other contracting party from these obligations [4]

[1] As regards inconsistency with the Covenant of the League see above, § 167oo

[2] This must be maintained in spite of the fact that Protocol No 24 of the Congress of Paris (see Martens, *N R G*, 15, pp 768-769) contains the following 'Sur une observation faite par MM les Plénipotentiaires de la Russie, le Congrès reconnaît que la présente resolution, ne pouvant avoir d'effet rétroactif, ne saurait invalider les conventions antérieures' This expression of opinion can only mean that previous treaties with such States as were not and would not become parties to the Declaration of Paris were not *ipso facto* cancelled by the Declaration

[3] See *Harvard Research* (1935, Part III), pp 1029-1044

[4] That municipal courts must apply the subsequent Municipal Law, although it conflicts with previous treaty obligations, there is no doubt, as has been pointed out above, § 21 See *The Cherokee Tobacco*, 11 Wall 616, *Whitney* v *Robertson*, 124

Violation by One of the Contracting Parties

§ 547. Violation [1] of a treaty by one of the contracting States does not *ipso facto* cancel the treaty, but it is within the discretion [2] of the other party to cancel it on this ground [3] There is indeed no unanimity among writers on International Law in regard to this point, since some make a distinction between essential and non-essential stipulations of the treaty, and maintain that only violation of essential stipulations creates a right for the other party to cancel the treaty Others oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential as well as essential stipulations, and that it is for the faithful party to consider for itself whether violation of a treaty, even in its least essential parts, justifies its cancellation [4] The case, however, is different, when a

U S 190, *Botiller* v *Dominguez*, 130 U S 238, Scott, *Cases*, pp 458-462 See also Moore, v § 774 On the question whether, after a treaty ceases to be in force, the relevant Municipal Law continues to be effective or not see Schoen in *Strupp, Wort*, II p 662, and *Renault et Société des usines Renault* v *Société Rousski Renault* before the First Chamber of La Cour de Paris on January 28, 1926 *Annual Digest*, 1925 1926, Case No 268 On the converse case of the effect of the repeal of a municipal law upon a treaty made to facilitate the execution of that treaty see Dickinson, referred to above, at p 452, n 2

[1] See Myers in *A J*, 11 (1917), pp 794-819, and 12 (1918), pp 96-161, where a number of treaty violations are discussed

[2] This was recognised in 1913 by the United States Supreme Court in *Charlton* v *Kelly*, 229 U S 447, Scott, *Cases*, p 415

[3] But not, of course, when party's failure to perform is due to the illegal act of the other party which prevented performance see the *Case concerning the Factory at Chorzów* before the Permanent Court in 1927, Series A, No 9, at p 31

[4] This was also the view of the author of this treatise But the correct view is probably that expressed by Hall, 8th ed, § 116, p 409, and Hyde, II § 546, according to whom it is only a failure by one party to 'observe a material stipulation, a stipulation which is material to the main object, or, if there are several to one of the main objects' that justifies the other party in abrogating the whole treaty (*Hooper* v *United States* (1887) United States Court of Claims, 22 Ct Cl 408, Hudson, *Cases*, p 930, and *Karnuth* v *United States* (1929) 279 U S 231, afford some authority for the view advocated in this note) See also *Harvard Research* (1935, Part III), pp 1134 1144 The question is essentially one of interpretation of the treaty, and it is in accordance with principle that the party claiming the right to rescind should put himself in the position of being able to invoke the authority of an arbitral or judicial pronouncement in support of the proposed action On March 16, 1935, Germany unilaterally denounced the provisions of Article 160 (Part V) of the Treaty of Versailles, limiting the size of her armed forces, and of Article 173, which prohibited conscription in Germany The reason given was that the other parties to the Treaty had not fulfilled the obligation to limit their armaments For a legal analysis of the German thesis see Bruns in *Schriften der Akademie für deutsches*

treaty expressly stipulates that it should not be considered broken merely by violation of one or another part of it

The right to cancel the treaty on the ground of its violation must be exercised within a reasonable time after the violation has become known If the Power possessing such a right does not exercise it in due time, it must be taken for granted that such right has been waived A mere protest, such as the protest of Great Britain in 1886 when Russia withdrew from Article 59 of the Treaty of Berlin of 1878, which stipulated for the freedom of the port of Batoum, neither constitutes a cancellation, nor reserves the right of cancellation [1]

Subsequent Change of Status of One of the Contracting Parties

§ 548 One cause which *ipso facto* cancels treaties is such subsequent change of status of one of the contracting States as transforms it into a dependency of another State As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be considered to have taken place, or, further, as regards the other question as to the kind of treaties cancelled by such change [2] Thus, for example, when a State becomes a member of a Federal State, it is obvious that all its treaties of alliance are *ipso*

Recht, No 3, 1934 But see Garner and Jobst III in *A J*, 29 (1935), pp 569-585 See *Documents*, 1935 (1), pp 58-68, 93 116 See also International Conciliation (Pamphlet No 310, May 1935) On March 7, 1936, Germany denounced the provisions of Articles 42 and 43 of the Treaty of Versailles relating to the demilitarisation of the Rhineland and guaranteed by the Treaty of Locarno on the ground that it was incompatible with the Franco Soviet Pact of May 2, 1935 *Off J*, 1936, p 312 Germany refused to submit to the Permanent Court or to any other tribunal the question of the compatibility of the two treaties In both cases the Council of the League found finally that Germany committed a breach of International Law by unilaterally repudiating her treaty obligations See *Off J*, 1935, p 551, 1936, p. 340 As to the denunciation of the Locarno Treaty and Articles 42 and 43 of the Treaty of Versailles see Fenwick in *A J*, 30 (1936), pp 265 270, Wright, *ibid*, pp 486-494, Schmitt in *Deutsche Juristen Zeitung*, 41 (1936), pp 337 341, Freytagh Loringhoven, *ibid*, 403 408, Aall Tjömo in *Z V*, 20 (1936), pp 139-154, Stauffenberg in *Z o V*, 6 (1936), pp 215 234, Mathiot in *R I (Paris)*, 17 (1936), pp 534 559, Rousseau in *La paix par le droit*, 46 (1936), pp 188-198, Wehberg in *Friedenswarte*, 36 (1936), pp 49 61 And see Misc No 3 (1936), Cmd 5143, for the official German view

[1] This was recognised in 1913 by the United States Supreme Court in *Charlton* v *Kelly*, 229 U S 447, Scott, *Cases*, p 415 See also Kunz in *A J*, 40 (1946), pp 383 390

[2] See Moore, v § 773, and above, § 82, p 153, n 2, and § 521

facto cancelled, for in a Federal State the power of making war rests with the Federal State, and not with the several members Changes in the government or in the constitution of a State have, as such, no effect upon the continued validity of its international obligations [1]

§ 549 The effect of the outbreak of war between the parties to a treaty upon the validity of that treaty is far from being settled, and is discussed later [2] War

XIII

RENEWAL, RECONFIRMATION, AND REDINTEGRATION OF TREATIES

Vattel, II § 199—Hall, § 117—Taylor, § 400—Hartmann, § 57—Ullmann, § 85 — Fauchille, §§ 836 839 — Despagnet, § 456 — Pradier Fodére, II §§ 1191-1199—Rivier, II pp 143 146—Calvo, III §§ 1637, 1666, 1669—Fiore, II §§ 1048, 1049, and *Code*, §§ 840 843

§ 550 Renewal of treaties is the term for the prolongation, before their expiration, of such treaties as were concluded for a limited period of time Renewal can take place through a new treaty, and the old treaty may then be renewed as a whole, or only in part But the renewal can also take place automatically, since many treaties concluded for a certain period stipulate expressly that they are to be considered as renewed for another period, in case neither of the contracting parties has given notice [3] Renewal of Treaties

§ 551 Reconfirmation is the term for an express statement, made in a new treaty, that a certain previous treaty, whose validity has, or might have, become doubtful, is still, and remains, valid Reconfirmation takes place after such changes of circumstances as might be considered to interfere with the validity of a treaty , for instance, after Reconfirmation

[1] See *Harvard Research* (1935, Part III), pp 1045-1055 And see *ibid* , pp 1066 1077, on the effect of territorial changes

[2] Vol II § 99

[3] *E g* the Treaty of Washington of 1922 for the limitation of Naval Armament.

a war, as regards such treaties as have not been cancelled by the outbreak of war [1] Reconfirmation can be given to the whole of a previous treaty, or to parts of it only

Redintegration

§ 552 Treaties which have lost their binding force, through expiration or cancellation, may regain it through redintegration A treaty becomes redintegrated by the mutual consent of the contracting parties, this is, as a rule given in a new treaty Thus it is usual for treaties of peace to redintegrate all those treaties cancelled through the outbreak of war, the stipulations of which the contracting parties do not want to alter [1]

XIV

INTERPRETATION OF TREATIES

Grotius, II c 16—Vattel, II §§ 262 322—Hall, §§ 111, 112—Phillimore, II §§ 64 95—Westlake, I pp 293, 294—Halleck, I pp 317 327—Taylor §§ 377 393—Walker, § 31—Wheaton, § 287—Moore, V §§ 763, 764—Hershey, § 299—Hyde, II §§ 530 535—Fenwick, pp 331 335—Heffter, § 95—Schwarzenberger, pp 193 209—Guggenheim, pp 122 132—Liszt, § 32 (II)—Hatschek, pp 236, 237—Fauchille, §§ 840 844—Despagnet, § 450—Pradier Foderé, II §§ 1171-1189—Merignhac, II p 678—Nys, II pp 520 522—Rivier, II pp 122-125—De Louter, I pp 497 501—Rousseau, pp 637-764—Calvo, III §§ 1649 1660—Suarez, I §§ 105 110—Fiore, II §§ 1032 1046, and *Code*, §§ 797 821—Cavaglieri, pp 93 103—Martens, I § 116—Keith's Wheaton pp 525 529—*Harvard Research* (1935, Part III), pp 937 977—McNair Chapters 15 27—Foster, *The Practice of Diplomacy* (1906) pp 284 297—Crandall, *op cit*, §§ 160 171—Verdross in *Strupp, Wort* II p 663—Ralston, §§ 26 39—Yu, *The Interpretation of Treaties* (1927)—Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933)—Jokl, *De l'interprétation des traités normatifs* (1936)—Frangulis, *Théorie et pratique des traités internationaux* (1936), pp 107 120—Hyde in *A J*, 3 (1909), pp 46 61, and 24 (1930), pp 1 19—Pic in *R G*, 17 (1910), pp 5 35—Ruegger in *Z I*, 28 (1919-1920), pp 426 502—Diaz in *R G*, 32 (1925) pp 429 442—Ehrlich in *Hague Recueil*, vol 24 (1924) (IV), pp 5 139—McNair in *Hague Recueil*, vol 43 (1933) (I), pp 251-279—Fairman in *Grotius Society*, 20 (1934), pp 123 139—Wilson in *A J*, 33 (1939), pp 541 545

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[1] As regards the practice at the end of the First World War see below, vol II § 99

Authentic Interpretation, and the Compromise Clause

§ 553 Neither customary nor conventional rules of International Law exist concerning the interpretation of treaties Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to the interpretation of treaties On the whole, such application is correct, in so far as those rules of Roman Law are full of common sense [1] In regard to interpretation given by the parties themselves, and which overrides general rules of interpretation, there are three different ways open to them They may either agree informally upon the interpretation, and execute the treaty accordingly, or they may agree upon an interpretative declaration [2] or protocol annexed to the treaty, or they may make a supplementary treaty, and provide therein for such interpretation of the previous treaty as they choose In the latter case, one speaks of 'authentic' interpretation, by analogy with the authentic interpretation of Municipal Law, given expressly by a statute Nowadays, however, most treaties contain the so-called 'compromise clause' [3] This is a clause providing that in case the parties do not agree on questions of interpretation, these questions shall be settled by arbitration [4]

Rules of Interpretation which commend themselves

§ 554 It is of importance to enumerate some rules of

[1] Westlake, 1 p 293, after saying that 'the important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence,' goes on to contrast the English methods of construing private contracts and acts of parliament with the less literal kind of interpretation best suited for treaties See Oppenheim, *The Future of International Law* (1911) (English translation in 1921, §§ 32 49), on some national divergencies in the interpretation of treaties As to the attitude of English courts with regard to resort to the terms of the treaty in the interpretation of municipal legislation giving effect to that treaty see *Ellerman Lines, Limited* v *Murray (The Croxteth Hall)* [1931] A C 126, and McNair in *Annual Digest*, 1929-1930, Case No 222 (n), and in *B Y*, 12 (1931), p 183, and 13 (1932), pp 120-122, 163, who is of the view that, on the balance of available authority, it is permissible to resort to the treaty if the language of the Statute is ambiguous See also the observations of Greene L J, in *Grein* v *Imperial Airways* (1936) 55 Ll L R 318

[2] See *e g* the Treaty for the Advancement of Peace between the United States and Holland of February 13, 1928, *A J*, Suppl, 22 (1928), p 116

[3] See below, vol II §§ 3, 13

[4] Normally an interpretation by an international tribunal only binds the parties who have referred their dispute to the Tribunal but Article 62 of the Statute of the International Court of Justice enables an interested third State to intervene in the proceedings, and Article 63 enjoins the Registrar in the case of the construction of a convention to notify all the parties to the Convention, a State which exercises its right to intervene in the proceedings is equally bound by the judgment

interpretation [1] which commend themselves on account of their suitability.[2]

(1) All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense [3]

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of every-day life, provided that they are not expressly used in a certain technical meaning, or that another meaning is not apparent from the context [4]

(3) It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognised principles of International Law,[5] nor

[1] The whole matter of interpretation of treaties is dealt with in an admirable way by Phillimore, II §§ 64 95, see also Moore, V § 763, Wharton, II 133, and Hyde, II §§ 530 535 There is a preliminary rule that 'it is not allowable to interpret what has no need of interpretation' Vattel, II § 263, but it is a rule which often begs the question

The, at times, questionable character of the usefulness of the rules of interpretation is well illustrated by a comparison of the rule postulating that in case of doubt restrictions upon State sovereignty cannot be presumed (see below, p 859, n 5), and the rule of liberal interpretation according to which 'when a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred' *Nielsen* v *Johnson* (1929), 279 U S 47, *Annual Digest*, 1929 1930, Case No 238 A provision *enlarging* the rights of one party *restricts* the sovereignty of the other In an extradition treaty an interpretation 'liberal' to the requesting State is not necessarily 'liberal' to the person affected See Hudson's observations on *Factor* v *Laubenheimer* (1933), 290 U S 276, in *A J*, 28 (1934), p 302 On the interpretation of and the law applicable to treaties relating to financial transactions between States see Mann in *B Y*, 21 (1944), pp 11 33

[2] On the violation of treaties in consequence of defective drafting see Myers in *A J*, 11 (1917), pp 538-565

[3] An excellent example illustrating this rule is the following, which is quoted by several writers In the interest of Great Britain, the Treaty of Peace of Utrecht of 1713 stipulated, in Article 9, that the port, and the fortifications, of Dunkirk should be destroyed, and never be rebuilt France complied with this stipulation, but at the same time began building an even larger port at Mardyck, a league off Dunkirk Great Britain protested on the ground that France, in so acting, was violating the reasonable, although not the literal, sense of the Peace of Utrecht, France in the end recognised this interpretation, and discontinued the building of the new port

[4] The ambiguity attending words used in the computation of time, *e g* 'day,' 'year,' 'month,' is discussed by Deák in *A J*, 20 (1926), pp 502 515

[5] For a clear statement to the effect that treaties must be interpreted by reference to general customary International Law see the award in *The Kronprins Gustaf Adolf Annual Digest*, 1931-1932, Case No 205 See also Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp 12 15

with previous treaty obligations towards third States If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable,[1] the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States [2]

(4) The whole of the treaty must be taken into consideration, if the meaning of any one of its stipulations is doubtful, and not only the wording [3] of the treaty, but also its purpose, the motives which led to its conclusion, and the conditions prevailing at the time [4]

(5) The principle *in dubio mitius* must be applied in interpreting treaties If, therefore, the meaning of a stipulation is ambiguous, that meaning is to be preferred which is less onerous for the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties [5]

(6) Previous treaties between the same parties, and

[1] See Advisory Opinion of the Permanent Court, Series B, No 1, at pp 23, 24

[2] On this last point see Wright in *A J*, 11 (1917), pp 566 579

[3] For an example of the importance of the punctuation used see Hunter Miller in *A J*, 29 (1935), pp 118 123, with reference to the interpretation of Article 2 of the Webster-Ashburton Treaty of 1842 by the Supreme Court of the United States in *Pigeon River Improvement, Slide and Boom Co* v *Charles W Cox, Ltd* (1934), 291 U S 138

[4] See *The Vryheid* (No 1) (1778), 1 English Prize Cases, at p 15

[5] In their Advisory Opinion upon the *Frontier between Turkey and Iraq*, Publications of the Court, Series B, No 12, at p 25, the Permanent Court admitted the soundness of the principle that 'if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted' Thus in the Advisory Opinion of December 11, 1931, concerning the access of Polish war vessels to the Port of Danzig, the Court held that as Poland claimed special rights and privileges for her war vessels in the Port of Danzig which could be exercised only in derogation of the rights of Danzig, the Polish claim must be established on a clear basis Series A/B, No 43, p 142 See also Series A/B, No 46, p 167 (*Free Zones* case) And see Ralston, § 30, and McNair, Chapter 20 The Supreme Court of the United States has declined to agree to the proposition that treaties with Indians must be construed favourably to the latter with the view to remedying injustices *Shoshone Indians* v *United States*, *A J*, 39 (1945), p 818

treaties between one of the parties and third parties, may be referred to for the purpose of clearing up the meaning of a stipulation [1]

(7) If two meanings of a stipulation are admissible according to the text of a treaty, such meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it

(8) If two meanings of a stipulation are admissible, that which is least to the advantage of the party for whose benefit the stipulation was inserted in the treaty should be preferred [2]

(9) The maxim *expressio unius est exclusio alterius* has been followed in the interpretation of treaties by international tribunals in a number of cases [3]

(10) If it is a matter of common knowledge that a State upholds a meaning of a term which is different from the generally accepted meaning, and if nevertheless another State enters into a treaty with the former in which such term is made use of, that meaning must prevail which is upheld by the former If, for instance, States conclude commercial treaties with the United States of America in which the most-favoured-nation clause [4] occurs, the particular meaning which the United States attributes to this clause must prevail

(11) If the meaning of a stipulation is ambiguous, and one of the contracting parties, at a time before a case arises for the application of the stipulation, makes known what meaning it attributes to it, the other party or parties cannot, when a case for its application does occur, insist upon a different meaning They ought to have previously protested, and taken the necessary steps to secure an authentic interpretation of the ambiguous stipulation Thus when, in 1911, it became obvious that Germany and other

[1] For instance, by the Permanent Court in Advisory Opinion, Series B, No 6, at pp 25, 26, 38, and in Judgment, Series A, No 7, at pp 25 *et seq*

[2] For instances see Ralston, § 30, and Award of Mixed Claims Commission, United States and Germany, in the *Lusitania* cases, *A J*, 18 (1924), p 373, where other illustrations are given

[3] For instances see *A J* 19 (1925), pp 602, 603, McNair, Chapter 18 Upon the relevance of the *ejusdem generis* rule of construction to treaties see McNair in *B Y*, 1924, pp 181 182, and Chapter 19

[4] See below, § 580

Continental States attributed to Article 23 (*h*) of the Hague Regulations respecting the Laws and Usages of War on Land a meaning different from the one preferred by Great Britain, the British Foreign Office made the British interpretation of this article known [1]

(12) It is to be taken for granted that the parties intend the stipulations of a treaty to have a certain effect, and not to be meaningless Therefore, an interpretation is not admissible which would make a stipulation meaningless, or ineffective [2]

(13) All treaties must be interpreted so as to exclude fraud, and so as to make their operation consistent with good faith [3]

(14) The rules commonly applied by the courts for the interpretation and construction of Municipal Laws are only applicable to the interpretation and construction of treaties, and in particular of law-making treaties, in so far as they are general rules of jurisprudence If they are rules sanctioned only by the Municipal Law, or by the practice of the courts, of a particular country, they may not be applied [4]

[1] See Oppenheim, *The Future of International Law* (1911) (English translation in 1921, §§ 35 38), and *The League of Nations* (1919), p 48

[2] See Ralston, § 32, and the Advisory Opinion of the Permanent Court on the *European Danube Commission*, Series B, No 14, at p 27

[3] For a refusal of the Permanent Court of International Justice to attach decisive importance to the system of numbering of paragraphs see *Peter Pazmany University* case of December 15, 1933, Series A/B, No 61, p 247

[4] On the interpretation of treaties by the Permanent Court of International Justice see Hudson, *The Permanent Court of International Justice* (1934), pp 543-573, Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), *passim*, Wilson in *A S Proceedings*, 1930, pp 39 46 As to English courts see McNair in *Hague Recueil*, vol 43 (1933) (i), pp 251 *et seq* As to the Supreme Court of the United States see Tennant in *Michigan Law Review*, 30 (1931 1932), pp 1016 1039

As to the competence of English courts to interpret treaties see the observations of Russel J in *Stoeck v Public Trustee* [1921] 2 Ch 67, 71, *In re Ning Yi-Ching and Others* (1939) 56 T L R 3, McNair, Chapter 15

As to France see Naurois, *Les traités internationaux devant les juridictions nationales* (1934), pp 159-232, Mestre in *Hague Recueil*, vol 38 (1931) (iv), pp 264 302, Niboyet in *Mélanges Carré de Malberg* (1933), pp 401-415, and Note in *Annual Digest*, 1929-1930, Case No 233 See also Duez, *Les actes de gouvernement* (1935) The practice of French courts is not quite uniform, but it seems that the courts are disinclined to interpret treaties raising political issues even if this interpretation is necessary in order to determine private rights

As to the United States see Jaffé, *Judicial Aspects of Foreign Relations* (1933), pp 71 *et seq*

(15) Unless the contrary is expressly provided,[1] if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts,[2] each party is only bound by the text in its own language.[3] Moreover, a party cannot claim the benefit of the text in the language of the other party.

Preparatory Work in the Interpretation of Treaties

§ 554a. It is a well-established rule in the practice of international tribunals that so-called preparatory work (*travaux préparatoires*)—i.e. the record of the negotiations preceding the conclusion of a treaty, the minutes of the plenary meetings and of committees of the Conference which adopted a convention, the successive drafts of a treaty, and so on—may be resorted to for the purpose of interpreting controversial provisions of a treaty.[4] The Permanent Court of International Justice has frequently affirmed the usefulness of preparatory work. It has as a rule confined its admissibility as evidence to cases in which the treaty is 'not clear'.[5] However, the finding whether a treaty is

[1] The Treaty of Peace of 1919 with Germany is in French and English, and it is expressly stipulated that both texts are authentic. The Treaties of Peace of 1919 with Austria, Bulgaria, and Hungary are in French, English, and Italian, but it was expressly declared that the French text shall prevail, except in the League of Nations and Labour Parts. As to the Charter of the United Nations see above, p. 690. See also above, § 359, and Scott, *Le Français, langue diplomatique moderne* (1924).

[2] See Foster, *The Practice of Diplomacy* (1906).

[3] See, however, the Permanent Court in Advisory Opinion, Series B, No. 10, at p. 18. And see Hudson, *International Legislation*, vol. v. p. 10, and in *A.J.*, 26 (1932), pp. 368-372. See also *Harvard Research* (1935, Article 19), Jokl, *op. cit.*, pp. 56-72, Ehrlich, *op. cit.*, pp. 90-101. As to treaties in three languages see the judgment of the Polish Supreme Court in *Archdukes of the Habsburg-Lorraine House v. Polish State Treasury*, of June 16, 1930, *Annual Digest*, 1929-1930, Case No. 235.

[4] Yü, *The Interpretation of Treaties* (1927), *passim*, Wright, *Mandates under the League of Nations* (1930), pp. 353-364, and in *A.J.*, 23 (1929), pp. 94-105, Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), pp. 22-60, 95-140, Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 35-42, the same in *Hague Recueil*, vol. 48 (1934) (II.), pp. 713-815, and in *H.L.R.*, 48 (1935), pp. 549-591, Spencer, *L'interprétation des traités par les travaux préparatoires* (1935), *Harvard Research Treaties* (1935), Article 19, Jokl, *De l'interprétation des traités normatifs* (1936), pp. 114-153, McNair, Chapter 25, Ehrlich in *Hague Recueil*, vol. 24 (1928) (IV.), pp. 116-131, Fachiri in *A.J.*, 23 (1929), pp. 745-752, Brown, *ibid.*, pp. 819-824, Hyde, *ibid.*, pp. 824-828, the same, *ibid.*, 24 (1930), pp. 13-17, 27 (1933), pp. 502-506, 29 (1935), pp. 479-482, Miller in *Iowa Law Review*, 17 (1932), pp. 206-222, 366-373, Fairman in *Grotius Society*, 20 (1934), pp. 123-139.

[5] See *e.g.* Series A/B, No. 50, p. 378, but see the Dissenting Opinion of Judge Anzilotti, *ibid.*, p. 383, and comment thereon by Hyde in *A.J.*, 27 (1933), pp. 502-506.

clear or not is not the starting-point but the result of the process of interpretation, and the Court itself has in fact had resort to preparatory work even when in its view the treaty was 'clear'[1] The deliberation and publicity accompanying the successive stages of the negotiation and conclusion of treaties are such as to render this kind of evidence of particular value[2]

§§ 555-568*i* The substance of §§ 555-568*i* will be found in §§ 50*b*, 492 (n), and 340*f*, 340*g*

[1] The warning sounded by the Court must be regarded as a formal concession to the objections raised from time to time to the use of preparatory work These have been voiced in particular on the ground that its use is contrary to Anglo American methods See *e g* P C I J , Series C, No 2, p 197, and No 10, p 20, Fachiri, *op cit* The objection is not, it is believed, well founded English and, in particular, American courts do not hesitate to resort to preparatory work for the purpose of interpreting treaties See Lauterpacht in *H L R* , 48 (1935), pp 562-571

[2] This is particularly obvious in cases in which a committee of Conference formally puts on record an interpretative understanding which, for one reason or another, it does not wish to include in the Treaty See *e g*, with regard to withdrawal from the United Nations, § 168*d* above See also above, § 168*k*, on the interpretative statement of the Sponsoring Powers at the San Francisco Conference in the matter of the voting procedure in the Security Council And see Robinson, *Human Rights in the Charter of the United Nations* (1946), pp 7-10

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I

ALLIANCES

Grotius, II c 15—Vattel, III §§ 78 102—Twiss, I § 246—Taylor, §§ 347 349—Wheaton, §§ 278 285—Bluntschli, §§ 446 449—Heffter, § 92—Geffcken in *Holtzendorff*, III pp 115 139—Ullmann, § 82—Hatschek, pp 243 251—Fauchille, §§ 871 881—Despagnet, § 459—Mérignhac, II p 683—Nys, III pp 531 534—Pradier Foderé, II §§ 934-967—Rivier, II pp 111-116—Gemma, pp 224 227—Calvo, III §§ 1587 1588—Fiore, II § 1094, and *Code*, §§ 898 904—Martens, I § 113—Keith's Wheaton, pp 529 540—Rolin Jaequemyns in *R I*, 20 (1888), pp 5 35—Erich, *Ueber Allianzen und Allianzverhaltnisse nach heutigem Volkerrecht* (1907)—Lammasch, *Das Volkerrecht nach dem Kriege* (1917), pp 159 171—Kunz, *Staatenverbindungen* (1929), pp 350 373—*Traités de Garantie, d'Alliance, de Collaboration politique, de Non agression et de Neutralité conclus après la guerre* Edited and annotated by Gretschaninow (1936)—Freytagh-Loringhoven, *Die Regionalvertrage* (1937)—Rehm in *Z I*, 26 (1915), pp 118 152—De Orue y Arregui in *Hague Recueil*, vol 53 (1935) (III), pp 7-93—Liang in *Grotius Society*, 31 (1945), pp 216 231

Conception of Alliances

§ 569 Alliances, in the strict sense of the term, are treaties of union between two or more States, for the purpose of defending each other against an attack in war, or of jointly attacking third States, or for both purposes The term 'alliance' is, however, often used in a wider sense, and it comprises in such cases treaties of union for various purposes Thus, the so-called 'Holy Alliance,' concluded in 1815 between the Emperors of Austria and Russia and the King of Prussia, and afterwards joined by almost all the sovereigns of Europe, was a union for such vague purposes that it cannot be called an alliance in the strict sense of the term

History relates innumerable alliances between the several States The triple alliance[1] between Germany, Austria,

[1] See Singer, *Geschichte des Dreibundes* (1914)

and Italy made in 1879 and 1882, renewed in 1912, and denounced by Italy in 1915, the alliance between Russia and France made in 1899, and that made between Great Britain and Japan in 1902, and renewed in 1905 and 1911,[1] are illustrative examples. The period after the First World War witnessed the conclusion of a considerable number of alliances[2] most of which, however, did not stand the test of events.[3] On the other hand, the British-Polish Agreement of Mutual Assistance of August 25, 1939, was directly acted upon when Great Britain declared war on Germany on September 3 of that year. Various alliances were concluded during the Second World War. Among these were the Treaty of Alliance—in terms of a defensive nature—between Germany, Italy, and Japan of September 27, 1940,[4] the

[1] The Anglo-Japanese alliance was the subject of a joint Declaration by the two Powers of July 8, 1920 (*L N T S*, 1 p. 24), stating that if continued after July 1921 it must be in a form consistent with the Covenant of the League. It was replaced by the Quadruple Pacific Treaty concluded at Washington on December 13, 1921, whereby those two Powers and France and the United States of America agreed to respect the *status quo* 'in the region of the Pacific Ocean' (*L N T S*, 25, p. 184, and Cmd. 1627). See Chung fu Chang, *The Anglo-Japanese Alliance* (1931).

[2] As to the compatibility of alliances with the Covenant of the League see below, § 571.

[3] Amongst the alliances made since the end of the First World War may be mentioned those between Czecho-Slovakia and Yugoslavia of August 14, 1920 (*L N T S*, 6, p. 210, 13, p. 232), which was renewed on August 31, 1922, between Czecho-Slovakia and Roumania of April 23, 1921 (*ibid*, 6, p. 216, 18, p. 82), between Roumania and Yugoslavia of June 7, 1921, the last three creating what is called 'the Little Entente' (see Toynbee, *Survey*, 1920-1923, pp. 287-303, *Survey*, 1924, pp. 440-456, and Wheeler-Bennett and Langermann, *The Problem of Security* (1927), pp. 187-189). The three 'Little Entente' treaties are printed in Toynbee, *Survey*, 1920-1923, p. [illegible]; between Poland and Roumania of March 3, 1921 (*L N T S*, 7, p. 78, see also the Treaty of Guarantee of January 15, 1931, *ibid*, vol. 115, p. 171), between Czecho-Slovakia and France of January 25, 1924 (*ibid*, 23, p. 164), a Military Convention between Belgium and France of September 7, 1920 (*ibid*, 2, p. 128), the Treaty of Alliance between Great Britain and Iraq of June 30, 1930 (see above, § 94*d*), the Treaty of Mutual Assistance between Czecho-Slovakia and Soviet Russia of May 16, 1935 (*Documents*, 1935 (1), p. 138), the Treaty of Mutual Assistance between France and Soviet Russia of May 2, 1935 (see *Documents*, 1935 (1), pp. 116-140). And see, on the controversy concerning the compatibility of those treaties with the Treaty of Locarno, *ibid*, pp. 264-273, Gouyet in *R I* (*Paris*), 15 (1935), pp. 388-423, Fenwick in *A J*, 30 (1936), pp. 265-270, *B Y*, 17 (1936), pp. 167-171), the Treaty of Alliance between Great Britain and Egypt of August 26, 1936 (see above, § 91 (n.)). For a list of treaties of alliance and guarantee after the First World War see Hapgood in *A J*, 30 (1936), Suppl., p. 154.

[4] The parties undertook to assist one another if one of them were attacked 'by a Power not at present involved in the European War or in the Sino-Japanese War'—an oblique reference to the United States.

Treaty of Alliance of January 29, 1942, between Great Britain, Soviet Russia, and Iran,[1] and the Treaty of Alliance of May 26, 1942, between Great Britain and Soviet Russia.[2]

Parties to Alliances

§ 570 Subjects of alliances are said to be full sovereign States only However, alliances have been concluded by States under suzerainty [3] A neutralised State can conclude an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality.

Different Kinds of Alliances

§ 571 As already mentioned, an alliance may be offensive or defensive, or both All three kinds may be either general alliances, in which case the allies are united against any possible enemy whatever, or particular alliances against one or more particular enemies Alliances, further, may be either permanent or temporary, in the latter case they expire with the period of time for which they were concluded. As regards offensive alliances, it must be emphasised that they are valid only when their object is not immoral.[4] Moreover, the capacity of States to enter alliances may be limited by a general engagement to which they are a party. Thus all alliances which were inconsistent with the Covenant of the League of Nations were *ipso facto* abrogated, as between members of the League, by Article 20 of the Covenant in which members undertook not to enter into any new engagements inconsistent with the Covenant and to take immediate steps to procure their release from any such obligations already assumed. However, international engagements for securing the maintenance of peace were declared valid [5] The position is essentially the same under the Charter of the United Nations. While the latter lays down in unequivocal terms the supremacy of the Charter

[1] *United Nations Agreements* (ed by Schnapper, 1944), p 262

[2] Cmd 6368 (1942) The Treaty was concluded, in the first instance, for twenty years

[3] Thus, the Convention of April 16, 1877, between Roumania, which was then under Turkish suzerainty, and Russia, concerning the passage of Russian troops through Roumanian territory in case of war with Turkey, was practically a treaty of alliance (see Martens, *N R G*, 2nd ser, 3, p 182) Thus, further, the former South African Republic, although, at any rate according to the views of the British Government, a half sovereign State under British suzerainty, concluded an alliance with the former Orange Free State by Treaty of March 17, 1897 (see Martens, *N R.G*, 2nd ser, 25, p. 327)

[4] See above, § 505

[5] Article 21 And see above, § 167*oo*.

over any other treaty obligations of its Members,[1] it provides, in Article 52 (1), that—

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations

In fact, the Charter imposes upon the Members of the United Nations the duty to utilise such regional arrangements and agencies for settling local disputes before referring them to the Security Council and lays down that the latter shall encourage the use of such agencies and arrangements for that purpose.[2] The most important of the existing regional agreements is that concluded on September 2, 1947, at Rio de Janeiro, between the members of the Pan-American Union. In the Treaty, which extends the provisions of the

[1] See above, § 503*a*.

[2] *Ibid.* See Liang in *Grotius Society*, 31 (1945), pp. 216-231. See also on various kinds of regional agreements Freytagh-Loringhoven in *Hague Recueil*, vol. 56 (1936) (II.), pp. 589-671. The parties to an alliance may create permanent organs for co-ordinating their foreign policy, and they may undertake substantial obligations for that purpose. The States composing the so-called Little Entente (Czecho-Slovakia, Roumania, and Yugoslavia)—an alliance which is now merely of historical interest—formed, by a statute adopted on February 16, 1933, a Permanent Council composed of the Ministers of Foreign Affairs of those countries. See *Documents*, 1933, pp. 415-423, 1934, pp. 364-390, 402-404, Crane, *The Little Entente* (1931), Bruns in *Z. o. V.*, 3 (1933), p. 556, Hobza in *R. I.*, 3rd ser., 14 (1933), pp. 235-253, Radovanovitch in *R. G.*, 40 (1933), pp. 716-778. Kuster in *Z. I.*, 50 (1935), pp. 1-14. On the Little Entente, Baltic Entente, and Balkan Entente see Sereni in *Rivista*, 28 (1936), pp. 172-208. See also as to the defunct Balkan Entente between Turkey, Greece, Yugoslavia, and Roumania, Toynbee, *Survey*, 1930, pp. 145-156, *ibid.*, 1931, pp. 324-353, and 1934, pp. 508-535, *Documents*, 1934, pp. 298-303, Pétrovitch, *L'Union et la Conférence Balkanique* (1934), Kazlauskas, *L'Entente Balkanique* (1939), Spiropoulos in *Z. I.*, 46 (1932), pp. 193-209, and in *Nordisk T. A.*, 4 (1933), pp. 25-39, Caloyani in *Grotius Society*, 18 (1933), pp. 97-108, Vulcan in *R. G.*, 41 (1934), pp. 419-440, *Z. o. V.*, 4 (1934), pp. 319-330, Girard in *R. I.* (*Paris*), 13 (1934), pp. 258-265, Radovanovitch in *R. I.*, 3rd ser., 16 (1935), pp. 688-735, *Z. o. V.*, 5 (1935), p. 133. As to the defunct Baltic Entente see *Documents*, 1934, pp. 187-191, Toynbee, *Survey*, 1934, pp. 404-415, Kaasik in *R. G.*, 41 (1934), pp. 631-647, *A. J.*, 30 (1936), Suppl., p. 174. And see, generally, on the juridical status of the Baltic since the nineteenth century Pusta in *Hague Recueil*, vol. 52 (1935) (II.), pp. 109-188, and, until the nineteenth century, Taube, *ibid.*, vol. 53 (1935) (III.), pp. 441-527. For the Pact of the Arab League of March 22, 1945, see *A. J.*, 39 (1945), Suppl., pp. 266-272. See also Ireland in *A. J.*, 39 (1945), pp. 797-800, Moushkéli in *R. G.*, 50 (1946), pp. 112-158, Khaduri in *A. J.*, 40 (1946), pp. 756-777, and *Bulletin of State Department*, 16 (1947), pp. 963-970.

Act of Chapultepec of 1945,[1] the Parties undertake to endeavour to settle their controversies before referring them to the United Nations In Article 3 of the Treaty the Parties agree that an armed attack by any State against an American State shall be considered to be an attack against all the American States Each Contracting Party undertakes to give assistance in meeting the attack (without, however, being obliged, against its will, to employ its armed forces) On the request of the State attacked and pending the decision of the 'Organ of Consultation'[2] created by the Treaty,[3] each Contracting Party may determine the measures which it should adopt in order to fulfil this obligation

Conditions of Alliances

§ 572 Subject, as between members of the United Nations, to the provisions of the Charter, alliances may contain all sorts of conditions The most important are the conditions regarding the assistance to be rendered

Casus Fœderis

§ 573 *Casus fœderis* is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other Thus, in case of a defensive alliance, the *casus fœderis* occurs when war is declared or commenced against one of the allies Treaties of alliance very often define precisely the event which shall be the *casus fœderis*, and then the latter is less exposed to controversy But, on the other hand, there have been many alliances concluded without such precise definition, and, consequently, disputes have arisen later between the parties as to the *casus fœderis*[4]

[1] See above, p 285

[2] This is composed of the Ministers for Foreign Affairs of the Parties to the Treaty Its decisions require for their validity a vote of two thirds of the members The Governing Body of the Pan American Union may act provisionally in its place In particular, the 'Organ of Consultation' is to be convened and to decide on sovereignty or independence of any American State should be threatened by an act of aggression not amounting to an armed attack or by any situation that might endanger the peace of America

[3] The Treaty applies when the attack, in the sense of Article 3, takes place within the territory of an American State or within the region bounded by the Treaty and including Canada and Greenland Neither Canada nor Denmark (which exercises sovereignty over Greenland) are parties to the Treaty

[4] Thus, during the First World War, Italy declined to recognise that a *casus fœderis* had occurred under the Triple Alliance (see *A J*, 8 (1914), Suppl, p 368), and Greece refused to recognise that a *casus fœderis* had occurred under the Graeco Serbian Treaty of 1913 (see *A J*, 12 (1918), p 312).

II

TREATIES OF GUARANTEE AND OF PROTECTION

Vattel, II §§ 235 239—Hall, § 113—Phillimore, II §§ 56 63—Twiss, I § 249—Halleck, I p 304—Taylor, §§ 350 353—Wheaton, § 278—Bluntschli, §§ 430-439—Heffter, § 97—Geffcken in *Holtzendorff*, III pp 85-112—Liszt, § 33 (III)—Ullmann, § 83—Hatschek, pp 251-258—Fiore, *Code*, §§ 792 796—De Louter, I pp 519 529—Fauchille, §§ 882 893 (9)—Despagnet, § 461—Mérignhac, II p 681—Nys, II pp 516 520—Pradier Fodéré, II §§ 969 1020—Rivier, II pp 97-105—Calvo, III §§ 1584, 1585—Martens, I § 115—McNair, Chapter 26—Neyron, *Essai historique et politique sur les garanties* (1777)—Milovanovitch, *Des traités de garantie en droit international* (1888)—Erich, *Ueber Allianzen und Allianzverhaltnisse nach heutigen Volkerrecht* (1907)—Quabbe, *Die volkerrechtliche Garantie* (1911)—Grosch, *Der Zwang im Volkerrecht* (1912), pp 66 75—Idman, *Le traité de garantie* (1913)—Sanger and Norton, *England's Guarantee to Belgium and Luxemburg* (1915)—Lammasch, *Das Volkerrecht nach dem Kriege* (1917), pp 159-171—Bussmann, *Der volkerrechtliche Garantievertrag*, etc (1927)—Freytagh-Loringhoven, *Die Regionalvertrage* (1937)—Zietzschmann, *Die volkerrechtliche Garantie seit den Locarnovertragen* (1938)—Erich in *Z V*, 7 (1913), pp 452 476—Satow in *Cambridge Historical Journal*, 1 (1925), pp 295 318—Headlam Morley, *ibid*, 2 (1927), pp 151-170—Zwaardemaker in *Z V*, 23 (1939), pp 301-316 And see a British *Parl Paper*, Misc No 2 (1898), C 9088, entitled 'Treaties containing Guarantees or Engagements by Great Britain in regard to Territory or Government of other countries' See also above, §§ 167*m* and 571*a*

Concep tion and Objects of Treaties of Guarantee

§ 574 Treaties of guarantee are conventions by which one of the parties engages to do what is in its power to secure a certain object to the other party Guarantee treaties may be mutual or unilateral They may be concluded by two States only, or by a number of States jointly. In the latter case, the single guarantors may give their guarantee severally, or collectively, or both. And the guarantee may be for a certain period of time only, or permanent

The possible objects of guarantee treaties are numerous [1] It suffices to give the following chief examples the per-

[1] The important part that treaties of guarantee play in politics may be seen from a glance at Great Britain's guarantee treaties. See Munro, *England's Treaties of Guarantee*, in *Law Magazine and Review*, 6 (1881), pp 215-238, and the *Parl Paper* cited above

formance of a particular act on the part of a certain State, as the discharge of a debt,[1] or the cession of territory, certain rights belonging to a State, the undisturbed possession of the whole, or a particular part, of its territory, a particular form of constitution, a certain status, as permanent neutrality or neutralisation,[2] or independence,[3] or integrity[4], particular dynastic succession, the fulfilment of a treaty concluded by a third State, or the pacific settlement of disputes[5]

Effect of Treaties of Guarantee

§ 575 The effect of guarantee treaties is the imposition of the duty upon the guarantors to do what is in their power in order to secure the guaranteed objects The compulsion to be applied by a guarantor for that purpose depends upon the circumstances But the duty of the guarantor to render, even by compulsion, the promised

[1] See Meyer-Balding in *Z I*, 26 (1916), pp 387-426, and the literature there quoted

[2] See above, § 95 See also the Convention of October 10, 1921 (*L N T S*, 9, p 212, Treaty Series, No 6 (1922), *A J*, 17 (1923), Suppl, pp 1 6) between ten States regarding the non fortification and neutralisation of the Aaland Islands, and in particular Article 7 as to utilising the machinery of the League for giving effect to the guarantee, see Charles de Visscher in *R I*, 3rd ser, 2 (1921), pp 580 585, and below, II § 72 (8), and *Strupp, Wort*, I p 22 for bibliography

[3] Thus Great Britain, France, and Russia by the Treaty with Denmark of July 13, 1863, guaranteed Greece as 'a monarchical, independent, and constitutional State' (Martens, *N R G*, 16, pt II p 79), for the bearing of this treaty upon the action of the Allies in regard to Greece during the First World War see Garner, II §§ 464 473, and Ion in *A J*, 11 (1917), pp 46 73, 327 357, *ibid*, 12 (1918), pp 312-337, 562 588, 796 812, Headlam Morley, *Studies in Diplomatic History* (1929), pp 126-145, Strupp in *Z V*, 16 (1931-1932), pp 103 138, 237-274, 377 460, and below, vol II § 323, p 557, n 1 The United States of America guaranteed the independence of Cuba by the Treaty of Havana of May 22, 1903 (Martens, *N R G*, 2nd ser, 32, p 79), of Panama by the Treaty of Washington of November 18, 1903 (Martens, *N R G*, 2nd ser, 31, p 599), and of Haiti by Article 14 of the Treaty of Port au Prince of September 16, 1915 (see *A J*, 10 (1916), Suppl p 234)

[4] Thus the integrity of Norway was guaranteed by Great Britain, Germany, France, and Russia by the Treaty of Christiania of November 2, 1907 (see Martens, *N R G*, 3rd ser, 1, p 14, and 2, p 9), a condition of this integrity being that Norway did not cede any part of her territory to any foreign Power (see Morgenstierne in *L Q R*, 31 (1905), pp 389-396), but by a note of January 8, 1924, addressed to three of her guarantors Norway denounced this treaty, on the ground (it is understood) of its incompatibility with her obligations under the Covenant of the League (see *R G*, 31 (1924), p 299, and *L N T S*, 23, p 64) In the Peace Treaty with Italy of 1946 the Parties agreed that the integrity and independence of the Free Territory of Trieste shall be assured by the Security Council of the United Nations (Article 21 of the Treaty and Article 2 of the Permanent Statute of the Territory)

[5] See below, p 873, n 2 (Locarno)

assistance to the guaranteed State depends upon many conditions and circumstances. Thus, first, the guaranteed State must request the guarantor to render assistance. Thus, secondly, the guarantor must at the critical time be able to render the required assistance. When, for instance, its hands are tied through waging war against a third State, or when it is so weak through internal troubles, or other factors, that its interference would expose it to a serious danger, it is not bound to fulfil the request for assistance. So too, when the guaranteed State has not complied with previous advice given by the guarantor as to the line of its behaviour, it is not the guarantor's duty to render assistance afterwards

Effect of Collective Guarantee

§ 576 In contradistinction to treaties constituting a guarantee on the part of one or more States severally, the effect of treaties constituting a *collective* guarantee on the part of several States requires special consideration On July 4, 1867, Lord Derby maintained [1] in the House of Lords, concerning the collective guarantee by the Powers of the neutralisation of Luxemburg, that, in case of a collective guarantee, each guarantor had only the duty to act according to the treaty when all the other guarantors were ready to act likewise, that, consequently, if one of the guarantors themselves should violate the neutrality of Luxemburg, the duty to act according to the treaty of collective guarantee would not accrue to the other guarantors This opinion, although, apparently,[2] approved by Viscount Grey, then British Secretary of State for Foreign Affairs, at the outbreak of the First World War in 1914, is hardly correct [3] There ought to be no doubt that, in a case of collective guarantee, one of the guarantors alone cannot be considered bound to act according to the treaty of guarantee For a

[1] *Hansard*, 3rd ser, vol 188, cols 968 974, see Sanger and Norton, *op cit*, pp 77-90, and Satow, *International Congresses* (Foreign Office Peace Handbook) (1920), pp 134 140 Satow examines the matter in *Cambridge Historical Journal*, 1 (1925), pp 295-318

[2] Misc No 6 (1914), Cmd 7467, No 148 The statement in question was made by Sir Edward Grey on August 2, 1914 It is not quite certain whether it was intended to endorse fully Lord Derby's interpretation

[3] See Hall, § 113, Bluntschli, § 440, Quabbe, *op cit*, pp 149 159, and Hatschek, pp 257, 258.

collective guarantee can only have the meaning that the guarantors should act in a body. But if one of the guarantors themselves violates the object of his own guarantee, the body of the guarantors remain, and it is certainly their duty to act against such faithless co-guarantor If, however, the majority,[1] and therefore the body of the guarantors, were to violate the very object of their guarantee, the duty to act against them would not accrue to the minority [2]

Different, however, is the case in which a number of Powers have *collectively and severally* guaranteed a certain object Then, not only as a body but also individually, it is their duty to interfere in any case of violation of the object of guarantee [3]

Pseudo-Guarantees

§ 576*a* Different from real guarantee treaties are such treaties as declare the policy of the parties with regard to the maintenance of their territorial *status quo* Whereas treaties guaranteeing the maintenance of the territorial *status quo* engage the guarantors to do what they can to maintain such *status quo*, treaties declaring the policy of the parties with regard to the maintenance of their territorial *status quo* do not contain any legal engagements, but simply state the firm resolution of the parties to uphold the *status quo* In contradistinction to real guarantee treaties, such treaties declaring the policy of the parties may fitly be called pseudo-guarantee treaties, and although their political value is very great, they have scarcely any legal importance For the parties do not bind themselves to pursue a policy for maintaining the *status quo* , they only declare their firm resolution to that end Further, the parties do not engage themselves to uphold the *status quo*, but only to communicate with one another, in case the *status quo* is threatened, with a view to agreeing upon such measures

[1] See against this statement Quabbe, *op cit* , p 158

[2] See *Annuaire*, 25 (1912), p 638

[3] The mere fact that a number of States guarantee a certain object to another State in one and the same treaty does not make the guarantee a *collective* guarantee , for a guarantee is collective only when it is expressly stated to be so, by the use of the terms 'collective' or 'joint' or the like In the Treaty of Alliance of January 29, 1942, between Great Britain, Soviet Russia, and Iran the first two States 'jointly and severally' undertook to *respect* the territorial integrity, sovereignty, and political independence of Iran *United Nations Agreements* (ed by Schnapper, 1944) p 262

as they may consider advisable for the maintenance of the *status quo* [1]

Treaties of Protection

§ 577 Different from guarantee treaties are treaties of protection Whereas the former constitute the guarantee of a certain object to the guaranteed State, treaties of protection are treaties by which strong States simply engage to protect weaker States without any guarantee whatever A treaty of protection must, however, not be confused with a treaty of protectorate [2]

[1] To this class of pseudo guarantee treaties belonged two sets of declarations which were of considerable diplomatic importance before the First World War

(1) The declarations (see Martens, *N R G*, 2nd ser, 35, p 692, and 3rd ser, 1, p 3) exchanged on May 16, 1907, between France and Spain on the one hand, and, on the other hand, between Great Britain and Spain, concerning the territorial *status quo* in the Mediterranean

(2) The declarations (see Martens, *N R G*, 3rd ser, 1, pp 17, 18) concerning the maintenance of the territorial *status quo* in the North Sea, signed at Berlin on April 23, 1908, by Great Britain, Germany, Denmark, France, Holland, and Sweden, and concerning the maintenance of the territorial *status quo* in the Baltic, signed at St Petersburg, on the same date, by Germany, Denmark, Russia, and Sweden

See also a declaration as to the *status quo* in the Pacific Ocean, namely, the Quadruple Pacific Treaty of December 13, 1921, between the United States of America, the British Empire, France, and Japan, Treaty Series, No 6 (1924), Cmd 2037, and *A J*, 16 (1922), Suppl, pp 60 64, the Political Agreement between France and Poland of February 19, 1921, *L N T S*, 18, p 11

[2] See above, § 92, and Hatschek, p 253 The so called 'Locarno Pact' proved of considerable importance in the history of Europe after the First World War, and special reference may therefore be made to the part of the Pact containing the Treaty of Mutual Guarantee concluded between Great Britain, Belgium, France, Germany, and Italy, dated October 16, 1925 In that Treaty all the parties 'collectively and severally guarantee the maintenance of the *status quo* resulting from the frontiers between Germany and Belgium, and between Germany and France, and the inviolability of the said frontiers', further Germany and Belgium, and also Germany and France, mutually undertook 'that they will in no case attack or invade each other or resort to war against each other' (apart from certain excluded circumstances), further, Germany and Belgium, and Germany and France, undertook definite obligations with regard to the pacific settlement of disputes that might arise between them (see below, vol II § 25*a*1) The mutual renunciation of resort to armed force and the undertaking as to the peaceful settlement of disputes were also placed under the guarantee of all the contracting parties (Articles 4 and 5), and the Council of the League was made the arbiter of the question whether or not there had been a breach of the mutual renunciation of resort to armed force (Article 4) The Treaty was to remain in force until a year after the Council, by at least a two-thirds majority, 'decides that the League of Nations ensures sufficient protection' to the parties (Article 8) On March 7, 1936, Germany in effect denounced the Treaty on the ground that the Treaty of Mutual Assistance, concluded on May 2, 1935, between France and Soviet Russia, was incompatible with the obligations of the Treaty of Locarno Treaty Series, No 28 (1926), Cmd 2764, and *Parl Paper*, Misc No 11 (1925), Cmd 2525, and *A J*, 20 (1926), Suppl, pp 21 33, *L N T S*, 54, p 289 Macartney,

III

TREATIES OF NEUTRALITY

Vattel, III § 107—Hall, § 208—Fauchille, § 1443—Kleen, *Lois et usages de la neutralité* (1898-1900), I §§ 8, 11, 17—Schücking und Wehberg, pp 667-669—Strupp, *Neutralisation, Befriedung, Entmilitarisierung* (1933), pp. 224-368—Jessup in *A S Proceedings*, 1933, pp 134-142

Treaties of Neutrality

§ 577*a* By the term 'treaty of neutrality' is not meant a league amongst neutral States for the mutual defence of their neutrality, such as has sometimes been formed in the past during or in view of a war, for instance, in the case of the Armed Neutralities of 1780 and 1800 [1] or the League of Neutrals during the Franco-Prussian War of 1870-1871,[2] and was under discussion during the First World War. The term denotes a treaty between two States whereby they mutually agree that, if one of them is attacked by a third State, the other will maintain an attitude of neutrality towards the conflict A considerable number of such treaties were concluded by States members of the League of Nations [3]

The danger inherent in a treaty of neutrality to which a member of the League—or, now, of the United Nations—is a party is that as the result of it the member may be prejudiced, in favour of the other contracting party, in deciding the question whether there has taken place resort to war in violation of the Covenant or the Charter, or hampered in co-operating in the application of the sanctions, economic or warlike Whether a treaty of neutrality does or does not have this disabling effect must depend upon its particular

Survey, 1925, II pp 1 66, 439 452. See also Toynbee, *Survey*, 1924, pp 1 64, Fauchille, §§ 893 (1)-893 (9), Strupp, *Das Werk von Locarno* (1926), Wehberg, *Die Sicherheitspakte* (1926), Bisschop in *Grotius Society*, 12 (1926), pp 79-112, *Locarno, Eine Dokumentensammlung*, Edited by Berber (1936), and literature cited below, vol II § 250*a*1

[1] See below, vol II §§ 289, 290

[2] See Fauchille, § 895

[3] See *e g* the Treaty between Italy and Yugoslavia of January 27, 1924 (*L N T S*, 24, p 33), the Treaty between Italy and Soviet Russia of September 2, 1933 (*Documents*, 1933, p 233), the various treaties concluded by the Baltic States (Esthonia, Lithuania, Latvia, and Finland) with Russia (see for a discussion of these treaties Rutenberg in *A J*, 29 (1935), pp 598-615), and many others referred to by Barandon, *Le système juridique de la Société des Nations pour la prévention de la guerre* (1933) p 346 And see below, vol II §§ 292*a* 292*g* on 'Neutrality and the League of Nations,' and particularly § 292*f*

provisions The legal effects of any inconsistency of such treaties with the terms of the Covenant or the Charter have already been discussed [1]

IV

COMMERCIAL TREATIES

Taylor, § 354—Moore, v §§ 765 769—Hyde, i § 482, ii §§ 536, 537—Ralston, § 19—Melle in *Holtzendorff*, iii pp 143 256—Liszt, § 32, i 4, 39—Ullmann, § 145—Hatschek, pp 258 264—Kohler, §§ 64, 65—Fauchille, § 928 (4)—Despagnet, § 462—Pradier Fodére, iv §§ 2005 2033—Mérignhac, ii pp 688 693—Rivier, i pp 370 374—Fiore, ii §§ 1065 1077, and *Code*, §§ 853-864—Guggenheim, pp 96 100—De Louter, i pp 532 537—Suarez, i §§ 206-214—Keith's Wheaton, pp 540 546—Anzilotti, pp 432-439—Scelle, ii pp 383-395—McNair, Chapter 27—Steck, *Versuch über Handels und Schiffahrtsvertrage* (1782)—Schraut, *System der Handelsvertrage und der Meistbegünstigung* (1884)—Nys, *Les origines du droit international* (1894), pp 278 294—Herod, *Favoured Nation Treatment* (1901)—Calwer, *Die Meistbegünstigung in den Vereinigten Staaten von Nord America* (1902)—Gher, *Die Meistbegünstigungs Klausel* (1906)—Cavaretta, *La clausola della nazione piu favorita* (1906)—Barclay, *Problems of International Practice and Diplomacy* (1907), pp 137 142—Hornbeck, *The Most Favoured Nation Clause* (1910), and in *A J*, 3 (1909), pp 394 422, 619 647, and 798 827—Weber, *System der deutschen Handelsvertrage* (1912)—Teubern, *Die Meistbegünstigungsklausel* (1913)—Hepp, *Théorie générale de la clause de la nation la plus favorisée* (1914)—Crandall, *op cit*, §§ 172 177—Culbertson, *International Economic Policies* (1925)—Isay, *Meistbegünstigungs- und Gleichberechtigungsklauseln* (1922)—Riedl, *La clause de la nation la plus favorisée* (1928)—the same, *Dérogations à la clause de la nation la plus favorisée* (1931)—Paranagua, *Politique commerciale internationale* (1930)—Bonhoeffer, *Die Meistbegünstigung im modernen Volkerrecht* (1930)—Ito, *La clause de la nation la plus favorisée* (1930)—Ebner, *La Clause* etc (1931)—Travers, *Le droit commercial international*, v (1932)—Loridan, *La clause* etc (1935)—Rist, *Le passé et l'avenir de la clause de la nation la plus favorisée* (1936)—Publication of the Economic Committee of the League (in 1936), No C 379 M 250 1936 II B—Nolde in *Hague Recueil*, 1924 (ii), pp 295 462 (with a bibliography)—Lehr in *R I*, 25 (1893), pp 313 316, and *ibid*, 12 (1910), pp 657 668—Visser in *R I*, 2nd ser, 4 (1902), pp 66 87, 159 177, and 270 280—Shepheard in *J C L*, New Ser, 3 (1901), pp 231-237, and 5 (1903), pp 132 136—Oppenheim in *L Q R*, 24 (1908), pp 328 334—Lederle and Springer in *Z I*, 27 (1918), pp 154-176 and 314 322—Isay in *Z V*, 12 (1922 1923), pp 276 289—McClure in *A J*, 19 (1925), pp 689-701—Report by Wickersham for League Codification Committee on *Most-Favoured-Nation Clause*, *A J*, 22 (1928), Special Suppl, pp 134 153, and comment by Wright in *A J*, 21 (1927), pp 760-763—S Basdevant in *Répertoire*, iii pp 465-512—Møller in *Nordisk T A*,

[1] See above, §§ 167oo and 503

1 (1930), pp 37-42—Peschardt, *ibid*, pp 88 95—Bailey in *Economica*, 1932, pp 89 115, 160 179—Nolde in *Hague Recueil*, vol 39 (1932) (1), pp 5-126—the same in *R I*, 3rd ser, 14 (1933), pp 185 215, and in *Annuaire*, 38 (1934), pp 414 468—Sereni in *Rivista*, 24 (1932), pp 53-82, 201-226, 405 427—Amery in *Revue économique internationale*, 1935 (Oct - Dec), pp 277 306—Sommer in *Z o R*, 16 (1936), pp 265 297—Schwarzenberger in *B Y*, 22 (1945), pp 96 121

Commercial Treaties in general

§ 578 Commercial treaties are treaties concerning the commerce and navigation of the contracting States, and concerning the subjects of these States who are engaged in commerce and navigation Incidentally, however, they also contain clauses concerning consuls and various other matters They are concluded, either for a limited or an unlimited number of years, and either for the whole territory of one or both parties, or only for a part of such territory All full sovereign States are competent to enter into commercial treaties, but it depends upon the special case whether half and part sovereign States are likewise competent [1]

The details of commercial treaties are, for the most part, purely technical, and are, therefore, outside the scope of a general treatise on International Law [2] There are, however, two points of great importance which require dis-

[1] Although competent to enter into commercial treaties, a State may, by an international compact, be restricted in its freedom with regard to its commercial policy Thus, according to the Convention of September 10, 1919, revising the General Act of the Berlin Congo Conference of February 26, 1885, all the Powers which have possessions in the Congo district must grant complete freedom of commerce to the signatory States and to those States, members of the League, which adhere to it (*L N T S*, 8, p 31 and above, p 423 (n))

[2] The following instances, some of which are of purely historical importance, of the policy of the 'open door' in economic matters may be mentioned (*a*) certain provisions in the A mandates (see above, § 94*c*), and as to the B mandates in Article 22, paragraph 5, of the Covenant, (*b*) Article 7 of the Tangier Statute of 1923 (Treaty Series No. 23 (1924), see below, vol II § 72 (9)), (*c*) Article 3 of the Treaty regulating the status of Spitsbergen, February 9, 1920 (Treaty Series, No 18 (1924), see below, vol II § 72 (6)), (*d*) the Nine Power Treaty of February 6, 1922, signed at Washington 'relating to principles and policies to be followed in matters concerning China' (Treaty Series, No 42 of 1925, *A J*, 16 (1922), Suppl, pp 64 74, Tachi in *R I*, 3rd ser, vol 15 (1934), pp 585 623), and (*e*) Article 23 (*e*) of the Covenant of the League ('equitable,' which does not necessarily mean 'equal,' 'treatment for the commerce of all members of the League'), Article 76 (*d*) of the Charter of the United Nations (equal treatment in Trust territories for all members of the United Nations—subject to the interests of the inhabitants of these territories) See also the Final Report of the Economic Conference held by the League at Geneva in May 1927, C E I 44 (1)

cussion—namely, the meaning of coasting-trade,[1] and of the most-favoured-nation clause

§ 579 See below [1]

Meaning of Most-favoured-Nation Clause

§ 580 Most of the commercial treaties of the nineteenth century contain a stipulation usually referred to as the most-favoured-nation clause [2] The wording of this clause is by no means the same in all treaties, and its general form has therefore to be distinguished from several others which are more specialised in their wording According to the most-favoured-nation clause in its general form, all favours which either contracting party has granted in the past, or will grant in the future, to any third State must be granted to the other party But the real meaning of this clause in its general form became controversial when the United States of America began to conclude commercial treaties embodying it Whereas, in former times, the clause was considered obviously to have the effect of causing all favours granted to any one State *at once and unconditionally* to accrue to all other States having most-favoured-nation treaties with the grantor, the United States contended that these favours could accrue to such of the other States only as *fulfilled the same conditions under which these favours had been allowed to the grantee* [3] It was, therefore, the general practice until 1923 for the most-

[1] § 579 The respective meanings of the term coasting trade (or *cabotage*) in International Law generally and in commercial treaties have already been mentioned above, § 187 They are discussed in some detail by the author in the third edition of this volume, and in *L Q R*, 24 (1908), pp 328 334

[2] Different from most favoured-nation treatment is 'national treatment,' which means that the nationals 'of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were natives of the second contracting party' That is, it prevents 'discrimination against the nationals of the contracting parties, in any way, in regard to the points stipulated in the treaty' Wicker-sham, *op cit* The most favoured-nation clause is not necessarily restricted to matters of commerce and navigation See the Exchange of Notes of May 21 25, 1929, between France and Great Britain laying down that the clause applies equally to the legal relations brought about by the laws of landlord and tenant Treaty Series, No 22 (1929), Cmd 3390

[3] An interpretation which is reminiscent of the Anglo-American doctrine of consideration in contracts The author (see 4th edition, § 580) regarded the American interpretation as unjustifiable, but pointed out that European writers of the authority of Martens (II p 225) and Westlake (I p 294) approved of it See also Fleischmann in Liszt, § 32, I (4) *c*, and Hatschek, p 264

favoured-nation clause when occurring in the commercial treaties of the United States to be not in the general form, but in what is called its conditional, qualified, or reciprocal form In this form it stipulates that all favours granted to third States shall accrue to the other party unconditionally, in case the favours have been allowed unconditionally to the grantee, but only under the same compensation, in case they have been granted conditionally But the United States adhered to the view that, even if a commercial treaty contains the clause in its general, and not in its qualified, form, it must always be interpreted as though it were worded in its qualified form, and the Supreme Court of the United States has confirmed [1] this interpretation

As a result, however, of the recommendations of the American Tariff Commission of 1919 and of the Tariff Act of 1922, the commercial policy of the United States of America in this respect underwent an important change [2] A large number of *modi vivendi* concluded with different countries stipulated for reciprocal most-favoured-nation treatment *in the unconditional form* [3] It does not follow, however, that the traditional American interpretation would not apply to most-favoured-nation clauses occurring in any of the older treaties which may be allowed to survive [4]

[1] See *Bartram* v *Robertson*, 122 U S 116, and *Whitney* v *Robertson*, 124 U S 190, Hudson, *Cases*, p 898 See also Hyde, 1 § 482, 11 §§ 536, 537 (with ample bibliography), McClure in *A J*, 19 (1925), pp 689 701, and Wickersham, *op cit* See, on the other hand, the interesting decision of the United States Supreme Court of the Territory of Hawaii, of December 18, 1929 31 Hawaii, 196, *Annual Digest*, 1929 1930, Case No 251

[2] See Wickersham, *op cit*, and McClure, *op cit*

[3] See *A J*, 20 (1926), Suppl, pp 4-21 As to some pronouncements of the Government of the United States in 1934 declaring the most-favoured nation clause in its unconditional form to be the ultimate objective and the Trade Agreement between the United States and Russia of July 13, 1935, see Anderson in *A J*, 29 (1935), pp 653 656 See also Catudal in *A J*, 35 (1941), pp 41 54, for a survey of decisions upholding the unconditional form of the clause as stipulated in treaties See, in particular, *John T Bill Co* v *United States*, *A J*, 35 (1941), p 160, *Annual Digest*, 1938-1940, Case No 197 For an interesting qualification see *The Yulu*, where a United States Circuit Court of Appeals held on June 16, 1934, that the benefits of the most-favoured-nation clause cannot be invoked in respect of illegitimate trade *Annual Digest*, 1933-1934, Case No. 21.

[4] It is not possible in a general treatise on International Law to enter into the details of the history, the different forms, the application, and the interpretation of the most-favoured-nation clause Readers must be referred for further information to the works and articles quoted above, before § 578 See also Moore, v

§ 581. International commodity agreements constitute an important development in the practice of treaties bearing on commerce Their purpose is mainly to regulate by common agreement the supply of certain agricultural and other products and raw materials on the part of producing States Experience has shown that the fall in prices following upon excessive and unregulated competitive supply of such goods is productive of avoidable economic hardship and unsettlement The following are the more important commodity agreements. (1) Agreement of May 6, 1937, concerning the Regulation of Production and Marketing of Sugar[1]; (2) The Final Act of August 25, 1933, of the Conference of Wheat Exporting and Importing Countries[2] and the International Wheat Agreement of April 22, 1942, between Argentina, Australia, Canada, Great Britain, and the United States[3], (3) the Agreement of September 9, 1942, for the International Control of the Production and Export of Tin[4], (4) the Agreement of May 7, 1934, for the Regulation of the Production and Export of

International Commodity Agreements.

§§ 765-769, Crandall in *A J*, 7 (1913), pp 708-723, and particularly Wickersham, *op cit* As to the treaties concluded by Soviet Russia see Korovin in *A J*, 22 (1928), pp 754-762 See also *International Economic Reconstruction* and *The Improvement of Commercial Relations between Nations* (both published in 1936 by the Joint Committee of the Carnegie Endowment and the International Chamber of Commerce and containing articles on the recent developments in the most-favoured-nation clause), Bailey in *Economica*, 1932, pp 89-115, 160-179 And see generally on conventional regulation of tariffs Janne in *Hague Recueil*, vol 21 (1928) (i), pp 113-185, Lhomme in *R G*, 38 (1931), pp 62-90 And see above p. 290, n. 1

[1] Hudson, *Legislation*, vii p 651, Misc. No 3 (1937), Cmd 5461 This agreement was preceded by a series of inter-governmental agreements, dating back to 1864, concerning drawbacks and bounties on sugar See *e g* Convention of November 8, 1864, regulating the drawbacks on sugar (*B F S P*, 54, p 29), the Brussels Convention of March 5, 1902, relative to bounties on sugar (*B F S P*, 95, p 31), Protocol of March 17, 1912, prolonging the international union established by the Sugar Convention of 1902 (*B F S P*, 105, p 392) See Kaufmann, *Weltzuckerindustrie und internationales und coloniales Recht* (1904), and in *Hague Recueil*, 3 (1924) (ii), pp 218 222, Borel in *R I*, 2nd ser, 5 (1912), pp 150 158, Andrée in *R G*, 19 (1912), pp 665 685, Wilk in *American Political Science Review*, 33 (1939), pp 860-878

[2] Cmd 4449 (1934)

[3] *A J*, 37 (1943) Suppl, p 24.

[4] *Intergovernmental Commodity Control Agreements* (published by the International Labour Office, 1943), p 95 This volume, preceded by a valuable introduction (pp iii lviii) and cited here as *Commodity Agreements*, contains the texts of practically all recent agreements for the control of the production and export of various commodities See *ibid*, pp 73 87, on previous agreements relating to tin, and pp 87 89 for the agreement of January 25, 1938, on a Tin Research Scheme

Rubber[1]; (5) the Inter-American Coffee Agreement of November 28, 1940[2]

There is some danger that commodity agreements of this kind may result in a system of international monopolies creating an artificial scarcity and perpetuating a high level of prices. Proposals have accordingly been made and, in some cases, given effect, for associating consumer countries with any such agreed regulation of production and for creating so-called buffer stocks of commodities to meet the impact of sudden changes in supply[3] Most of the commodity agreements have created special organs and offices for administering the schemes of regulation of production and exports[4] In general, however, the execution of the agreements is left to the national authorities of the contracting parties, with the result that it has proved necessary, in most cases, to provide machinery for investigating complaints arising out of the administration of the agreement[5] Moreover, it is clear that, in addition, some co-ordinating machinery of international supervision—possibly by an

[1] Hudson, *Legislation*, vi p 856, *L N T S*, 171, p 203

[2] *Commodity Agreements*, p 59 See also Wickizer, *The World Coffee Economy with Special Reference to Control Schemes* (1943), and, on the Inter American Coffee Board, Ruth Masters, *Handbook of International Organizations in the Americas* (1944), pp 93 98 The regulation of the production and export of tea is the subject of an Agreement of November 18, 1934, between the various private associations such as the India Tea Association and the corresponding Dutch companies See *Commodity Agreements*, p 52

[3] See *e g* Agreement of June 20, 1938, on the Tin Buffer Stock Scheme *Commodity Agreements*, p 90 The idea underlying such internationally held and controlled buffer stocks is that they should be increased when production exceeds demand and drawn upon in the converse case By buying up stocks at a time when prices tend to be depressed because of excess of supply, buffer stocks may assist in preventing a disastrous fall in prices And see in general the exhaustive study by Staley, *Raw Materials in Peace and War* (1937)

[4] See *e g* Article 11 (*a*) of the Tin Agreement concerning the powers of the International Tin Committee, Article 15 (*e*) of the Rubber Agreement concerning the International Rubber Regulating Committee, Article 7 (2) of the Wheat Agreement concerning the International Wheat Council It has been suggested that these and similar organs as well as buffer stock authorities should be granted an international legal personality and a measure of independence, including immunity from taxation, of the jurisdiction of the State where they are situated As to wheat see Cale in *Bulletin of State Department*, 16 (1947), pp 1053-1065

[5] The Sugar, Coffee, and Tin Agreements give the central control authorities the power to enquire into complaints as to the infringement of the agreement by the national authorities and to make recommendations The Sugar Agreement provides also for a measure of arbitral settlement (Article 51 (*c*))

organ of the Economic and Social Council of the United Nations—may be indicated in order to safeguard the interests of the consuming countries [1] and, generally, of an expanding and orderly international economy [2]

[1] As well as the interests of labour

[2] The Second World War gave rise to some agreements establishing agencies for the control of commodities as well as to ordinary purchase agreements by governments Most of these agreements are of transient importance, but it may be of interest to refer to some of them See *e g* as to the Combined Raw Materials Board set up in January 1942 between the United States and Great Britain, Duncan Hall in *B Y*, 21 (1944), pp 168-171, Ruth Masters, *op cit*, 53 59, *Commodity Agreements*, pp 158 171, Agreement of June 23, 1939, between Great Britain and the United States for the exchange of cotton and rubber, *ibid*, p 178, Agreement of March 26, 1943, between the United States, Canada, and Great Britain establishing a reserve of industrial diamonds, *ibid*, p 190, and Agreement of September 3, 1942, between the United States and Brazil for the development of foodstuffs production in Brazil, *ibid*, p 195

APPENDIX A

LIST OF THE MORE IMPORTANT GENERAL CONVENTIONS OF A NON-POLITICAL CHARACTER

(For General Literature see above, § 458)

I —TRANSIT, TRANSPORT, AND COMMUNICATIONS

General Telegraphic Convention [1]	May 17, 1865, Paris [2]
International Radiotelegraphic Convention [3]	July 5, 1912, London , November 25, 1927, Washington [4]
International Telecommunication Convention	December 9, 1932, Madrid [5]

[1] Fischer, *Die Telegraphie vnd das Volkerrecht* (1876) , Kunz, *Die internationalen Telegraphenunionen* (1924) , Boisson, *op cit* below, n 8 , Stewart in *A J* , 23 (1929), pp 292 306

[2] The basis of the Union is the Convention of July 22, 1875 (Martens, *N R G* , 2nd ser , 3, p 614), as revised by the Convention of Lisbon of June 11, 1908, *ibid* , 3rd ser , 5, p 208 For the revision of October 29, 1925, of the Service Regulations attached to the Telegraph Convention of 1875 see *L N T S* , 57, p 220 , Hudson, *Legislation*, III p 1696 For an opinion of the Permanent Legal Committee of the Organisation for Communications and Transit of the League of Nations interpreting the provisions of the Convention relating to secrecy in the transmission of telegrams see *Off J* , 1930, p 1548 , *Annual Digest*, 1929 1930, Case No 255

[3] See above, §§ 174 (2), 287*a* and 287*b* for the more recent literature See also Fauchille, §§ 531 (16) and (17), and in *Annuaire*, 21 (1906), pp 76 87 , Meili, *Die drahtlose Telegraphie*, etc (1908) , Schneeli, *Drahtlose Telegraphie und Volkerrecht* (1908) , Landsberg, *Die drahtlose Telegraphie* (1909) , Kausen, *Die drahtlose Telegraphie im Völkerrecht* (1910) , Thurn, *Die Funkentelegraphie im Recht* (1913) , Devaux, *La télégraphie sans fil* (1914) , Loewengard, *Die internationale Radiotelegraphie im internationalen Recht* (1915) , Rolland in *R G* , 13 (1906), pp 58 92 , Despagnet, § 433 , Meurer and Boidin in *R G* , 16 (1909), pp 76, 261

[4] See above, § 287*b*

[5] Hudson, *Legislation*, VI p 109 (including the General Radio Regulations, *ibid* , p 178 , the Telegraph Regulations, *ibid* , p 200 , and the Telephone Regulations, *ibid* , p 257) This Convention, which replaces the Telegraph Union, is supplemented by Telegraph Regulations, Telephone Regulations, and the Radio Regulations For most practical purposes, it replaces the former telegraphic and radiotelegraphic conventions For an interesting example of an interpretation, by an international tribunal, of some important aspects of that Convention see *French High Commission to the State of Levant* v *Egyptian Government, Annual Digest*, 1941-1942, Case No 133

I —TRANSIT, TRANSPORT, AND COMMUNICATIONS—*contd.*

Convention	Date and Place
General Postal Convention [6]	October 9, 1874 Berne [7] (revised November 30, 1920, Madrid, August 28, 1924, Stockholm, June 28, 1929, London [8], March 20, 1934, Cairo [9])
Convention for the Protection of Submarine Cables [10]	March 14, 1884, Paris [11]

[6] Fischer, *Post und Telegraphie im Weltverkehr* (1879), Schroter, *Der Welt postverein* (1900), Rolland, *De la correspondance postale et télégraphique dans les relations internationales* (1901), Beelenkamp, *Les lois postales universelles* (1910), *L'union postale universelle sa fondation et son développement*, 1874 1924, published in 1924 by the Postal Union, Sly, *The Genesis of the Universal Postal Union* (1927) (International Conciliation Pamphlet, No 233), *Résumé des documents des congres et conférences de l Union postale universelle*, 1874 1931, 2 vols (1932 1933), published by the Universal Postal Union See also Convention of September 15, 1921, *L N T S*, 30, p 141, reorganising the Pan-American Postal Union created in 1912, and also the Postal Convention of November 9, 1926 There is a Central Office of this Union at Montevideo, Uruguay There exists also a postal union of the Americas and Spain, established by the Convention of Madrid of November 10, 1931 (Hudson, *Legislation*, v p 1104) and revised by the Convention signed at Panama on December 22, 1936 Hudson, *Legislation*, vii p 500 And see generally on the Postal Union of the Americas and Spain, Ruth Masters, *Handbook of International Organizations in the Americas* (1944), pp 379 389, and Piedrahita in *L'Union Postale*, 63 (1938), pp 319 325 and 388 397

[7] See Martens, *N R G*, 2nd ser, I, p 651 As to the Postal Conventions in 1878 and 1906 see *ibid*, 3, p 699, and 3rd ser, 1, p 355, respectively See also *L N T S*, 11, p 368, for the Universal Postal Convention and Final Protocol of November 30, 1920, and Lederle in *Strupp, Wort*, II pp 299 303 For the Convention of Stockholm of August 28, 1924, see Sly, *op cit*, and *L N T S*, 40, p 19 And see Williamson in *International Affairs*, 9 (1930), pp 68 78

[8] That Convention has been ratified by practically all the States signatories of the previous Conventions See *L N T S*, 102, p 245, Hudson, *Legislation*, IV p 2870 See also the following instruments bearing the same date Provisions concerning the Transport of Postal Letters by Air (superseding the Provisions adopted in 1927) *L N T S*, 102, p 504, Hudson, *Legislation*, IV p 2935, Agreement concerning Letters and Parcels of Declared Value (revising the Convention of 1924) *L N T S*, 103, p 73, Hudson, *Legislation*, IV p 3040, Provisions concerning the Transport of Postal Parcels by Air (superseding the Convention of 1927) *L N T S*, 103, p 222, Hudson, *Legislation*, IV p 3112, Agreement concerning Money Orders (revising the Agreement of 1924) *L N T S*, 103, p 249, Hudson, *Legislation*, IV p 3122, Agreement concerning Postal Clerks (revising the Agreement of 1924) *L N T S*, 103, p 321, Hudson, *Legislation*, IV p 3154, Agreement concerning Payments on Delivery (revising the Agreement of 1924) *L N T S*, 103, p 377, Hudson, *Legislation*, IV p 3170, Agreement concerning Subscriptions to Newspapers and Periodicals (revising the Agreement of 1924) *L N T S*, 103, p 429, Hudson, *Legislation*, IV p 3188 And see Blayac, *Origine, évolution et organisation de l'Union postale universelle* (1932), Boisson, *La Société des Nations et les bureaux internationaux des Unions universelles postale et télégraphique* (1932), Hackworth, IV §§ 359-361, Turkel in *B Y*, 10 (1929), pp 171 180, and in *R I*, 3rd ser, 12 (1931), pp 120 130, Akzin in *A J*, 27 (1933), pp 651 674

[9] Published in *L N T S*, No 4048, Hudson, *Legislation*, VI pp 646 818, *Documents des Congrès Postal du Caire* (1934), II pp 693 ff That Convention is accompanied by a number of agreements on such matters as insured letters and boxes, parcel post, money orders, transfer to and from postal cheque accounts, subscriptions to newspapers and periodicals, collection of bills, drafts, etc

[10] See §§ 286 and 287 [11] See Martens, *N R G*, 2nd ser, 11, p 281.

I —TRANSIT, TRANSPORT, AND COMMUNICATIONS—*contd.*

Convention	Date and Place
Conventions concerning the Standardisation of Railways, and the Sealing of Railway Trucks subject to Customs Inspection	May 15, 1886, Berne [12]
Convention concerning the International Circulation of Motor Vehicles	October 11, 1909, Paris [13]
Convention on Road Traffic	April 24, 1926, Paris [14]
Convention for the Unification of Road Signals	March 30, 1931, Geneva [15]
Convention on Taxation of Foreign Motor Vehicles	March 30, 1931, Geneva [16]
Convention concerning Railway Transports and Freights	October 14, 1890, Berne [17] (revised October 23, 1924, Paris [18])
Air Navigation Convention	October 13, 1919, Paris [19]
Convention on International Civil Aviation (and accompanying Agreements)	December 7, 1944, Chicago [20]
Convention for the Unification of Certain Rules regarding Air Transport	October 12, 1929, Warsaw [21]
Convention relating to the Simplification of Customs Formalities	November 3, 1923, Geneva [22]
Convention and Statute on the Régime of Navigable Waterways of International Concern	April 20, 1921, Barcelona [23]
Convention and Statute on the Freedom of Transit	April 20, 1921, Barcelona [24]

[12] See Martens, *N R G*, 2nd ser, 22, p 42, and *ibid*, 3rd ser, 2, p 878

[13] See Martens, *N R G*, 3rd ser, 3, p 834, Treaty Series (1910), No 18 See also the Motor Car (International Circulation) Act, 1910 (9 Edw 7, c 37)

[14] See above, § 141 (n 1) [15] *Ibid*

[16] *Ibid* See also *ibid* for other conventions of this type

[17] See Martens, *N R G*, 2nd ser, 19, p 289, Kaufmann, *Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht* (1873), Rosenthal, *Internationales Eisenbahnfrachtrecht* (1894), Mayne, *Les raccordements internationaux des chemins de fer* (1901), Eger, *Das internationale Übereinkommen über den Eisenbahnfrachtverkehr* (3rd ed, 1909), Blume, *Internationales Übereinkommen über den Eisenbahnverkehr* (1910), v der Leyen in *Strupp, Wort*, 1 pp 266 273, Dupuis in *Hague Recueil*, vol 2 (1924) (1), pp 263 273 For the international traffic law in general see Holländer in *A J*, 17 (1923), pp 470 488, and Kunz in *Z o R*, 13 (1933), pp 408 438

[18] See Loening, *Internationales Übereinkommen über den Eisenbahnfrachtverkehr vom 23 Oktober* 1924 (1927) And see Treaty Series, No 3 (1933), Cmd 4243, Travers, *Le droit commercial international*, v (1932), Develle, *Le régime international des voies ferrées* (1935), Fourcauld in *Répertoire*, III pp 289 409 And see Agreement of September 27, 1945, concerning an Organisation for European Inland Transport Cmd 6685

[19] See above, § 197c [20] See above, § 197*eb* [21] See above, § 197*d*

[22] *L N T S*, 30, p 371, Treaty Series (1925), No 16

[23] Treaty Series (1923), No 28, *L N T S*, 7, p 35 And see *ibid*, p 65, for the Additional Protocol See above, § 178*b* [24] *L N T S*, 7, p 11

I —TRANSIT, TRANSPORT, AND COMMUNICATIONS—*contd*

Convention	Date and Place
Convention and Statute on the International Régime of Railways	December 9, 1923, Geneva [25]
Convention on the Transport of Goods by Rail	November 23, 1933, Rome [26]
Convention regarding the Measurement of Vessels employed in Inland Navigation	November 27, 1925, Paris [27]
Convention on the International Régime of Maritime Ports	December 9, 1923, Geneva [28]
Convention relating to the Transmission in Transit of Electric Power	December 9, 1923, Geneva [29]
Convention on the Development of Hydraulic Power affecting more than one State	December 9, 1923, Geneva [30]

[25] Treaty Series (1925), No 23, *L N T S*, 47, p 55 See also the Agreement concerning Transport of Corpses signed on February 10, 1937, under the auspices of the International Office of Public Hygiene (Hudson, *Legislation*, VII p 630)

[26] Hudson, *Legislation*, VI p 527

[27] *L N T S*, vol 67, p 63 And see above, p 429, n 2, for other general conventions relating to inland navigation

[28] Treaty Series (1925), No 24, *L N T S*, vol 58, p 285 See above, § 190c

[29] Treaty Series (1925), No 25, *L N T S*, vol 58, p 315 See above, § 178a

[30] *L N T S*, 36, p 75, Treaty Series (1925), No 26 See above, § 178a

II —OTHER ECONOMIC INTERESTS

(a) COPYRIGHT ECONOMIC CO-OPERATION

Convention	Date and Place
Convention for the Protection of Works of Art and Literature [1]	September 9, 1886, Berne [2], June 2, 1928, Rome [3]

[1] See Orelli, *Der Internationale Schutz des Urheberrechts* (1887), Thomas, *La convention littéraire et artistique internationale*, etc (1894), Briggs, *The Law of International Copyright* (1906), Rothlisberger, *Die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst* (1906), and in *La vie internationale*, II (1912) pp 201 247, Ladas, *The International Protection of Literary and Artistic Property*, 2 vols (1938), Hackworth, II § 118, Ruffini in *Hague Recueil*, vol 12 (1926) (II), pp 391 569, Ostertag in *Michigan Law Review*, 25 (1926), pp 107 123, Solberg in *Yale Law Journal*, 36 (1926), pp 68 111 On the protection by international action of works of art against destruction in war, as well as against unscrupulous commercial dealings, see Ch de Visscher in *R I*, 3rd ser, 16 (1935), pp 32 74, 246 287

[2] This Convention was revised in 1908 (see Martens, *N R G*, 3rd ser, 4, p 590, and Treaty Series (1912), No 19) See Wauwermans, *Les Conventions de Berne (révisées à Berlin)*, etc (1910), and 49 and 50 Vict, c 33

[3] Hudson, *Legislation*, IV p 2463 (with a bibliography), Treaty Series, No 12 (1932), Cmd 4057, Ladas in *A J*, 23 (1929), pp 552 569, Messina in *Hague Recueil*, vol 52 (1935) (II), pp 447 580 For the Pan American Habana Convention concerning Literary and Artistic Copyright of February 20, 1920, revising the Buenos Aires Convention of 1910, see Hudson, *Legislation* IV p 2369

(*a*) Copyright Economic Co-operation—*contd*

Convention	Date and Place
International Union for the Protection of Industrial Property [4]	March 20, 1883, Paris (revised June 2, 1911,[5] Washington), November 6,[6] 1925, The Hague [7], and June 2, 1934
Convention concerning International Exhibitions	November 22, 1928,[8] Paris

[4] Treaty Series (1913), Nos 7 and 8, Martens, *N R G*, 3rd ser, 8, p 760 On the Agreement of April 14, 1891, at Madrid concerning arrangements in regard to indications of origin and the registration of trade marks see Martens, *N R G*, 2nd ser, 22, p 208

[5] See Pelletier et Vidal Noguet, *La convention d'union pour la protection de la propriété industrielle du 20 Mars 1883 et les conférences de révision postérieures* (1902), Pillet, *Le régime international de la propriété industrielle* (1911), Ostertag in *Michigan Law Review*, 25 (1926), pp 107 123, Rogers in *Yale Law Journal*, 36 (1926), pp 235 244, Jaton, *La répression des fausses indications de provenance et les conventions internationales* (1926) (with an extensive bibliography) The Conference at The Hague which took place between October 8 and November 6, 1925, introduced certain modifications in the previous Conventions See Jaton, *op cit*, Plaisant et Fernand Jacq, *Le nouveau régime international de la propriété industrielle* (1927), and Alingh Prins in *Grotius Annuaire*, 1927, pp 18 62 And see *L'Union Internationale pour la Protection de la Propriété Industrielle*, 1883 1933 (Berne, 1933) On the creation of a central office of patents of inventions see Chabaud in *R I*, 3rd ser, 2 (1921), pp 151 160 See also Agreement concerning the Preservation or Re establishment of the Rights of Industrial Property affected by the First World War, signed June 30, 1920 *L N T S*, 1, p 60 There exists a separate office at Habana created by almost all American States in 1917, and established in 1919

[6] *L N T S*, 74, p 289, Hudson, *Legislation*, III p 1761 See also the Agreements, of the same date, on Suppression of False Indications of Origin of Goods (*L N T S*, 74, p 319, Hudson, *Legislation*, III p 1782), on International Registration of Trade Marks (*L N T S*, 74, p 327, Hudson, *Legislation*, III p 1785), and on International Registration of Industrial Designs or Models (*L N T S*, 74, p 341, Hudson, *Legislation*, III p 1799) See also Patents and Designs (Convention) Act, 1928 (1 Geo 5, c 3), amending existing legislation to give effect to the Hague Convention for the Protection of Industrial Property See *La propriété scientifique* (Reports published by the International Institute of Intellectual Co operation, 1929), Ladas, *The International Protection of Industrial Property* (1930), Plaisant, *Répertoire des brevets d'invention en droit international*, (2nd ed 1929), the same in *Hague Recueil*, vol 39 (1932) (1), pp 357 541, Hackworth, II §§ 116, 117, Stringham, *Patents and Gebrauchs muster in International Law* (1935), Pichot in *Répertoire*, VII pp 94 215, and VIII pp 615 690, Plaisant and Fernand Jacq, *ibid*, II pp 447 677, Weiss in *R I*, 3rd ser, 16 (1935), pp 334 349 See also the General Inter American Convention for Trade Mark and Commercial Protection of February 20, 1929, and a Protocol, of the same date, on Registration of Trade Marks Hudson, *Legislation*, IV p 2642, Ladas, *The International Protection of Trade Marks by the American Republics* (1929), *A J*, 23 (1929), pp 158 182, McClure, *ibid*, 36 (1942), pp 383 399

[7] *A J*, 34 (1940), Suppl, p 89

[8] The Convention contains provisions relating to 'official or officially recognised international exhibitions,' *i e* exhibitions to which foreign countries are invited through the diplomatic channel, which are not held periodically, and whose main object is to show the progress of the country concerned in one or several branches of production The Convention contains provisions concerning the frequency of exhibitions, the obligations of the inviting and participating countries, the granting of awards, and the international exhibitions bureau The bureau was placed, in May 1931, under the direction of the League of Nations For the Convention see Treaty Series, No 9 (1931), Cmd 3776, *L N T S*, III p 343, Hudson, *Legislation*, IV p 2554

(*a*) Copyright Economic Co-operation—*contd.*

Convention	Date and Place
Convention for the Establishment of the Bank for International Settlements	January 20, 1930. The Hague [9]
Agreement on the International Bank for Reconstruction and Development	July 1944, Bretton Woods [10]
Agreement on the International Monetary Fund	July 1944, Bretton Woods.[10]
International Commodity Agreements	See above, § 581.

[9] Treaty Series, No 6 (1931), Cmd 3766, *L N T S*, 104, p 441, Hudson, *Legislation*, v p 307 (with a detailed bibliography), the same in *A J*, 24 (1930), pp 561 566, Otlet, *La Banque internationale* (1929), Einzig, *The Bank for International Settlements* (1930), Karamikas, *La Banque des Règlements Internationaux* (1931), Beitzke, *Die Rechtsstellung der Bank fur internationalen Zahlungsausgleich* (1932), Dulles, *The Bank for International Settlements at Work* (1932), Schluter, *Die Bank für internationalen Zahlungsausgleich* (1932), Fischer Williams in *A J*, 24 (1930), pp 665 673, Ceretı in *Rivista di diritto pubblico*, 23 (1931), pp 169 193, Trotabas in *R I*, 3rd ser, 12 (1931), pp 61 84, Canina in *Hague Recueil*, vol 37 (1931) (III), pp 294 306, Grizıotti, *ibid*, vol 42 (1932) (IV), pp 353 466 And see Treaty Series, No 25 [1937], Hudson, *Legislation*, VII p 404, *L N T S*, 197, p 31, for the Protocol of July 30, 1936, regarding the Immunities of the Bank for International Settlements These attach not only to its own property and assets but also to those entrusted to it in accordance with banking practice On the Protocol see Hudson in *A J*, 32 (1938), pp 128 134

[10] See above, § 141*a*

(*b*) Metric System

Convention	Date and Place
Convention for the Unification and Improvement of the Metric System	May 20, 1875,[1] Paris (revised October 6, 1921, Paris)

[1] See Martens, *N R G*, 2nd ser, I p 663, Guillaume in *La vie internationale*, III (1913) pp 5 44 This Convention was modified by the Convention of October 6, 1921, signed at Sèvres See *L N T S*, 17, p 46, Treaty Series (1923), No 24, see W Kaufmann in *Hague Recueil*, vol 3 (1924) (II), pp 222 224

As to the Convention of Paris of December 23, 1865, between Belgium, France, Italy, and Switzerland establishing the so called 'Latin Monetary Union,' see Martens, *N R G*, 20, pp 688, 694, *ibid*, 2nd ser, 4, pp 725, 11, p 65, and 21, p 285 See also Willis, *History of the Latin Monetary Union* (1901), Palgrave, *Dictionary of Political Economy* (1923), *sub tit* 'Latin Monetary Union', Greul, *Die lateinische Münz Union* (1926), Fauchille, § 918 For the Supplementary Convention between France, Greece, Italy, and Switzerland of March 25, 1920, concerning small silver currency, see *L N T S*, 1, p 46 Belgium left the Union in December 1926 The Union was broken up by the First World War And see above, p 290, n (*in fine*)

(c) Agriculture, Preservation of Animal Life

Convention	Date and Place
Convention for the Prevention of the Extension of Phylloxera Epidemics	November 3, 1881, Berne [1]
Agreement Creating the International Bureau of Intelligence on Locusts	May 20, 1926, Damascus [2]
International Agreement for the Creation at Paris of an International Office for dealing with Contagious Diseases of Animals	January 25, 1924, Paris [3], February 20, 1935, Geneva [4]
Convention concerning the Preservation of Birds useful to Agriculture	March 19, 1902, Paris [5]
Convention for the Protection of Fauna and Flora	November 8, 1933, London [6]
Convention for the Regulation of Whaling	September 24, 1931, Geneva [7], June 8, 1937, London [8]
Convention for the Creation of an International Agricultural Institute	June 7, 1905, Rome [9]

[1] See Martens, *N R G*, 2nd ser, 6, p 261, and 8, p 435

[2] Between Turkey, Iraq, Syria, Palestine and Transjordan Treaty Series, No 16 (1930), Cmd 3542, *L N T S*, 109, p 121, Hudson, *Legislation*, III p 1888 See also the Agreement concerning the campaign against locusts, Montevideo, December 13, 1934 Hudson, *Legislation*, VI p 954.

[3] Treaty Series (1926), No 11 [4] Hudson, *Legislation*, VII p 1

[5] See Martens, *N R G*, 2nd ser, 30, p 686

[6] That Convention provides for the establishment of national parks and other reserves within which hunting is prohibited, for the institution of regulations concerning the hunting of fauna outside such areas, for the regulation of the traffic in trophies, and prohibition of certain methods of killing and hunting of fauna Treaty Series, No 27 (1936), Cmd 5280, *L N T S*, No 3995, Hudson, *Legislation*, VI p 594 See also Hayden, *International Protection of Wild Life* (1942) See also Exchange of Notes of November 26, 1932, between Great Britain and Italy concerning traffic in game trophies across the frontier between Kenya and Italian Somaliland Treaty Series, No 1 (1933), Cmd 4232 See also the Convention for the Protection of Plants, of April 16, 1929, ratified by a number of States, including Italy Hudson *Legislation*, IV p 2680 On February 20, 1935, Conventions were concluded at Geneva on transit of animals, meat and other products of animal origin, and on import and export of animal products other than meat and milk Hudson, *Legislation*, VII pp 13, 27

[7] See above, § 285*a* And see § 284 as to Seal Fisheries

[8] Treaty Series, No 37 (1938), Cmd 5757 See also the Protocols signed in London on June 24, 1938, Treaty Series, No 18 (1939), Cmd 5993, and on February 7, 1944, Misc No 1 (1944), Cmd 6510 And see above, § 285*a*

[9] See Martens, *N R G*, 3rd ser, 2, p 238, Treaty Series (1910), No 17, Hobson, *The International Institute of Agriculture* (1931) (a comprehensive work), Louis Dop in *La vie internationale*, I (1912), pp 428 454, Weith-Knudsen in *Festschrift für Lujo Brentano* (1916) See also the International Convention for the Creation of an Agricultural Mortgage Credit Company of May 21, 1931, League Doc C 434 (1) M 181 (1) 1931 II A, Hudson, *Legislation*, V p 959 This Convention is not yet in force And see for the history of the Convention Doc 375 M 155 1931 II A See also Cohen in *Revue économique internationale*, 23 (1933) (III), pp 105 125, and Vimaux, *ibid*, pp 127-145 On international co-operation in the sphere of agriculture see Houiller, *L'organisation internationale de l'agriculture* (1935), Vitta in *Hague Recueil*, vol 56 (1936) (II), pp 305 412 See also Dop, *La nouvelle condition juridique de l'Institut international d'Agriculture* (1932)

(c) Agriculture, Preservation of Animal Life—*contd*

Convention	Date and Place
The Pelagic Sealing Convention	July 7, 1911, Washington [10]
Convention establishing a Wine Bureau	November 29, 1924, Paris [11]
Convention of the Unification of the Methods of Analysis of Wines in International Commerce	June 5, 1935, Rome [12]
Convention for the Unification of Methods of Sampling and Analysing Cheeses	April 26, 1934, Rome [13]
Convention for the Unification of Methods of Keeping and Operating Cattle Herdbooks	October 14, 1936, Rome [14]
Final Act of the United Nations Conference on Food and Agriculture	May 1943, Hot Springs (Virginia) [15]

[10] See above, § 284 As to the unratified Convention for the Preservation of Animals, Birds, and Fish in Africa, signed in London on May 19, 1900, see Martens, *N R G*, 2nd ser, 30, p 430 Cf also the Convention for the Protection of Migratory Birds, signed at Washington on August 16, 1916, between Great Britain (for Canada) and the United States (see Treaty Series (1917), No 7), the Convention concerning Halibut Fisheries in the North Pacific Ocean, between the United States and Canada, of March 2, 1923, *L N T S*, 32, p 94, and the Convention concerning the Conserving and Developing of the Marine Life Resources in the Ocean Waters, between the United States and Mexico, of December 1925, *L N T S*, 48, p 444

[11] *L N T S*, 80 p 293, Hudson, *Legislation*, II p 1534

[12] Hudson, *Legislation*, VII p 88

[13] Hudson, *Legislation*, VI p 840

[14] Hudson, *Legislation*, VII p 426

[15] Resolution No 2 (Misc No 3 (1943), Cmd 6451 And see for the Constitution of the Food and Agriculture Organisation of the United Nations, Misc No 4 (1945), Cmd 6950

(d) Publications, Information, and Statistics

Convention	Date and Place
International Convention for the Publication of Customs Tariffs	July 5, 1890, Brussels [1]
Conventions concerning the Exchange of Official Documents [2] and of Official Journals and Parliamentary Documents [3]	March 15, 1886, Brussels

[1] Martens, *N R G*, 2nd ser, 18, p 558

[2] See Martens, *N R G*, 2nd ser, 14, p 287 [3] *Ibid*, p 285

(*d*) Publications, Information, and Statistics—*contd*

Convention	Date and Place
Convention for the Establishment of International Commercial Statistics	December 31, 1913, Brussels [4]
Convention concerning Economic Statistics	December 14, 1928, Geneva [5]
Convention concerning Statistics of Causes of Death	June 19, 1934, London [6]

[4] See Martens, *N R G*, 3rd ser, 11, p 304, Treaty Series (1924), No 15

[5] The Parties undertook to compile and publish statistics concerning, *inter alia*, external trade, occupations, agriculture, livestock, forestry and fisheries, mining and metallurgy, industry and index numbers of prices, in accordance with a protocol attached to the Convention See Treaty Series, No 43 (1930), Cmd 3710, *L N T S*, 110, p 171, Hudson, *Legislation*, iv p 2575

See also the Convention for the Standardisation of Methods of Presenting the Results of the Analysis of Human and Animal Foods of June 30, 1931 *L N T S*, 149, p 63, Hudson, *Legislation*, v p 1039 For the former Convention of October 16, 1912, see *British and Foreign State Papers*, 114, p 580

[6] Treaty Series, No 27 (1934), Cmd 4715, Hudson, *Legislation*, vi p 899

III—HUMANITARIAN CONVENTIONS

Convention	Date and Place
Convention concerning the Unification of the Pharmacopœial Formulas for Potent Drugs	November 29, 1906, Brussels [1], August 20, 1920 [2]
Convention establishing the International Health Office	December 9, 1907, Paris [3], revised by the International Sanitary Convention, June 21, 1926, Paris [4]

[1] See Martens, *N R G*, 3rd ser, 1, p 592, Treaty Series (1907), No 10 On the conferences of experts convened under the auspices of the League of Nations on the standardisation of sera and serological tests see *Off J*, 3 (1922), pp 179, 934 For the literature on the subject see Schucking und Wehberg, pp 754, 755

[2] *L N T S*, 98, p 125, Hudson, *Legislation*, v p 64 Provision was made in 1920 for a permanent organisation and secretariat see *Off J*, 1929, pp 1448, 1478, 1930, p 738 And see Doc C 233 M 97 1934 III See also Agreement between the United States and the United Kingdom of January 25, 1946, on the principles applying to the exchange of information relating to the synthesis of penicillin Cmd 6757

[3] See Martens, *N R G*, 3rd ser, 2, p 913, Treaty Series (1909), No 6 As to the International Sanitary Convention of Venice of January 30, 1892, see Martens, *N R G*, 2nd ser, 19, p 261, as to the Cholera Convention of Dresden of April 15, 1893, *ibid*, p 239, as to the Cholera Convention of Paris of April 3, 1894, *ibid*, 24, pp 516, 553, as to the Plague Convention of March 19 1897, signed at Venice, *ibid*, 28, p 339, and 29, p 495 See also Louth, *La politique sanitaire internationale* (1906), and Ullmann in *R I*, 11 (1879), pp 527 531, and in *R G*, 4 (1897), p 437 As to the International Sanitary Convention of Paris of December 3, 1903, revising the previous cholera and plague conventions, see Martens, *N R G*, 3rd ser, 1, p 78, Treaty Series (1907), No 27 As to the Pan American Sanitary Bureau, established in 1902, see Schmeckebier, *op cit* below, p 893, n 8, pp 167 173

[4] *L N T S*, 78, p 229, *British and Foreign State Papers*, 123, p 610, Hudson, *Legislation*, iii p 1903, Vitta in *Hague Recueil*, vol 33 (1930) (iii), pp 549 668 This Convention was revised in 1944 see Cmd 6637 The Office is to be gradually liquidated as the result of the creation of the World Health Organisation on July 22, 1946 See Sharp in *A J*, 41 (1947), pp 509 530

III —HUMANITARIAN CONVENTIONS—*contd*

Convention	Date and Place
Sanitary Convention for Aerial Navigation	April 12, 1933, The Hague [5]
Convention on the Control of the Liquor Traffic in Africa	September 10, 1919, St Germain [6]
Convention for Mutual Protection against Dengue Fever	July 25, 1934, Athens [7]
Convention for the Suppression of the Traffic in Women and Children	September 30, 1921, Geneva [8]
Convention for the Suppression of the Traffic in Women of Full Age	October 11, 1933, Geneva [9]
International Opium Convention	January 23, 1912, The Hague [10], February 11, 1925, Geneva [11], February 19, 1925, Geneva [12], July 13, 1931, Geneva [13], December 11, 1946, New York [13a]

[5] Treaty Series, No 19 (1935), Cmd 4938, Hudson, *Legislation*, vi p 292

[6] Treaty Series (1919), No 19 Placed under the authority of the League of Nations by the resolution of the Council of January 11, 1922 And see Wyndham in *International Affairs*, 9 (1930), pp 801 818, Buell, *Native Problem in Africa*, ii (1928) pp 942 949 See also above, § 283 For the unratified Convention on Supervision of International Trade in Arms and Ammunition of June 17, 1925, see Hudson, *Legislation*, iii p 1634 For the Convention for the Control of the Trade in Arms and Ammunition, signed at St Germain on September 10, 1919, see Treaty Series (1919), No 12

[7] Treaty Series, No 37 (1935), Cmd 5008, Hudson, *Legislation*, vi p 930

[8] *L N T S*, 9, p 415 For details as to the Conventions of 1904 and 1910 on this subject see Martens, *N R G*, 2nd ser, 32, p 160, and 3rd ser, 7, p 252, respectively See also Schucking und Wehberg, pp 723 727, Butz, *Die Bekampfung des Madchenhandels im internationalen Rechte* (1908), Hachfeld, *Der Mädchenhandel und seine Bekampfung im Volkerrecht* (1913), Rehm in *Z V*, 1 (1907), pp 446 453, Hepburn in *New York University Law Quarterly Review*, 9 (1931 1932), pp 202 215, Vitta in *Hague Recueil*, 45 (1933) (iii), pp 552 663

[9] *L N T S*, 150, p 431

[10] *L N T S*, 8, p 187

[11] *L N T S*, 51, p 337, Hudson, *Legislation*, iii p 1580, Treaty Series (1928), No 13

[12] *Off J*, 6 (1925) p 689, Treaty Series No 27 (1928), Cmd 3264, *L N T S*, 81, p 317, Hudson, *Legislation*, iii p 1589 On the international regulation of the opium traffic see Schucking und Wehberg, pp 727 730, Hirschmann, *Die Opiumfrage und ihre internationale Behandlung* (1912), Dunn, *The Opium Traffic in its International Aspects* (1920), Buell, *The International Opium Conference* (1925) (World Peace Foundation Pamphlet), Willoughby, *Opium as an International Problem, The Geneva Conferences, 1925* (1925), Hoijer, *Le trafic de l'opium et d'autres stupéfiants* (1925), Renborg, *International Drug Control* (1947), Hamilton Wright in *A J*, 6 (1912), pp 858 889, and 7 (1913), pp 108 139, Mandere in *Grotius Annuaire*, 1914, pp 125 138, Van Wettum, *ibid*, 1927, pp 63 78

[13] Treaty Series, No 31 (1933), Cmd 4413, *L N T S*, 139, p 301, Hudson, *Legislation*, v p 1048, *British and Foreign State Papers*, 134, p 361 See also the Dangerous Drugs Act, 1932 (22 Geo 5, c 5) (to give effect to the Convention of 1931) And see Liais, *La question des stupéfiants* (1928), and in *R G*, 35 (1928),

III —HUMANITARIAN CONVENTIONS—*contd*

Convention	Date and Place
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs	June 26, 1936, Geneva.[14]
Slavery Convention	September 25, 1926, Geneva [15]
Agreement respecting Facilities to be given to Merchant Seamen for the Treatment of Venereal Disease	December 1, 1924, Brussels [16]
Convention for the Exemption of Hospital Ships from Harbour Dues	December 21, 1905, The Hague [17]
Convention concerning the Suppression of and Traffic in Obscene Publications	September 12, 1923, Geneva [18]
Convention and Statute establishing an International Relief Union	July 12, 1927, Geneva [19]
Agreement for United Nations Relief and Rehabilitation Administration (U N R R A)	November 9, 1943, Washington [20]

pp 571 590, Wissler, *Die Opiumfrage* (1931), Chanut, *Le régime de l'opium en droit international* (1933), Eisenlohr, *International Narcotics Control* (1934), Bailey, *The Anti Drug Campaign* (1935), Hepburn in *New York University Law Quarterly Review*, 9 (1931 1932), pp 321 336, Hoijer in *R I* (*Paris*), 9 (1932), pp 528 578, Wright in *A J*, 28 (1934), pp 475 486, Moorshead in *Geneva Special Studies*, 11, No 1 (1934), Starncoff in *J C L*, 3rd ser, 18 (1936), pp 94 100, Renborg in *A J*, 37 (1943), pp 436 459

See also the Agreement of November 27, 1931, concerning the Suppression of Opium smoking *L N T S*, No 4100, Hudson, *Legislation*, v p 1149

[13a] Amending various previous agreements, conventions and protocols Treaty Series No 35 (1947), Cmd 7135 For a concise history see Report to the President of April 21, 1947 *Bulletin of State Department*, 16 (1947), p 817 See also Morlock, *ibid*, 16 (1947), pp 687 692

[14] Hudson, *Legislation*, vii p 359, *L N T S*, 198, p 300 See also Starke in *A J*, 31 (1937), pp 31 43

[15] Printed in *Off J*, 7 (1926), p 1655, *L N T S*, 60, p 253 For details and history of and literature on the slave traffic see § 340*h*

[16] Treaty Series (1926), No 20

[17] See *British and Foreign State Papers*, 98, p 624

[18] *L N T S*, 27, p 213 As to the previous Convention of May 4, 1910, on this subject see Martens, *N R G*, 3rd ser, 7, p 266, Treaty Series (1911), No 11 And see Hepburn in *New York University Law Quarterly Review*, 9 (1931 1932), pp 310 320

[19] Treaty Series (1933), No 3, *Off J*, 8 (1927), p 997, *L N T S*, 135, p 247 See Ciraolo, *L' unione internazionale di soccorso* (1931) (a comprehensive work), Sauer, *Der Welthilfsverband und seine Rechtsstellung* (1932), Borgeaud, *L'Union internationale de Secours* (1932), Ruzé in *R G*, 35 (1928), pp 294 309 As to refugees see above, p 613

[20] Treaty Series, No 3 (1943), Cmd 6491, *A J*, 38 (1944), Suppl, p 3 See also the Resolutions adopted at the first Session of the Council of the U N R R A (Atlantic City, New Jersey, November 1943, Misc No 5 (1943), Cmd 6497) and at its second Session (Montreal, September 1944, Misc No 5 (1944), Cmd 6566) See also Jessup in *A J*, 38 (1944), pp 101 106, Friedmann in *The Fortnightly Review*, 1944, pp 18 25, Fisher in *Political Science Quarterly*, 1944, p 1-14, Wahrhaftig, *Relief und Rehabilitation* (1944)

IV.—UNIFICATION OF LAWS

(a) Private International Law

Convention	Date and Place
(1) Procedure in Civil Cases	July 17, 1905, The Hague [1]
(2) Marriage	June 12, 1902, The Hague [2]
(3) Divorce	June 12, 1902, The Hague [3]
(4) Guardianship of Minors	June 12, 1902, The Hague [4]
(5) Marriage and Property Relations	July 17, 1905, The Hague [5]
(6) Guardianship of Adults	July 17, 1905, The Hague [6]
(7) Bankruptcy	November 7, 1925, The Hague [7]
(8) Foreign Judgments	November 7, 1925, The Hague [8]
(9) Protocol on Arbitration Clauses in Commercial Contracts	September 24, 1923, Geneva [9]

[1] See Martens, *N R G*, 3rd ser, 2, p 243 And see Hille in *Répertoire*, Supplement (1934), pp 273 288, Bradway and Evans in *A J*, 38 (1944), pp 462-467 (in connection with legal aid)

[2] See Martens, *N R G*, 2nd ser, 31, p 706 [3] *Ibid*, p 715 [4] *Ibid*, p 724

[5] Printed in Kosters, *Les Conventions de la Haye* (1921), p 803

[6] *Ibid*, p 857

[7] Meili and Mameluk, *Das internationale Privat und Civilprozessrecht auf Grund der Haager Konventionen* (1911), contains a digest of all the Hague Conventions concerned See also Kosters and Bellemans, 'Les Conventions de la Haye de 1902 et 1905 sur le droit international privé,' in *Recueil de législation et de jurisprudence* (1921), a digest of national and case law relating to these Conventions This digest is contained in the *Bulletin de l'Institut Intermédiaire International* And see Lewald in *Strupp, Wort*, 1 pp 458 481, and Nadelmann in *Pennsylvania Law Review*, 93 (1944), pp 1 39 On the various Hague Conventions on Private International Law see Lapradelle in *Répertoire*, IV pp 553 592 And see below, notes 8 11 As to the Conference of 1928 see Kosters in *R I*, 3rd ser, 9 (1928), pp 813-863, and 10 (1929), pp 308 335, 791 818 On March 27, 1931, a Protocol was signed by a number of States conferring upon the Permanent Court of International Justice jurisdiction to interpret these Conventions Hudson, *Legislation*, v p 933 As to the Pan American Convention of Habana on Private International Law of February 20, 1928, see *L N T S*, 86, p 111, Hudson, *Legislation*, IV p 2279 (with a bibliography), and see *ibid*, p 2283, for a Code of Private International Law attached to the Convention (the so called Bustamante Code) See also Bustamante, *Le Code de droit international privé et la VIème Conférence panaméricaine* (1929)

[8] This, and the preceding Conventions, are merely projects drawn up by the Conference See Cucinotta, *L'assistenza giudiziaria nei rapporti internazionali* (1935), *Annuaire*, 30 (1923), pp 173 226, Perroud in *Répertoire*, v pp 350 412, Kosters in *R I*, 3rd ser, 7 (1926), pp 157 201, 245 280, Verbeek in *Z I*, 45 (1931), pp 1 141, Gutteridge in *B Y*, 13 (1932), pp 49 67, Yntema in *Michigan Law Review*, 33 (1934 1935), pp 1129 1168 See also Foreign Judgments (Reciprocal Enforcement) Act, 1933 (23 Geo 5, c 13) For another example of judicial assistance see the Convention of February 10, 1931, between Denmark, Sweden, Norway, and Finland concerning the collection of maintenance allowances Hudson, *Legislation*, v p 885 There exists since 1872 an International Penal and Prison Commission which is not based on any international agreement, but is maintained by the informal subscriptions of over thirty Governments For details and bibliography see Schmeckebier, *International Organisations in which the United States participates (1935), pp 13 25 As to* the Convention on Suppression of Counterfeiting Currency of May 1, 1929, *see* above, p 300, n 2

[9] *L N T S*, 27, p 157.

(*a*) Private International Law—*contd*

Convention	Date and Place
(10) Execution of Foreign Arbitral Awards	September 26, 1927, Geneva [10]
(11) Uniform Law for Bills of Exchange and Promissory Notes	June 7, 1930, Geneva [11]
(12) Uniform Law for Cheques	March 19, 1931,[12] Geneva

[10] *L N T S*, 92, p 302, *British and Foreign State Papers*, 126, p 433, Tre Series, No 28 (1930), Cmd 3655 And see the Arbitration (Foreign Awards) Act, 1930 (20 Geo 5, c 15) *British and Foreign State Papers*, 132, p 12 See also Sturges, *A Treatise on Commercial Arbitrations and Awards* (1930), Brachet in *Répertoire*, III (1928), pp 448 *et seq*, Balladore Pallieri in *Hague Recueil*, vol 51 (1935) (1), pp 291 400

[11] That Convention was concluded in order to avoid difficulties created by the divergency of the laws of various States in which bills of exchange circulate and to give more security to international trade relations It was signed by a considerable number of States, including Germany and Japan, but not by Great Britain or the United States On the same date a Convention was concluded for the settlement of certain conflicts of laws in connection with Bills of Exchange and Promissory Notes As to the first Convention see *L N T S*, 143, p 257, Hudson, *Legislation*, v p 516 See also Angeloni, *La cambiale ed il vaglia cambiario secondo la legge uniforme di Ginevra* (1934), Hupka, *Das einheitliche Wechselrecht der Genfer Vertrage* (1934), Krimmel, *Zur internationalen vereinheitlichung des Wechselrechts* (1934), Janno in *R I*, 3rd ser, 10 (1929), pp 52 90, Hudson and Feller in *Harvard Law Review*, 44 (1930 1931), pp 333 374, Wigny in *R I*, 3rd ser, 12 (1931), pp 774 816, and 13 (1932), pp 202 241, 410 428, Gutteridge in *B Y*, 12 (1931), pp 13 30, and in *J C L*, 3rd ser, 14 (1934), pp 53 77, Kuhn in *A J*, 25 (1931), pp 318 320, *ibid*, pp 730 733, Balogh in *Nouvelle revue de droit international privé*, 1 (1934), pp 511 545, 739 777, and in *Tulane Law Review*, 9 (1935), pp 165 190 As to the second Convention see *L N T S*, 143, p 317, Hudson, *Legislation*, v p 550 And see *ibid*, p 337, for the Convention, of the same date, concerning Stamp Laws in connection with Bills of Exchange and Promissory Notes See Treaty Series, No 14 (1934), Cmd 4594, *British and Foreign State Papers*, 134, p 439 Great Britain did not sign, but acceded in 1934 And see the Convention on Stamp Laws in connection with Cheques of March 19, 1931 Treaty Series, No 26 (1933), Cmd 4443, *British and Foreign State Papers*, 134, p 410 On the proposed international code of the law of sale see Gutteridge in *B Y*, 14 (1933), pp 75 88

[12] *L N T S*, 143, p 355 And see *ibid*, p 407, for the Convention on Certain Conflicts of Laws in Connection with Cheques

(*b*) NATIONALITY

Convention	Date and Place
Convention concerning Certain Questions relating to the Conflict of Nationality Laws	April 12, 1930, The Hague [1]
Protocol relating to Military Obligations in Certain Cases of Double Nationality	April 12, 1930, The Hague [2]
Protocol relating to a Certain Case of Statelessness	April 12, 1930, The Hague [3]
Special Protocol concerning Statelessness	April 12, 1930, The Hague [4]

[1] See above, §§ 35 and 310*a* [2] *Ibid* [3] See above, §§ 35 and 313 [4] *Ibid*

(*c*) MARITIME LAW [1]

Convention	Date and Place
Conventions on the Unification of Rules with respect to	
(*a*) Collisions at Sea	September 23, 1910, Brussels [2]
(*b*) Assistance and Salvage at Sea	September 23, 1910, Brussels [2]
(*c*) Safety of Life at Sea	January 20, 1914, London, May 31, 1929, London [3]
(*d*) Unification of Buoyage and the Lighting of Coasts	October 23, 1930, Lisbon [4]
(*e*) Manned Lightships not on their Stations	October 23, 1930, Lisbon.[5]
(*f*) Agreement concerning Maritime Signals	October 23, 1930, Lisbon [6]
(*g*) Load Line Convention	July 5, 1930, London [7]
(*h*) Limitation of Responsibility of Ship-owners	August 25, 1924, Brussels [8]
(*i*) Bills of Lading	August 25, 1924, Brussels [9]
(*k*) Maritime Liens	April 10, 1926, Brussels [10]
(*l*) Declaration recognising the Right to a Flag of States having no Sea-coast	April 20, 1921, Barcelona [11]
(*m*) Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels	April 10, 1926, Brussels, Additional Protocol, May 24, 1934 [12]

[1] As to Inland Navigation see above, p 429, n 2
[2] See above, §§ 265*a*, 271 [3] See above, § 265
[4] *Ibid* Not in force [5] *Ibid*
[6] *L N T S*, 125, p 95 [7] *Ibid* [8] *L N T S*, 70, p 125
[9] Treaty Series, No 17 (1931), Cmd 3806, *L N T S*, 70, p 157
[10] *L N T S*, 70, p 189, Hudson, *Legislation*, III p 1845
[11] *L N T S*, 7, p 73 And see above, § 258
[12] *L N T S*, No 4062 See above, p 769, n 1

(*d*) MUTUAL AID WITH REGARD TO SUPPRESSION OF CRIME

Convention	Date and Place
Convention for the Suppression of Counterfeiting Currency	May 1, 1929, Geneva [1]

[1] *L N T S*, 112, p 371 And see above, p 300, n 2

V —JUDICIAL UNIONS

Convention	Date and Place
Convention for the Pacific Settlement of International Disputes	July 29, 1899, October 18, 1907, The Hague [1]
Protocol of the Signature of the Statute of the Permanent Court of International Justice	December 16, 1920, Geneva [2]
Charter of the United Nations establishing the International Court of Justice [3]	June 26, 1945, San Francisco

[1] See below, vol II § 17 [2] See below, vol II § 25*ac* [3] Article 92

VI —SCIENTIFIC UNIONS

Convention	Date and Place
Convention concerning the International Hydrographic Bureau [1]	June 30, 1919, London, Statute of June 21, 1921, Monaco [2]
Convention concerning the International Institute of Refrigeration	June 21, 1920, Paris [3], May 31, 1937, Paris [4]
Geodetic Convention	December 31, 1925, Helsingfors [5], renewed June 22, 1936, Helsingfors [6]
Convention for the Creation of an International Office of Chemistry	October 29, 1927, Paris [7]

[1] By a Resolution of the Council (October 2, 1921) this Union was placed under the direction of the League under Article 24 of the Covenant See *Off J*, December 1921, p 1166 The United States, which is a member of this Union, consented (see Schucking und Wehberg, p 760, and Schmeckebier, *International Organisations in which the United States participates* (1935), pp 283 303)

[2] Hudson, *Legislation*, I p 663

[3] *L N T S*, 8, p 66

[4] Hudson, *Legislation*, VII p 743, Cmd 5747 (1938)

[5] Treaty Series (1923), No 6, *L N T S*, 79, p 167, Hudson, *Legislation*, III p 1823 The International Geodetic Association, created in 1886, the International Seismologic Association, created in 1905, and the Central Office, created in 1911, for the international hydrographic and biological investigation of the North Sea (for details see third edition of this volume, § 596), are no longer in existence The Seismologic Association was formally dissolved in 1922, and its functions taken over by the Seismologic Section of the Union Géodésique et Géophysique Internationale, a private association founded in 1919 in place of the Geodetic Association On the Central Bureau of the Map of the World see International Map Committee, *Resolutions and Proceedings of the International Map Committee Assembled in London, 1919* Published by the General Staff of the British War Office

[6] *L N T S*, No 4126, Hudson, *Legislation*, VII p 340

[7] Hudson, *Legislation*, IV p 3205 And see *ibid*, p 3207, for the Regulations of the International Office of Chemistry

VII.—EDUCATIONAL CONVENTIONS

Convention	Date and Place
Convention for Instituting the International Circulation of Films of an Educational Character	October 11, 1933, Geneva [1]
Final Act of the United Nations Conference for the Establishment of an Educational and Cultural Organisation	November 16, 1945, London [2]

[1] *L N T S*, 155, p 331, and Hudson, *Legislation*, vi p 456 In force since January 1935 [2] Cmd 6711 (1945)

VIII —REGIONAL UNIONS

Convention	Date and Place
The Pan-American Union	April 19, 1890 [1], February 20, 1928, Habana [2]

[1] Until the Sixth Pan American Conference in 1928, this Union was not based on any particular treaty At the Sixth Conference a formal convention was adopted as the basis of the Union (see Scott in *A J*, 22 (1928), p 354) It is controlled by a Governing Board, composed of the diplomatic representatives of American Republics at Washington In the absence of a diplomatic representative at Washington the State concerned appoints a special representative It collects information in regard to American countries and fulfils the function of a permanent commission of the Pan American conferences, which has to keep the archives, to assist in obtaining ratifications, and to study or initiate projects to be included in the programme of the conferences See Barrett, *The Pan-American Union* (1911), Fried, *Pan Amerika* (2nd ed, 1918), Dupuis, *Le droit des gens et les rapports des grandes puissances*, etc (1921), pp 389 409, Urrutia, *Les conférences pan américaines* (1923), Robertson, *Hispanic American Relations with the United States* (1923), pp 378 416, Buell, *International Relations* (1925), pp 235 240, Penfield in *A J*, 20 (1926), pp 257 262 (as to its legal status), Niemeyer in *Strupp Wört*, iii pp 228 231 (with a bibliography) And see n 2, below As to the activities of the Union in connection with the codification of International Law see above, p 62, n As to the possible participation of Canada see Fenwick in *A J*, 31 (1937), pp 473 476

[2] Toynbee, *Survey*, 1927, pp 400 441, Hudson, *Legislation*, iv p 2420, Rowe, *Organisation and the Functions of the Pan American Union* (Report to the Governing Board, 1928), Manger in *A J*, 22 (1928), p 764, Sibert in *R G*, 36 (1929), pp 52 72 And see the Regulations of the Pan American Union adopted on May 2, 1928 Hudson, *Legislation*, iv p 2428 And see generally on the Pan American Movement and the Pan American Union, Bustamante, pp 501-533, Potter, *This World of Nations* (1929), pp 274 289, Yepes, *El Panamericanismo y el derecho internacional* (1930), *The International Conference of American States* (1889 1928) (1931, with an introduction by J B Scott) and *First Supplement* (1939-1940) (with an introduction by Finch, 1940), Ermarth, *Die Pan-Amerikanische Union* (1934), Schmeckebier, *International Organisations in which the United States participates* (1935), pp 75 112, Fleming, *The United States and World Organisation, 1920-1933* (1938), Cruchaga in *R G*, 36 (1929), pp 88-107 See also Kelchner, *Latin American Relations with the League of Nations* (1929), Yepes in *Hague Recueil*, vol 47 (1934) (i), pp 115 137, the same in *R I F*, 1 (1936), pp 14-28, 2 (1936), pp 5 18, 113-130, and in *R I (Paris)*, 18 (1936), pp 40 80 And see above, p 371 (n) For regional unions of a political character see above, p 867 See also Ruth Masters, *Handbook of International Organisations in the Americas* (1945), and, especially, pp 32-348 on the Pan-American Union And see Planas Suarez, *La solidaridad americana* (1945), Yepes, *Philosophie du Panaméricanisme et Organisation de la paix* (1945), the same in *R G*, 50 (1946), pp 79 111

APPENDIX B

LIST OF LABOUR CONVENTIONS ADOPTED BY THE GENERAL CONFERENCE OF THE INTERNATIONAL LABOUR ORGANISATION UP TO SEPTEMBER 1947

No [1]	Short Title [2]	Date of adoption by Conference	Date of first coming into force	Number of Ratifications up to April 1, 1945	Whether ratified by Great Britain
1	Hours of Work (Industry) Convention, 1919	Nov 28, 1919	June 13, 1921	22	No
2	Unemployment Convention, 1919	Nov 28, 1919	July 14, 1921	30	Yes
3	Childbirth Convention, 1919	Nov 28, 1919	June 13, 1921	16	No
4	Night Work (Women) Convention, 1919	Nov 28, 1919	June 13, 1921	30 [3]	Yes [4]
5	Minimum Age (Industry) Convention, 1919	Nov 28, 1919	June 13, 1921	28	Yes
6	Night Work (Young Persons) Convention, 1919	Nov 28, 1919	June 13, 1921	30	Yes
7	Minimum Age (Sea) Convention, 1920	July 9, 1920	Sept 27, 1921	32	Yes
8	Unemployment Indemnity (Shipwreck) Convention, 1920	July 9, 1920	Mar 16, 1923	28	Yes
9	Placing of Seamen Convention, 1920	July 10, 1920	Nov 23, 1921	27	No
10	Minimum Age (Agriculture) Convention, 1921	Nov 16, 1921	Aug 31, 1923	19	No
11	Right of Association (Agriculture) Convention, 1921	Nov 12, 1921	May 11, 1923	31	Yes
12	Workmen's Compensation (Agriculture) Convention, 1921	Nov 12, 1921	Feb 26, 1923	23	Yes
13	White Lead (Painting) Convention, 1921	Nov 19, 1921	Aug 31, 1923	26	No
14	Weekly Rest (Industry) Convention, 1921	Nov 17, 1921	June 19, 1923	32	No
15	Minimum Age (Trimmers and Stokers) Convention, 1921	Nov 11, 1921	Nov 20, 1922	32	Yes

[1] In the case of the first 40 Conventions the numbers are unofficial In Convention 41 onwards they appear in the authentic text

[2] In the case of the first 40 Conventions the short titles are those used by the International Labour Office, but they have no legal status In Conventions 41 onwards the short titles are prescribed by the Convention

[3] In 7 cases this Convention has been denounced on ratification of the Night Work (Women) Convention (Revised), 1934

[4] Great Britain denounced this Convention in 1937 on ratifying the Night Work (Women) Convention (Revised), 1934

LIST OF LABOUR CONVENTIONS—*contd*

No	Short Title	Date of adoption by Conference	Date of first coming into force	Number of Ratifications up to April [1], 1945	Whether ratified by Great Britain
16	Medical Examination of Young Persons (Sea) Convention, 1921	Nov 11, 1921	Nov 20, 1922	33	Yes
17	Workmen's Compensation (Accidents) Convention, 1925	June 10, 1925	April 1, 1927	18	No
18	Workmen's Compensation (Occupational Diseases) Convention, 1925	June 10, 1925	April 1, 1927	29 [5]	Yes [6]
19	Equality of Treatment (Accident Compensation) Convention, 1925	June 5, 1925	Sept 8, 1926	35	Yes
20	Night Work (Bakeries) Convention, 1925	June 8, 1925	May 26, 1928	12	No
21	Inspection of Emigrants Convention, 1926	June 5, 1926	Dec 29, 1927	20	Yes (conditionally)
22	Seamen's Articles of Agreement Convention, 1926	June 24, 1926	April 4, 1928	25	Yes
23	Repatriation of Seamen Convention, 1926	June 23, 1926	April 16, 1928	17	No
24	Sickness Insurance (Industry, etc) Convention, 1927	June 15, 1927	July 15, 1928	15	Yes
25	Sickness Insurance (Agriculture) Convention, 1927	June 15, 1927	July 13, 1928	10	Yes
26	Minimum Wage Fixing Machinery Convention, 1928	June 16, 1928	June 14, 1930	22	Yes
27	Marking of Weight (Packages Transported by Vessels) Convention, 1929	June 21, 1929	March 9, 1932	34	No
28	Protection Against Accidents (Dockers) Convention, 1929	June 21, 1929	April 1, 1932	4 [7]	No
29	Forced Labour Convention, 1930	June 28, 1930	May 1, 1932	21	Yes
30	Hours of Work (Commerce and Offices) Convention, 1930	June 28, 1930	Aug 29, 1933	9	No
31	Hours of Work (Coal Mines) Convn , 1931	June 18, 1931	Will not enter into force	1	No
32	Protection against Accidents (Dockers) Convention(Revised),1932	April 27, 1932	Oct 30, 1934	9	Yes.

[5] In 3 cases this Convention has been denounced on ratification of the Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934

[6] Great Britain denounced this Convention in 1936 on ratifying the Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934

[7] Spain denounced this Convention in 1934

LIST OF LABOUR CONVENTIONS —*contd*

No	Short Title	Date of adoption by Conference	Date of first coming into force	Number of Ratifications up to April 1, 1945	Whether ratified by Great Britain
33	Minimum Age (Non-Industrial Employment) Convention, 1932	April 30, 1932	June 6, 1935	6	No
34	Fee Charging Employment Agencies Convention, 1933	June 29, 1933	Oct 18, 1936	5	No
35	Old Age Insurance (Industry, etc) Convention, 1933	June 29, 1933.	July 18, 1937	3	Yes.
36	Old - Age Insurance (Agriculture) Convention, 1933	June 29, 1933	July 18, 1937.	3	Yes.
37	Invalidity Insurance (Industry, etc) Convention, 1933	June 29, 1933	July 18, 1937	3	Yes
38	Invalidity Insurance (Agriculture) Convention, 1933	June 29, 1933	July 18, 1937	3	Yes
39	Survivors' Insurance (Industry, etc) Convention, 1933	June 29, 1933	Not yet in force	1	Yes
40	Survivors' Insurance (Agriculture) Convention, 1933	June 29, 1933	Not yet in force	1	Yes
41	Night Work (Women) Convention (Revised), 1934	June 19, 1934	Nov 22, 1936	15	Yes
42	Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934	June 21, 1934	June 17, 1936	13	Yes
43	Sheet-Glass Works Convention, 1934	June 21, 1934	Jan 13, 1938	7	Yes
44	Unemployment Provision Convention, 1934	June 23, 1934	June 10, 1938	4	Yes
45	Underground Work (Women) Convention, 1935	June 21, 1935	May 30, 1935	21	Yes
46	Hours of Work (Coal Mines) Convention, (Revised), 1935	June 21, 1935	Not yet in force	2	No
47	Forty-Hour Week Convention, 1935	June 22, 1935	Not yet in force	1	No
48	Maintenance of Migrants' Pension Rights Convention, 1935	June 22, 1935	Aug 10, 1938	4	No
49	Reduction of Hours of Work (Glass Bottle Works) Convention, 1935	June 25, 1935	June 10, 1938.	6	No
50	Recruiting of Indigenous Workers Convention, 1936	June 20, 1936	Sept 8, 1939.	3	Yes.

LIST OF LABOUR CONVENTIONS—*contd*

No	Short Title	Date of adoption by Conference	Date of first coming into force	Number of Ratifications up to April 1, 1945	Whether ratified by Great Britain.
51	Reduction of Hours of Work (Public Works) Convention, 1936	June 23, 1936	Not yet in force	1	No
52	Holidays with Pay Convention, 1936	June 24, 1936	Sept 22, 1939	4	No
53	Officers' Competency Certificates Convention, 1936	Oct 24, 1936	Mar 29, 1939	7	No
54	Holidays with Pay (Sea) Convention, 1936	Oct 24, 1936	Not yet in force	3	No
55	Shipowners' Liability (Sick and Injured Seamen) Convention, 1936	Oct 24, 1936	Oct 29, 1939	3	No.
56	Sickness Insurance (Sea) Convention, 1936	Oct 24, 1936	Not yet in force		No
57	Hours of Work and Manning (Sea) Convention, 1936	Oct 24, 1936	Not yet in force	4	No
58	Minimum Age (Sea) Convention (Revised), 1936	Oct 24, 1936	April 11, 1939	6	No
59	Minimum Age (Industry) Convention (Revised), 1937	June 22, 1937	Feb 21, 1941	2	No
60	Minimum Age (Non Industrial Employment) Convention (Revised), 1937	June 22, 1937	Not yet in force		No
61	Reduction of Hours of Work (Textiles) Convention, 1937	June 22, 1937	Not yet in force	1	No
62	Safety Provisions (Building) Convention, 1937	June 23, 1937	July 4, 1942	2	No
63	Statistics of Wages and Hours of Work in the Principal Mining and Manufacturing Industries and in Agriculture, 1938	June 20, 1938	June 22, 1940	10	No
64	Regulation of Written Contracts of Employment of Indigenous Workers, 1939	June 27, 1939		1	Yes
65	Penal Sanctions for Breaches of Contracts of Employment of Indigenous Workers, 1939	June 23, 1939	..	1	Yes
66	Recruitment, Placing, and Conditions of Labour of Migrants for Employment, 1939	June 28, 1939	.	..	..

LIST OF LABOUR CONVENTIONS—*contd*

No	Short Title	Date of adoption by Conference	Date of first coming into force	Number of Ratifications up to April 1, 1945	Whether ratified by Great Britain
67	Regulation of Hours of Work and Rest Periods in Road Transport, 1939	June 28, 1939			
68	Food and Catering for Crews on Board Ship	June 29, 1946			
69	Certification of Ships' Cooks	June 29, 1946			
70	Social Security for Seafarers	June 29, 1946			..
71	Seafarers' Pensions	June 29, 1946			.
72	Vacation holidays with Pay for Seafarers	June 29, 1946			..
73	Medical Examination of Seafarers	June 29, 1946			
74	Certification of all Seamen	June 29, 1946			.
75	Crew Accommodation on Board Ship	June 29, 1946			.
76	Wages, Hours of Work on Board Ship and Manning	June 29, 1946			
77	Medical Examination of Children and Young Persons (Industry)	Sept 19, 1946			.
78	Medical Examination of Children and Young Persons (Non-Industrial Occupations)	Sept 19, 1946			.
79	Night Work of Children and Young Persons (Non-Industrial Occupations)	Sept 19, 1946			
80	Final Articles Revision	Sept 19, 1946		.	
81	Labour Inspection in Industry and Commerce	June, 19, 1947			
82	Social Policy in Non-Metropolitan Territories	June 19, 1947		.	.
83	Application of International Labour Standards to Non Metropolitan Territories	June 19, 1947		..	
84	Right of Association and Settlement of Labour Disputes in Non-Metropolitan Territories	June 19, 1947			
85	Labour Inspectorates in Non Metropolitan Territories	June 19, 1947		..	.
86	Maximum Length of Contracts of Employment of Indigenous Workers.	June 19, 1947		..	.

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